

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

RICHARD A. HUNTER, an individual,

Appellant,

vs.

WILLIAM GANG, an individual,

Respondent.

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Case No.: 59691 Tracie K. Lindeman  
Clerk of Supreme Court

Appeal from the Eighth Judicial  
District Court, The Honorable Douglas  
E. Smith Presiding.

**RESPONDENT'S ANSWERING BRIEF**

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6           1.     Respondent, William Gang, is an individual;  
7           2.     The following law firms have represented Respondent in this  
8 litigation: Marquis Aurbach Coffing.

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1 **I. JURISDICTIONAL STATEMENT**

2 On November 7, 2011, the District Court entered the Order granting  
3 Defendant/Respondent William Gang's ("Gang") Motion to Dismiss.<sup>1</sup> On  
4 November 8, 2011, Gang filed the Notice of Entry of Order regarding the  
5 Order.<sup>2</sup> Plaintiff/Appellant Richard A. Hunter ("Hunter") filed his Notice of  
6 Appeal regarding the Order on November 16, 2011.<sup>3</sup> As a result, the Court has  
7 jurisdiction over this appeal.

8 **II. ISSUES ON APPEAL**

- 9 **A. WHETHER THE DISTRICT COURT POSSESSED THE**  
10 **INHERENT POWER TO DISMISS THE CASE FOR LACK**  
11 **OF PROSECUTION BEFORE TWO YEARS SINCE THE**  
12 **COMMENCEMENT OF THE ACTION.**
- 13 **B. WHETHER THE DISTRICT COURT PROPERLY**  
14 **EXERCISED ITS DISCRETION IN DISMISSING THE**  
15 **CASE FOR LACK OF PROSECUTION.**
- 16 **C. WHETHER THE DISTRICT COURT PROPERLY**  
17 **EXERCISED ITS DISCRETION IN CONSIDERING THE**  
18 **MERITS OF THE CASE AND WHETHER THE MERITS**  
19 **REQUIRED THE DISTRICT COURT'S DISMISSAL OF**  
20 **THE CASE.**
- 21 **D. WHETHER THE DISTRICT COURT PROPERLY**  
22 **EXERCISED ITS DISCRETION IN AWARDING**  
23 **ATTORNEY FEES AND COSTS TO GANG BECAUSE**  
**HUNTER'S COMPLAINT WAS FRIVOLOUS.**

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21 <sup>1</sup> Appellant's Appendix ("AA") at APP0036-0039.

22 <sup>2</sup> AA at APP0040-0045.

23 <sup>3</sup> AA at APP0051-0053.

1 E. WHETHER THE DISTRICT COURT PROPERLY  
2 EXERCISED ITS DISCRETION IN AWARDING  
3 ATTORNEY FEES AND COSTS TO GANG AS THE  
4 PREVAILING PARTY.

5 F. WHETHER HUNTER CAN ESTABLISH THAT THE  
6 DISTRICT COURT ABUSED ITS DISCRETION IN  
7 DISMISSING THE CASE FOR LACK OF PROSECUTION,  
8 CONSIDERING THE MERITS, OR AWARDING FEES AND  
9 COSTS.

10 G. WHETHER GANG IS ENTITLED TO HIS ATTORNEY  
11 FEES AND COSTS BECAUSE THIS APPEAL IS  
12 FRIVOLOUS.

13 **III. STATEMENT OF THE CASE**

14 The issues in this case involve judicial discretion and whether the district  
15 courts have inherent power to dismiss cases for lack of prosecution and  
16 frivolousness. In the underlying case, Hunter asserted an adverse possession  
17 claim against Gang and continues in this appeal to assert that claim. However,  
18 Hunter's claim was destined to fail because Hunter never paid (or claimed to  
19 have paid) any property taxes on Gang's property.<sup>4</sup> Further, Hunter became  
20 unresponsive for almost an entire year after alternative dispute resolution efforts  
21 broke down.

22 As a result, Gang moved to dismiss Hunter's Complaint. In response to  
23 Gang's Motion to Dismiss, the District Court exercised its inherent power and  
related discretion in dismissing Hunter's Complaint for lack of prosecution and

<sup>4</sup> The failure to pay property taxes is dispositive of adverse possession claims in Nevada. See NRS 11.150.



1 merit and, based on the frivolous nature of Hunter's claims, granted Gang's  
2 request for attorney fees and costs.

3 Hunter cannot establish that the District Court abused its discretion when  
4 it dismissed the case or entered the fees and costs award. As a result, this Court  
5 should affirm the District Court's orders and award Gang his attorney fees and  
6 costs under NRAP 38.

7 **A. THE NATURE OF THE CASE.**

8 This is an adverse possession case.<sup>5</sup> Hunter and Gang own adjoining  
9 properties in Mountain Springs, Nevada.<sup>6</sup> Hunter built his house and related  
10 structures within eight inches of the property line with Gang and constructed a  
11 backyard, including trees, boulders, shrubs, and curbing on 7,000-8,000 square  
12 feet of Gang's property.<sup>7</sup>

13 In mid to late 2009, Hunter was selling his house, but the potential buyer  
14 backed out of the sale, presumably in-part, because of Hunter's encroachment  
15 on Gang's property and Hunter's inability to produce a variance to show he had  
16 authority to build so close to the property line in violation of Clark County  
17 building codes.<sup>8</sup> Hunter blamed Gang for the failed sale and filed the  
18

19 \_\_\_\_\_  
20 <sup>5</sup> AA at APP0001-0007.

21 <sup>6</sup> AA at APP0001:23-0002:7, APP0030:10-12, and APP0036:25-0037:7.

22 <sup>7</sup> AA at APP0029-0036, APP0030:17-20, APP0033:13, 21-23, and APP0037:9-14.

23 <sup>8</sup> AA at APP0001-0007, APP0030:15-18, and APP0033:7-10.

1 underlying suit in an attempt to obtain Gang's property through adverse  
2 possession so Hunter could claim land belonging to Gang.<sup>9</sup>

3 The District Court exercised its inherent power and related discretion in  
4 dismissing Hunter's Complaint and, based on Hunter's frivolous claims, entered  
5 an award of fees and costs in favor of Gang.<sup>10</sup> Hunter's appeal challenges the  
6 District Court's ability to dismiss cases for lack of prosecution until after two  
7 years has expired since the filing of the Complaint. In response, Gang asserts  
8 that courts possess the inherent power and related discretion, irrespective of rule  
9 or statute, to dismiss cases for lack of prosecution.

10 **B. THE COURSE OF THE PROCEEDINGS.**

11 Hunter filed his Complaint on December 4, 2009.<sup>11</sup> On August 11, 2011,  
12 Gang filed his Motion to Dismiss.<sup>12</sup> Hunter opposed the Motion to Dismiss on  
13 the basis that Hunter claimed he had health problems and two years had not yet  
14 passed since Hunter filed the Complaint.<sup>13</sup> On September 13, 2011, the District  
15 Court heard oral argument.<sup>14</sup> On November 7, 2011, the Court entered the  
16  
17

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18 <sup>9</sup> Id.

19 <sup>10</sup> AA at APP0036-0039 and APP0177-0180.

20 <sup>11</sup> AA at APP0001-0007.

21 <sup>12</sup> AA at APP0014-0018.

22 <sup>13</sup> AA at APP0021-0025.

23 <sup>14</sup> AA at APP0029-0035.

1 Order dismissing the case and, on November 8, 2011, entered the Notice of  
2 Entry of Order.<sup>15</sup>

3 On November 28, 2011, based on NRS 18.010(2) and NRS 18.020, Gang  
4 filed his Motion for Attorney Fees and Costs.<sup>16</sup> On December 8, 2011, Hunter  
5 filed an opposition to Gang's fees and costs Motion.<sup>17</sup> Although Hunter never  
6 paid property taxes on Gang's property, which NRS 11.150 requires for an  
7 adverse possession claim, Hunter argued in his Opposition that "Hunter's  
8 Verified Complaint stated prima facie causes of action for adverse  
9 possession."<sup>18</sup> On January 5, 2012, Gang responded to Hunter's Opposition.<sup>19</sup>  
10 On January 9, 2012, the District Court granted Gang's Motion for Attorney  
11 Fees and Costs and, on January 26, 2012, entered the related Order.<sup>20</sup>

12 **C. THE DISPOSITION BELOW.**

13 The District Court exercised its inherent power and related discretion and  
14 dismissed Hunter's Complaint because it recognized Hunter was not  
15 prosecuting the case, and the Complaint was without merit due to Hunter  
16 asserting an adverse possession claim despite never having paid property taxes  
17

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18 <sup>15</sup> AA at APP0036-0039.

19 <sup>16</sup> AA at APP0059-0084.

20 <sup>17</sup> AA at APP0087-0141 and APP0143-0175.

21 <sup>18</sup> AA at APP0091:8-9.

22 <sup>19</sup> AA at APP0143-0175.

23 <sup>20</sup> AA at APP0142 and APP0143-0175.

1 on Gang's property, which is dispositive of the claim.<sup>21</sup> This Court should  
2 affirm the District Court's Orders granting Gang's Motion to Dismiss and  
3 awarding Gang attorney fees and costs.

4 **IV. STANDARDS OF REVIEW**

5  
6 **A. STANDARD OF REVIEW FOR DISMISSALS DUE TO  
LACK OF PROSECUTION.**

7 Unless there has been a gross abuse of discretion on the part of the trial  
8 court in dismissing an action for lack of prosecution, its decision will not be  
9 disturbed on appeal.<sup>22</sup>

10  
11 **B. STANDARD OF REVIEW FOR AWARDS OF ATTORNEY  
FEES.**

12 The decision whether to award attorney fees is within the sound  
13 discretion of the trial court.<sup>23</sup> A district court's award of attorney's fees will not  
14 be disturbed on appeal absent a manifest abuse of that discretion.<sup>24</sup> In  
15  
16  
17

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18 <sup>21</sup> AA at APP0036-0039 and APP0179-0180.

19 <sup>22</sup> Volpert v. Popagna, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969).

20 <sup>23</sup> Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (citing  
21 County of Clark v. Blanchard Construction Co., 98 Nev. 488, 492, 653 P.2d  
22 1217, 1220 (1982); National Tow v. Integrity Insurance Co., 102 Nev. 189, 191,  
23 717 P.2d 581, 583 (1986)).

<sup>24</sup> Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138,  
1139-1140 (1994).

1 determining whether the District Court's award of attorney fees is warranted,  
2 this Court reviews the record for support.<sup>25</sup>

3 **C. STANDARD OF REVIEW FOR AWARDS OF COSTS.**

4 The determination of allowable costs is within the sound discretion of the  
5 trial court.<sup>26</sup>

6 **D. STANDARD OF REVIEW FOR QUESTIONS OF LAW.**

7 The Supreme Court reviews questions of law de novo.<sup>27</sup>

8 **E. STANDARD OF REVIEW FOR FRIVOLOUS LAWSUITS  
9 AND APPEALS.**

10 This Court reviews the district court's imposition of sanctions according  
11 to an abuse of discretion standard.<sup>28</sup> With reference to frivolous appeals, this  
12 Court has announced, "We wish . . . to put litigants and attorneys on notice that  
13 willful abuse of court process in the trial court may well give rise to an

14 \_\_\_\_\_  
15 <sup>25</sup> Mack-Manley v. Manley, 122 Nev. 849, 860, 138 P.3d 525, 533 (2006); see  
16 also Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330, 130 P.3d  
17 1280, 1288 (2006) ("We have consistently recognized that [t]he decision to  
18 award attorney fees is within the [district court's] sound discretion . . . and will  
19 not be overturned absent a 'manifest abuse of discretion.' Having considered  
20 the record in light of the broad discretion left to the district court in this area, we  
21 conclude that the district court's award of attorney fees as sanctions was not a  
22 manifest abuse of its discretion.") (citations and internal quotations omitted).

19 <sup>26</sup> Bergmann, 109 Nev. at 679, 856 P.2d at 565-566 (citing Mist v. Westin  
20 Hotels, Inc., 69 Haw. 192, 738 P.2d 85, 92 (1987); State v. Meyer, 174 Cal.  
21 App. 3d 1061, 220 Cal. Rptr. 884, 890 (1985); Gilmore v. Rubeck, 708 P.2d  
22 486, 487 (Colo. App. 1985)).

22 <sup>27</sup> City of Henderson v. Kilgore, 131 P.3d 11, 11 (Nev. 2006) (citing Birth  
23 Mother v. Adoptive Parents, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002)).

23 <sup>28</sup> See generally Naimo v. Fleming, 95 Nev. 13, 588 P.2d 1025 (1979).

1 inference of abuse of appellate process on appeal, rendering the possibility of  
2 sanctions under NRAP 38 more likely than in other cases.”<sup>29</sup> When an  
3 appellant’s contentions on appeal are so lacking in merit as to constitute a  
4 frivolous appeal and a misuse of the appellate process of this court, this Court is  
5 authorized pursuant to NRAP 38 to impose sanctions against the offending  
6 party.<sup>30</sup> Here, Hunter continues in contravention of Nevada law to claim a right  
7 to adverse possession of Gang’s property. This appeal should be viewed as a  
8 continuation of Hunter’s misuse of the court process to coerce or vex Gang  
9 without legal grounds, to achieve an end not obtainable under the litigation.

10 **V. FACTUAL BACKGROUND**

11 Gang and Hunter own adjoining properties in Mountain Springs,  
12 Nevada.<sup>31</sup> The north side of the Hunter property borders the south side of the  
13 Gang property.<sup>32</sup> Mountain Springs is an exclusive community located off of  
14 Highway 160 approximately half way between Las Vegas and Pahrump.<sup>33</sup>  
15 Without County approval, Hunter built his house and related structures within  
16 approximately eight inches of the property line between Hunter and Gang.<sup>34</sup> In

17 \_\_\_\_\_  
18 <sup>29</sup> Young v. Johnny Ribeiro Building, Inc., 106 Nev. 88, 95, 787 P.2d 777, 781  
(1990).

19 <sup>30</sup> Works v. Kuhn, 103 Nev. 65, 69, 732 P.2d 1373, 1376 (1987).

20 <sup>31</sup> AA at APP0002:3-7, APP0001:23-2:7, APP0030:10-12, APP0036:25-37:7.

21 <sup>32</sup> AA at APP0002:6-7, APP0030:13-22, and APP0037:4.

22 <sup>33</sup> AA at APP0030:10-12.

23 <sup>34</sup> AA at APP0030:13-21 and APP0037:7-8.

1 addition, Hunter used a backhoe to construct a berm on Gang's property and  
2 then landscaped, including trees, shrubs, curbing and boulders on  
3 approximately 7,000-8,000 square feet – an area of about 40' X 200' – of  
4 Gang's property.<sup>35</sup> In essence, Hunter created a backyard on Gang's property.<sup>36</sup>



17 In mid to late 2009, Hunter had a potential buyer for his property, but the  
18 sale fell through, in-part, because of Hunter's encroachment on Gang's  
19 property.<sup>37</sup> Hunter then filed the underlying suit against Gang claiming

20 \_\_\_\_\_  
21 <sup>35</sup> AA at APP0029-0036, APP0030:17-20, APP0033:13 and 21-23, and APP0037:9-14.

22 <sup>36</sup> Id.

23 <sup>37</sup> AA at APP30:15-18.



ownership through adverse possession of the 7,000-8,000 square feet of Gang's property that Hunter landscaped on.<sup>38</sup>

Notably, Hunter alleged he was entitled to the portion of Gang's property he encroached on through adverse possession,<sup>39</sup> despite never having paid property taxes on Gang's property.<sup>40</sup> In fact, Hunter never even alleged that he paid these property taxes.<sup>41</sup> Hunter's failure to pay the property taxes was dispositive of the adverse possession claim.<sup>42</sup>



<sup>38</sup> AA at APP0001-0007.

<sup>39</sup> Id.

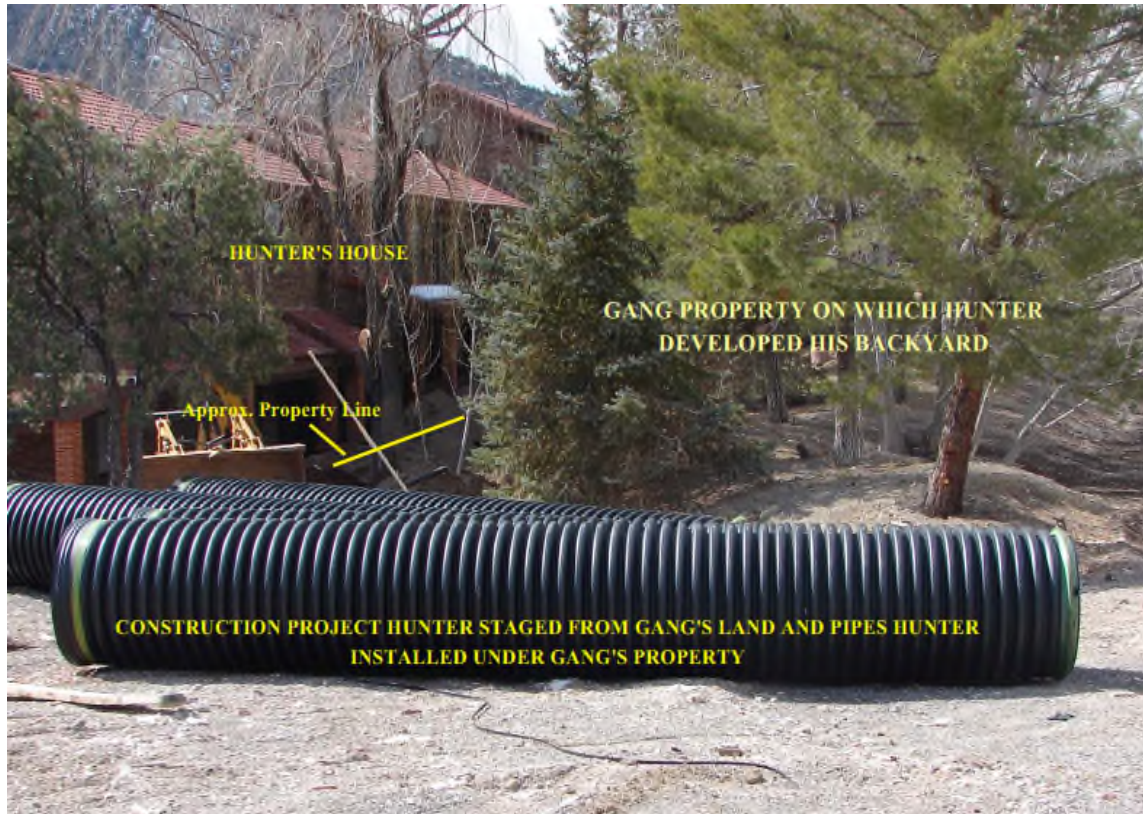
<sup>40</sup> AA at APP0001-0007 (Hunter's Complaint is void of any such allegation).

<sup>41</sup> AA at APP0001-0007.

<sup>42</sup> .NRS 11.150; AA at APP0145:17-146:19.



1        Soon after Hunter filed the lawsuit against Gang, the Parties met to  
2 discuss alternative dispute resolution. Hunter did not require Gang to file an  
3 answer to the Complaint as settlement was being discussed. However, Hunter  
4 was unresponsive for multiple months at a time.<sup>43</sup> Not only was Hunter  
5 unresponsive, but, after filing the lawsuit, he staged a construction project from  
6 Gang's property installing 24-inch pipes, with a portion of these pipes believed  
7 to be underneath Gang's property.<sup>44</sup> Thus, Hunter's landscape, boulders, and  
8 drainage pipe all lie on Gang's property.<sup>45</sup>



<sup>43</sup> AA at APP0148:15-149:5.

<sup>44</sup> AA at APP0031:13-16, APP0038:5-8, and APP0044:5-12.

<sup>45</sup> Id. and AA at APP0030:17-20, APP0031:14-16, APP0033:21-23, and APP0037:9-12.



In an attempt to keep the peace and work toward alternative dispute resolution, Gang did not seek an injunction regarding the construction project and the installation of the 24-inch pipes. Rather, Gang kept attempting, without success, to elicit a response from Hunter. However, after almost two years of Gang's property being encumbered by Hunter's lawsuit and month after month of unresponsiveness from Hunter, Gang filed a Motion to Dismiss on August 8, 2011.<sup>46</sup>

On September 13, 2011, the District Court heard oral argument regarding the Motion to Dismiss.<sup>47</sup> During the hearing, the District Court recognized the lack of prosecution and frivolous nature of Hunter's Complaint stating:

<sup>46</sup> AA at APP0014-00018.

<sup>47</sup> AA at APP0029-00035.

1 “Well, I just think there’s more to it then he’s sitting on his rights  
2 right now. I don’t think he [Hunter] has a position and he’s just  
3 filed a suit in hopes that something sticks if he throws it against the  
4 wall”.<sup>48</sup>

4 In response, Hunter admitted: “There is no question there is . . . landscaping on  
5 Mr. Gang’s property . . . Mr. Hunter put up trees and what have you on Mr.  
6 Gang’s property . . .”<sup>49</sup> Moreover, this was not Hunter’s first time encroaching  
7 on property belonging to others at Mountain Springs.<sup>50</sup> Hunter also landscaped  
8 on Forest Service land, just as he did on the Gang property, and with the same  
9 disregard for ownership and property rights.<sup>51</sup> Hunter also built a structure on  
10 Forest Service land.<sup>52</sup> The Forest Service required Hunter to remove the  
11 structure and improvements.<sup>53</sup> Hunter also obtained an illegitimate easement on  
12 another property, and Hunter has had run-ins with multiple neighbors at  
13 Mountain Springs regarding property related issues.<sup>54</sup> Thus, Hunter’s  
14 encroachment on the Gang property was part of a pattern of encroachment by  
15 Hunter.<sup>55</sup>

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16 <sup>48</sup> AA at APP0032:6-8.

17 <sup>49</sup> AA at APP0033:2-3, 22-23.

18 <sup>50</sup> AA at APP0030:22-31:2 and APP0037:26-38:4.

19 <sup>51</sup> Id.

20 <sup>52</sup> Id.

21 <sup>53</sup> Id.

22 <sup>54</sup> Id.

23 <sup>55</sup> Id.

1 After the District Court exercised its inherent power and discretion and  
2 granted Gang's Motion to Dismiss and awarded Gang his reasonable attorney  
3 fees and costs,<sup>56</sup> Gang made further attempts in good faith to resolve the matter,  
4 but the attempts were not successful.

5 The Parties then submitted competing dismissal orders to the District  
6 Court. And, on November 3, 2011, the District Court signed Gang's proposed  
7 Order which was entered on November 7, 2011.<sup>57</sup> On November 8, 2011, Gang  
8 filed the Notice of Entry of Order regarding the dismissal Order.<sup>58</sup> On  
9 November 15, 2011, Gang filed his Verified Memorandum of Costs.<sup>59</sup> On  
10 November 16, 2011, Hunter filed his Notice of Appeal.<sup>60</sup> On November 28,  
11 2011, Gang filed his Motion for Attorney Fees, which was followed by  
12 Hunter's Opposition, and Gang's Reply.<sup>61</sup> Finally, on January 26, 2012, the  
13 Court entered the Order granting Gang's Motion for Attorney Fees and Costs.<sup>62</sup>

14 Gang did not immediately file a Notice of Entry of Order regarding the  
15 fee Order because doing so would trigger additional procedural requirements  
16 that Hunter desired to avoid while the Parties continued to discuss alternative

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17 <sup>56</sup> AA at APP0035:3-4, APP0036-0039, and APP0177-0180.

18 <sup>57</sup> AA at APP0036-0039.

19 <sup>58</sup> AA at APP0040-0045.

20 <sup>59</sup> AA at APP0046-0050.

21 <sup>60</sup> AA at APP0051-0053.

22 <sup>61</sup> AA at APP0059-0084, APP0087-0141, and APP0143-0175.

23 <sup>62</sup> AA at APP0177-0180.

1 dispute resolution. However, those discussions also proved fruitless and, on  
2 August 13, 2013, the Notice of Entry of Order regarding the fee award was filed  
3 with the District Court along with Hunter's Amended Notice of Appeal.<sup>63</sup>

4 **VI. LEGAL ARGUMENT**

5 For at least seven reasons the Court should affirm the Order granting  
6 Gang's Motion to Dismiss, affirm the Order awarding him his attorney fees and  
7 costs, and award him his attorney fees and costs for this frivolous appeal.

8 1. The District Court possessed the inherent power to dismiss the case  
9 for lack of prosecution prior to the expiration of two years since the  
10 commencement of the action.

11 2. The District Court properly exercised its discretion in dismissing  
12 the case for lack of prosecution.

13 3. The District Court properly exercised its discretion in considering  
14 the merits of the case and the merits required dismissal of the case.

15 4. The District Court properly exercised its discretion in awarding  
16 Gang attorney fees and costs because Hunter's claims were frivolous.

17 5. The District Court properly exercised its discretion in awarding  
18 attorney fees and costs to Gang as the prevailing party.

19 6. Hunter cannot establish that the District Court abused its discretion  
20 in dismissing the case for lack of prosecution, considering the merits, or  
21 granting the fees and costs.

22  
23 <sup>63</sup> AA at APP0177-0180 and APP0181-183.



1           7.     This Court should award Gang his attorney fees and costs because  
2 Hunter's appeal is frivolous.

3           Based on these seven arguments, Gang submits that the Court should  
4 affirm the Orders on appeal and award him, pursuant to NRAP 38, his attorney  
5 fees and costs.

6           **A.     THE DISTRICT COURT POSSESSED THE INHERENT**  
7           **POWER TO DISMISS THE CASE FOR LACK OF**  
8           **PROSECUTION BEFORE THE EXPIRATION OF TWO**  
9           **YEARS SINCE THE COMMENCEMENT OF THE ACTION.**

10           *Legal Issue*

11           Whether the District Court possessed the inherent power to dismiss the  
12 case prior to the expiration of two years since the commencement of the action.

13           *Rule*

14           Inherent in courts is the power to dismiss a case for failure to prosecute.<sup>64</sup>  
15 Courts may exercise this power within the bounds of sound judicial discretion  
16 to prevent undue delays and to control their calendars.<sup>65</sup> This power to dismiss  
17 for failure to prosecute is **"independent of any authority granted under**  
18 **statutes or court rules.**"<sup>66</sup> The "courts have always possessed an inherent

19 <sup>64</sup> Moore v. Cherry, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974) (referencing  
20 NRCP 41(b) repeatedly, which does not have a two-year requirement, in  
21 conjunction with the court's inherent authority to dismiss for failure to  
22 prosecute).

23 <sup>65</sup> Id.

<sup>66</sup> Id. at 395 (emphasis added) (citations omitted); see also Esworthy v.  
Williams, 100 Nev. 212, 213, 678 P.2d 1149, 1150 (1984) (again confirming  
courts have the inherent power, independent of statute or court rule, to dismiss a  
case for failure to prosecute).

1 power to dismiss an action for want of prosecution.”<sup>67</sup> In Walls v. Brewster,  
2 this Court stated:

3 **Every court** has the inherent power . . . to dismiss a cause for want  
4 of prosecution. **The duty rests upon the plaintiff** to use diligence  
5 and to expedite his case to a final determination. The decision of a  
6 trial court in dismissing a cause for lack of prosecution **will not be**  
**disturbed on appeal** unless it is made to appear that there has  
7 been a **gross abuse of discretion**.<sup>68</sup>

8 The element necessary for dismissal for failure to prosecute is lack of diligence,  
9 whether individually or through counsel.<sup>69</sup>

### 10 *Analysis*

#### 11 1. **The District Court Properly Exercised Its Inherent** **Power and Discretion to Dismiss the Case for Lack of** **Prosecution.**

12 Hunter wants this Court to overturn decades of precedent and create new  
13 law holding that District Courts lack “inherent power” to control their dockets,  
14 irrespective of rule or state. To avoid losing this appeal, Hunter wants this  
15

16 <sup>67</sup> Volpert v. Papagna, 85 Nev. 437, 439-440, 456 P.2d 848, 849 (1969) (also  
17 stating “neither statute nor rule is needed to confer the inherent power to  
18 dismiss an action for want of prosecution upon a court.”) (emphasis added)  
19 (citing Dubin v. Harrell, 79 Nev. 467, 386 P.2d 729 (1963) (also indicating  
20 neither statute nor rule is needed to confer dismissal for lack of prosecution  
power on a court)); see also Lindauer v. Allen, 85 Nev. 430, 435, 456 P.2d 851,  
854 (1969) (courts have always possessed the inherent power to dismiss for  
want of prosecution and neither statute nor rule is needed to confer said power  
on courts).

21 <sup>68</sup> Walls v. Brewster, 112 Nev. 175, 178, 912 P.2d 261, 263 (1963) (emphasis  
22 added) (quoting Moore v. Cherry, 90 Nev. 390, 395, 528 P.2d 1018, 1027  
(1974) (quoting Sweeney v. Anderson, 129 F. 2d 756, 758 (10th Cir. 1942))).

23 <sup>69</sup> Moore, at 395 (emphasis added).

1 Court to hold that the only vehicle courts possess to dismiss cases for lack of  
2 prosecution is NRCP 41(e). Such a holding would be contrary to Nevada law.

3 Under Nevada law, courts are automatically vested with the “inherent  
4 power” to dismiss for failure to prosecute irrespective of rule, statute, or even  
5 specific timing requirements. Courts are not required to wait until two years  
6 has passed since the commencement of cases before they exercise this inherent  
7 power and related discretion to dismiss cases for lack of prosecution. And,  
8 courts may certainly exercise this inherent power and related discretion to  
9 prevent undue delays and to control their calendars. Therefore, the District  
10 Court possessed the inherent power and discretion to dismiss the case.

11 **2. NRCP 41(e) Does Not Divest District Courts of Their**  
12 **Inherent Power to Dismiss for Lack of Prosecution.**

13 Hunter contends that the District Court did not have the authority to  
14 dismiss the case short of two years since the filing of the Complaint. Hunter’s  
15 argument is misleading. There is a distinct difference between “inherent  
16 power” that automatically exists irrespective of rule or statute and “authority”  
17 vested due to a rule or statute. The Court here exercised its inherent power and  
18 related discretion, which has nothing to do with NRCP 41(e), to dismiss for lack  
19 of prosecution. And, there is nothing in or about NRCP 41(e) that strips  
20 District Courts of this inherent power.

21 Indeed, NRCP 41(e) vests courts with authority to dismiss cases for want  
22 of prosecution whenever the plaintiff has failed for two years to bring the case  
23 to trial and makes said dismissal mandatory after five years if trial has not taken



1 place. However, the authority that NRCP 41(e) allows courts does not replace  
2 or supersede the inherent power to dismiss for lack of prosecution. The  
3 inherent power to dismiss for lack of prosecution exists independently of the  
4 authority NRCP 41(e) allows.

5           **3. Hunter's Contention That This Case Is About**  
6           **NRCP 41(e) Is Misleading – This Case Has Nothing to Do**  
7           **With NRCP 41(e).**

8           This case has nothing to do with NRCP 41(e). Gang did not move for  
9 dismissal pursuant to NRCP 41(e) and the District Court did not dismiss  
10 Hunter's case pursuant to NRCP 41(e). The only reason NRCP 41(e) is even  
11 being mentioned is because Hunter has no viable arguments. Thus, Hunter is  
12 trying to portray the District Court's decision to dismiss his Complaint as a  
13 gross abuse of discretion because it dismissed the case prior to the expiration of  
14 two years under NRCP 41(e). However, the District Court did not act pursuant  
15 to NRCP 41(e), was not required to do so, and for Hunter to suggest  
16 NRCP 41(e) bound the District Court is misleading. Moreover, following  
17 Hunter's logic, a court would be abusing its discretion if it acted on day 729  
18 instead of day 730, which is nonsensical when courts possess the inherent  
19 power to dismiss for lack of prosecution irrespective of rule (including  
20 NRCP 41(e)) or statute.

21           Even if the District Court was required to adhere to the two years  
22 NRCP 41(e) sets forth, which the case law expressly indicates it was not, the  
23 rule does not state that the dismissal has to take place after the two-year period.

1 Rather, the rule states: “whenever plaintiff has failed for 2 years after action is  
2 filed to bring such action to trial.”<sup>70</sup>

3 Here, Hunter filed the Complaint on December 4, 2009 and the District  
4 Court entered the Order dismissing the case on November 7, 2011. As a result,  
5 to avoid dismissal under NRCP 41(e) as well, Hunter would have had to bring  
6 the case to trial within less than one month after the District Court entered the  
7 dismissal Order, which would have been impossible. Thus, although  
8 NRCP 41(e) has nothing to do with the case, dismissal under NRCP 41(e)  
9 would have been appropriate because Hunter could not have brought the case to  
10 trial within two years.

### 11 *Conclusion*

12 There is no doubt that courts possess the inherent power to dismiss cases  
13 for lack of prosecution. This inherent power automatically exists irrespective of  
14 rule or statute. Thus, Hunter’s logic and reliance on NRCP 41(e) is misleading  
15 and inaccurate.

### 16 **B. THE DISTRICT COURT PROPERLY EXERCISED – AND 17 DID NOT ABUSE – ITS DISCRETION IN DISMISSING THE CASE FOR LACK OF PROSECUTION.**

### 18 *Legal Issue*

19 Whether the District Court properly exercised discretion in dismissing  
20 the case for lack of prosecution.

---

23 <sup>70</sup> NRCP 41(e).

1        ***Rule***

2        The element necessary to justify dismissal for failure to prosecute is lack  
3 of diligence on the part of the plaintiff, whether individually or through  
4 counsel.<sup>71</sup> The duty rests upon the plaintiff to use diligence at every stage of the  
5 proceeding to expedite the case to final determination.<sup>72</sup> The defendant on the  
6 other hand, is required only to meet the plaintiff step by step as the latter  
7 proceeds.<sup>73</sup>

8        ***Analysis***

9  
10            1.        **Hunter's Lack of Diligence and Failure to Expedite the Case.**

11        Gang obtained counsel immediately after being served with the lawsuit  
12 and was prepared to respond. However, the Parties pursued alternative dispute  
13 resolution. Such resolution did not occur because it became clear that Hunter  
14 was utilizing the legal action as leverage to pressure Gang into selling his  
15 property to Hunter. Once Hunter's tactic began to fail, Hunter all but  
16 abandoned prosecution of the case and became unresponsive.

17        As to Hunter's unresponsiveness, Gang sent correspondences to Hunter  
18 on or about:

- 19            • September 22, 2010;

20  
21        <sup>71</sup> Moore, 90 Nev. at 395, 528 P.2d at 1022.

22        <sup>72</sup> Thran v. First Judicial District Court, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963).

23        <sup>73</sup> Id.

- 1 • September 29, 2010;
- 2 • October 28, 2010; and
- 3 • November 12, 2010 without receiving a timely response.<sup>74</sup>

4 Finally, on November 23, 2010, Hunter responded to Gang's four inquiries  
5 indicating "the Hunters have been traveling. i [sic] will reach out and hopefully  
6 get you an answer of some sort."<sup>75</sup> However, no further answer came from  
7 Hunter.

8 Despite the lack of a response from Hunter, Gang continued to follow-up.  
9 Gang sent additional correspondences to Hunter on:

- 10 • December 3, 2010;
- 11 • March 23, 2011;
- 12 • April 25, 2011;
- 13 • July 24, 2011;
- 14 • July 27, 2011; and
- 15 • August 1, 2011.<sup>76</sup>

16 Finally, on August 2, 2011 – **almost nine months after the November 23,**  
17 **2010 correspondence from Hunter** – Hunter finally responded to Gang's  
18 additional six correspondences indicating: "i [sic] am on vacation this week and  
19 will get with dick [Hunter] and maggie [Hunter's wife] next week."<sup>77</sup> The next

20 <sup>74</sup> AA at APP0148:16-20 and APP0155:26-0156:2.

21 <sup>75</sup> Id.

22 <sup>76</sup> AA at APP0148:20-23 and APP0156:4-9.

23 <sup>77</sup> Id.

1 nine days came and went without further contact from Hunter.<sup>78</sup> Thus, on  
2 August 11, 2011, Gang informed Hunter that Gang would be moving to dismiss  
3 the case.<sup>79</sup>

4 In short, Gang made repeated efforts (at least 10)<sup>80</sup> to elicit participation  
5 from Hunter and all Hunter had to say in the year leading up to the dismissal  
6 was: (1) “the Hunters have been traveling. i [sic] will reach out and hopefully  
7 get you an answer of some sort”; and (2) “i [sic] am on vacation this week and  
8 will get with dick [Hunter] and maggie [Hunter’s wife] next week.”<sup>81</sup>

9  
10 **2. Hunter Never Indicated He Could Not Participate and**  
11 **His Counsel Possessed Authority to Act, but Did Not Do**  
12 **So.**

13 These circumstances (Hunter’s two responses in the year leading up to  
14 dismissal indicating that he and his counsel were traveling and on vacation)  
15 belie Hunter’s contention that he was too ill to participate in the prosecution of  
16 the case or alternative dispute resolution, as Hunter contended in his Opening

---

17 <sup>78</sup> Id.

18 <sup>79</sup> AA at APP0156:8-9.

19 <sup>80</sup> It is disingenuous and misleading for Hunter to contend in his Opening Brief  
20 that these efforts and the related correspondences are evidence that alternative  
21 dispute resolution discussions had not broken down. See Opening Brief at 8.  
22 The record is clear that for almost nine months Hunter never responded once,  
and, during almost an entire year, all Hunter indicated on two occasions was  
that he and his attorney were traveling and on vacation. AA at APP0148:1-  
0149:8. Moreover, Hunter admitted at the Motion to Dismiss hearing that  
“things have broken down a number of times.” AA at APP0034:22-23.

23 <sup>81</sup> AA at APP0148:16-0149:2 and APP0155:26-0156:9.

1 Brief. During the year leading up to dismissal, Hunter never indicated he was  
2 ill; never indicated he was in the hospital; never indicated he had a medical  
3 setback; never indicated his medical condition was creating issues; and, never  
4 indicated he needed more time. Hunter only indicated that he and his counsel  
5 were on vacation and traveling.<sup>82</sup> Moreover, if Hunter was too ill to participate,  
6 his attorneys had authority under Nevada Rule of Professional Conduct 1.2 to  
7 act, at least procedurally, but they did not do so.

8  
9 **3. Hunter Had Multiple Opportunities to Present Evidence  
and Oftentimes Failed to Do So**

10 Hunter claims that he never had an opportunity to oppose Gang's  
11 arguments and/or present opposing evidence. This is misleading and  
12 inaccurate. The truth is that Hunter did not and could not dispute his chronic  
13 inaction, did not and could not dispute his encroachment, and did not and could  
14 not argue that he paid Gang's property taxes.

15 Hunter had multiple opportunities to oppose Gang's arguments and  
16 present evidence. Hunter had the opportunity to oppose the Motion to Dismiss  
17 and contest the factual elements Gang presented, but failed to do so. Hunter  
18 had an opportunity to attend oral argument, did attend, and argued primarily the  
19 adverse possession claim, without making the necessary claim that Hunter paid  
20 Gang's property taxes.<sup>83</sup> Hunter had the opportunity to oppose the Motion for  
21 Fees and Costs. Hunter had the opportunity to file a motion for reconsideration

22 <sup>82</sup> Id.

23 <sup>83</sup> AA at APP0029-0035.

1 regarding the dismissal Order, but chose not to. Hunter had an opportunity to  
2 file a reconsideration motion on the fee Order, but chose not to. Hunter also  
3 had opportunities to file NRCP 59(e) motion(s) to alter or amend any judgment,  
4 but chose not to. Thus, it is disingenuous for Hunter to imply he did not have  
5 an opportunity to oppose Gang's arguments or present evidence.

6  
7 **4. Hunter Misleads the Court Asserting that He Could  
Have Entered Default and/or Default Judgment**

8 Hunter asserts that he could have entered default and/or default judgment  
9 against Gang. This contention is a factually and legally false claim that  
10 apparently is made to mislead this Court into viewing Hunter as a magnanimous  
11 advocate of settlement when the facts belie the posture.

12 The truth is that Hunter never made the necessary Nevada Rule of  
13 Professional Conduct 3.5A inquiry.<sup>84</sup> In addition, Hunter never filed or served  
14 a Notice of Intent to Take Default Judgment, as NRCP 55 requires.<sup>85</sup>  
15 Moreover, it was Hunter who was not participating, not responding, and not  
16 prosecuting the case. Gang was diligent and never put himself in a position  
17 where Hunter could have legitimately entered default – let alone default  
18 judgment – against him.

19  
20 <sup>84</sup> NRPC 3.5A requires lawyers to first inquire about the opposing lawyer's  
intention to proceed before causing any default to be entered. See NRPC 3.5A;  
see also Rowland v. Lepire, 95 Nev. 639, 600 P.2d 237 (1979).

21 <sup>85</sup> NRCP 55(b)(2); see also Landreth v. Malik, 127 Nev. —, —, 251 P.3d  
22 163, 172 (Nev. 2011) (stating “before seeking an entry of default in a case, a  
23 party must inquire into the opposing party's intent to proceed [pursuant to  
NRPC 3.5A], and once default is entered and before seeking a default  
judgment, the party must serve a three-day notice to satisfy NRCP 55(b)(2).”

1 Gang submits that Hunter became unresponsive and failed to diligently  
2 pursue the litigation because Hunter's intent in filing the legal action was to  
3 utilize it to coerce Gang to sell a portion of his property to Hunter by forcing  
4 Gang to incur legal fees via Hunter's vexatious and frivolous action. In  
5 addition, by allowing the legal action to languish, the action would further  
6 encumber Gang's ability to sell his property to third parties, which would  
7 further Hunter's scheme to obtain ownership of the property.

8 Hunter contends that appropriate action by Gang would have been to file  
9 an answer and pursue legal remedies. However, to answer would have  
10 acknowledged legitimacy of a frivolous legal action. To answer also would  
11 have been to ignore this Court's longstanding preference to have civil cases  
12 concluded through alternative dispute resolution rather than full blown  
13 litigation. Further, the most reasonable and expeditious way to present the  
14 merits of the case was through the Motion to Dismiss and related arguments  
15 since Hunter's record of inaction and the merits of the case were evident.

16 As a result, for appellate counsel to attempt to shift responsibility to  
17 Gang for furtherance of a legal action he did not initiate, particularly in light of  
18 Hunter's abandonment of prosecution and alternative dispute resolution efforts,  
19 is nothing more than a bait-and-switch tactic. Hunter's failure to pursue judicial  
20 resolution and his abandonment of alternative dispute resolution are clear and  
21 plain indicators that Hunter's legal action was filed for purposes other than  
22  
23



1 obtaining a legal outcome.<sup>86</sup> With no action by Hunter, the District Court  
2 properly exercised its discretion and dismissed the case.

### 3 *Conclusion*

4 The District Court properly exercised its discretion in dismissing  
5 Hunter's Complaint for lack of prosecution. The element necessary to justify  
6 dismissal for failure to prosecute is lack of diligence, whether individually or  
7 through counsel.<sup>87</sup> All Hunter did throughout almost an entire year was to  
8 inform on two occasions that people were traveling and on vacation – this is the  
9 epitome of “lack of diligence.” The District Court agreed and exercised its  
10 inherent power and discretion to dismiss the case due to Hunter's lack of  
11 diligence.

### 12 **C. THE DISTRICT COURT PROPERLY CONSIDERED THE** 13 **MERITS AND THE MERITS REQUIRED THE DISTRICT** 14 **COURT'S DISMISSAL OF THE CASE.**

### 15 *Legal Issue*

16 Whether the District Court properly exercised its discretion when it  
17 considered the merits of the case and entered findings of fact and conclusions of  
18 law.

### 19 *Rule*

20 This Court has held repeatedly that district courts are justified in  
21 considering the merits of cases when motions to dismiss for want of prosecution

22 <sup>86</sup> When a case has long been neglected, “an inference arises that the case lacks  
merit . . .” Volpert v. Popagna, 85 Nev. at 441, 456 P.2d at 850.

23 <sup>87</sup> Moore, 90 Nev. at 395, 528 P.2d at 1022.

1 are brought.<sup>88</sup> Further, when a case has long been neglected, “an inference  
2 arises that the case lacks merit . . .”<sup>89</sup>

3 *Analysis*

4  
5 **1. The District Court Acted Properly in Considering the Merits When It Exercised Its Discretion.**

6 Hunter asserts that the District Court erred in addressing the merits.  
7 However, there is no authority precluding district courts from considering the  
8 merits of cases when motions to dismiss for want of prosecution are brought.  
9 Rather, just the opposite is true. The District Court was justified in considering  
10 the merits of the case when considering the Motion to Dismiss.<sup>90</sup> To suggest  
11 that it would require an answer and prolonged litigation to present the same  
12 information to the District Court is disingenuous.

13  
14 **2. The Merits Required the District Court to Dismiss the Case.**

15 Hunter’s case lacked merit, and despite Hunter’s misleading claims of a  
16 right to adverse possession, the case will always lack merit. The main claim for  
17 relief in Hunter’s Complaint was adverse possession, with the remaining claims

18  
19 <sup>88</sup> Volpert v. Popagna, 85 Nev. at 441, 456 P.2d at 850 (stating “If in fact the  
20 trial court did consider the merits of the action in exercising its discretion this  
was not error.”).

21 <sup>89</sup> Id.; see also Northern Illinois Corporation v. Miller, 78 Nev. 213, 217, 370  
22 P.2d 955, 956 (1962) (stating it was not in error for the trial court to consider  
the merits of the action in exercising its discretion and an inference arises that a  
case lacks merit when it has long been neglected) (citations omitted).

23 <sup>90</sup> Volpert, at 441; see also Northern Illinois Corporation, at 217.

1 (injunctive relief, declaratory relief, and quiet title) acting as appendages to the  
2 adverse possession claim.

3 In Nevada, failure to pay taxes on adversely possessed real property is  
4 dispositive of the claim.<sup>91</sup> “In order to claim adverse possession . . . **the**  
5 **claimant must pay all taxes** assessed against the property for that same time  
6 period.”<sup>92</sup> Here, Hunter did not pay any taxes on the Gang property, and Hunter  
7 cannot succeed without establishing that he paid taxes.<sup>93</sup> During arguments on  
8 the motion to dismiss, Hunter did not claim, nor could he claim, that he paid  
9 Gang’s property taxes, thus conceding the issue. Hunter simply had no hope of  
10 succeeding. The District Court recognized the frivolous nature of Hunter’s  
11 claims when it considered the merits. The District Court stated:

12 *Well, I think there’s more to it than he’s [Hunter] sitting on his*  
13 *rights right now. I don’t think he [Hunter] has a position and he’s*  
14 *just filed a suit in hopes that something sticks if he throws it*  
*against the wall.*<sup>94</sup>

15 In addition, the District Court questioned Hunter’s counsel about the merits:

16 *Do you -- argue that he [Hunter] did not landscape on Mr. Gang’s*  
17 *property, is that your argument?*<sup>95</sup>

18  
19 <sup>91</sup> See NRS 11.150 and NRS 40.090; see also Potts v. Vokits, 101 Nev. 90, 93,  
692 P.2d 1304, 1306 (1985).

20 <sup>92</sup> Id. (emphasis added).

21 <sup>93</sup> Id.

22 <sup>94</sup> AA at APP0032:7-8.

23 <sup>95</sup> AA at APP0032:23-33:1.

1 Hunter's counsel responded:

2 *There is no question there is . . . landscaping on Mr. Gang's*  
3 *property . . . Mr. Hunter put up trees and what have you on Mr.*  
4 *Gang's property . . .*<sup>96</sup>

5 . . .

6 After additional argument from Hunter, the district court further inquired:

7 *So if -- so it's -- you think that's reasonable?*<sup>97</sup>

8 . . .

9 *And you think that, well, I get the property if Gang doesn't do*  
10 *anything about it?*<sup>98</sup>

11 Therefore, the District Court recognized that Hunter had encroached on  
12 Gang's property by planting trees on the property and that Hunter's claims were  
13 not justified. The District Court also recognized that allowing the legal action  
14 to languish further was not in the interests of judicial expediency or justice. As  
15 a result, the District Court not only dismissed the case for lack of prosecution,  
16 but it also properly considered the merits and dismissed the case.

17 **3. The Findings of Fact and Conclusions of Law Are**  
18 **Accurate.**

19 Hunter takes issue with the "findings" the District Court entered, but  
20 never specifically identifies the Findings of Fact he believes are inaccurate. In

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21 <sup>96</sup> AA at APP0033:2-3, 22-23.

22 <sup>97</sup> AA at APP0033:25.

23 <sup>98</sup> AA at APP0034:2-3.

1 total, the District Court made 17 Findings of Fact.<sup>99</sup> Findings of Fact 1-4  
2 describing the two properties and their relationship to each other are true and  
3 accurate.<sup>100</sup> Findings of Fact 5-7 indicating that Hunter built within eight  
4 inches of the property line, landscaped on Gang's property, and identifying the  
5 approximate dimension of the encroachment are true and accurate.<sup>101</sup> Findings  
6 of Fact 8-9 describing Hunter's Complaint and the action he has taken are true  
7 and accurate.<sup>102</sup> Findings of Fact 10-11 indicating that settlement negotiations  
8 broke down, Hunter became unresponsive for extended periods of time, and  
9 Gang's property remains encumbered are true and accurate.<sup>103</sup> And, Findings  
10 of Fact 12-17 describing Hunter's building and improvements on Forest Service  
11 land, the Forest Service's demands, Hunter staging a project and installing pipes  
12 on Gang's property, and Gang's lack of authorization are true and accurate.<sup>104</sup>  
13 Thus, the Findings of Fact the District Court entered are true and accurate.  
14

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15 <sup>99</sup> AA at APP0036-0039.

16 <sup>100</sup> AA at APP0001:23-0002:7, APP0030:10-12, and APP0036:25-0037:7.

17 <sup>101</sup> AA at APP0029-0036, APP0030:17-20, APP0033:13, APP0033:21-23, and  
18 APP0037:7-14.

19 <sup>102</sup> AA at APP0001-0007 and APP0184-0186.

20 <sup>103</sup> For almost nine months Hunter never responded once; and, during almost an  
21 entire year all Hunter indicated on two occasions was that he and his attorney  
22 were traveling and on vacation. AA at APP0148:1-0149:8. Moreover, Hunter  
admitted at the Motion to Dismiss hearing that "things have broken down a  
number of times." AA at APP0034:22-23.

23 <sup>104</sup> AA at APP0030:22-31:2 and APP0037:26-38:4.

1                   4.     **The Supreme Court May Affirm the District Court's**  
2                   **Decision for Alternative Reasons.**

3             This Court may affirm when the right decision was made even if it was  
4 made for the wrong reason.<sup>105</sup> As a result, even if the Court believes that the  
5 District Court dismissed the case for the wrong reasons, this Court should still  
6 affirm because the decision to dismiss was correct.

7             Here, the right decision for the District Court to make was to dismiss  
8 Hunter's case. As discussed throughout this Answering Brief, Hunter asserted  
9 adverse possession against Gang, but never paid (or even claimed to pay)  
10 property taxes on Gang's property. Failure to pay property taxes is dispositive  
11 of adverse possession claims. Further, Hunter built within eight inches of the  
12 property line, landscaped on Gang's property, and filed the suit to attempt to  
13 coerce Gang into giving Hunter property. Thus, whether it was for lack of  
14 prosecution or something else, the District Court made the right decision, and  
15 this Court should affirm.

16                   ***Conclusion***

17             This Court has held repeatedly that district courts are justified in  
18 considering the merits of cases when motions to dismiss for want of prosecution  
19

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20 <sup>105</sup> See State ex rel. State Board of Equalization v. Bakst, 122 Nev. 1403, 1416,  
21 148 P.3d 717, 726, n. 40 (2006) (stating that this Court will affirm an order  
22 when the right decision is reached, even if it is for the wrong reasons); see also  
23 Dynamic Transit v. Trans Pac. Ventures, 291 P.3d 114, 117 (Nev. 2012)  
(stating: "If a decision below is correct, it will not be disturbed on appeal even  
though the lower court relied upon wrong reasons." (quoting Hotel Riviera, Inc.  
v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981)))

1 are brought.<sup>106</sup> Further, when a case has long been neglected, “an inference  
2 arises that the case lacks merit . . .”<sup>107</sup> Moreover, the Court may affirm even if  
3 the District Court made the right decision for the wrong reasons. Therefore, the  
4 District Court was within its scope of discretion to consider the merits of the  
5 case, the merits required dismissal, and this Court should affirm.

6  
7 **D. THE DISTRICT COURT PROPERLY EXERCISED ITS**  
8 **DISCRETION IN AWARDING GANG ATTORNEY FEES**  
9 **AND COSTS BECAUSE HUNTER’S CLAIMS WERE**  
10 **FRIVOLOUS.**

11 *Legal Issue*

12 Whether the District Court properly exercised its discretion in awarding  
13 Gang attorney fees and costs due to Hunter’s frivolous claims.

14 *Rule*

15 The generally accepted “American Rule” is that parties to a lawsuit pay  
16 their own attorneys fees. The American Rule, however, may be abrogated by  
17 contract, rule or statute.<sup>108</sup> As to statute, NRS 18.010(2)(b) states in pertinent  
18 part:

19 2. In addition to the cases where an allowance is authorized by  
20 specific statute, the court may make an allowance of attorney’s  
21 fees to a prevailing party:

22 . . .

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23 <sup>106</sup> Volpert, at 441.

<sup>107</sup> Id.; see also Northern Illinois Corporation, at 217.

<sup>108</sup> Barrett v. Baird, 111 Nev. 1496, 908 P.2d 689 (1995).

1 (b) Without regard to the recovery sought, when the court finds  
2 that the claim . . . was brought or maintained without  
reasonable ground or to harass the prevailing party.<sup>109</sup>

3 Moreover, “the statute’s 2003 amendment unambiguously reflects the  
4 Legislature’s intent to liberalize attorney fee awards.”<sup>110</sup>

5 In 2003, “Senate Bill 250 added the following language to NRS 18.010:  
6 ‘The court shall liberally construe the provisions of this paragraph in favor of  
7 awarding attorney’s fees in all appropriate situations.’”<sup>111</sup> Thus, the “**statutory**  
8 **language is clear; it encourages the district court to award attorney**  
9 **fees.**”<sup>112</sup>

10 The actual language of the statute further reinforces the intent of the  
11 Legislature by declaring that:

12 The court [should] award attorney’s fees . . . in all appropriate  
13 situations to punish for and deter frivolous and vexatious claims and  
14 defenses because such claims and defenses overburden limited judicial  
resources, hinder the timely resolution of meritorious claims and  
15 increase the costs of engaging in business and providing professional  
services to the public.<sup>113</sup>

16 As a result, NRS 18.010(2)(b) gives the District Court authority and discretion  
17 to award attorney fees when a claim “was brought or maintained without

18 \_\_\_\_\_  
19 <sup>109</sup> See NRS 18.010.2(b).

20 <sup>110</sup> Trustees v. Developers Surety, 120 Nev. 56, 63, 84 P.3d 59, 63 (2004).

21 <sup>111</sup> Id. (citing S.B. 250, 72d Leg. (Nev. 2003); 2003 Nev. Stat., ch. 508, § 153,  
at 3478).

22 <sup>112</sup> Id. (emphasis added).

23 <sup>113</sup> NRS 18.010(2)(b).



1 reasonable ground or to harass the prevailing party.”<sup>114</sup> “For purposes of  
2 NRS 18.010(2)(b), **a claim is frivolous or groundless if there is no credible**  
3 **evidence to support it.**”<sup>115</sup> In addition, the Nevada Supreme Court “reviews an  
4 attorney fees decision for an abuse of discretion.”<sup>116</sup>

### 5 *Analysis*

6 In Nevada, failure to pay taxes on adversely possessed real property is  
7 dispositive of the related claim.<sup>117</sup> “In order to claim adverse possession . . . **the**  
8 **claimant must pay all taxes** assessed against the property for that same time  
9 period.”<sup>118</sup> Under Nevada law, the payment of taxes on the property at issue is  
10 an “**absolute requirement**” for establishing title through adverse possession.<sup>119</sup>

11 Here, Hunter paid no taxes on the Gang property and does not even  
12 allege he paid any taxes on the Gang property.<sup>120</sup> As a result, there can be no  
13 evidence to support the adverse possession claim. Hunter should have alleged

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14 <sup>114</sup> Id.

15 <sup>115</sup> Rodriguez v. Primadonna Co., LLC, 125 Nev. 578, 588, 216 P.3d 793, 800  
16 (2009) (emphasis added) (citing Semenza v. Caughlin Crafted Homes, 111 Nev.  
17 1089, 1095, 901 P.2d 684, 687 (1995); Allianz Ins. Co. v. Gagnon, 109 Nev.  
18 990, 996, 860 P.2d 720, 724 (1993)).

18 <sup>116</sup> Rodriguez v. Primadonna Co., LLC, at 588 (citations omitted).

19 <sup>117</sup> See NRS 11.150 and NRS 40.090; see also Potts v. Vokits, 101 Nev. 90, 93,  
20 692 P.2d 1304, 1306 (1985).

20 <sup>118</sup> Id. (emphasis added).

21 <sup>119</sup> Potts, at 93, 692 P.2d at 1306 (1985) (emphasis added) (citing Crumbaker v.  
22 Kelly, 95 Nev. 743, 601 P.2d 1199 (1979); Reno Brewing Co. v. Packard, 31  
23 Nev. 433, 103 P. 415 (1909)).

<sup>120</sup> AA at APP0001-0007.

1 he paid Gang's property taxes in the Complaint, and his failure to do so is  
2 further evidence that the legal action is frivolous.

3 Hunter was aware of the payment of taxes requirement prior to filing the  
4 frivolous Complaint, and, if he was not, his counsel presumably knew adverse  
5 possession claims in Nevada require the payment of property taxes. Without  
6 payment of taxes, the case law is clear that there is no reasonable ground for an  
7 adverse possession claim. Thus, because Hunter did not pay any taxes or even  
8 allege he paid any taxes on the Gang property, Hunter brought the claim  
9 without reasonable ground.<sup>121</sup>

10 Hunter's claims were also groundless because he was seeking to obtain  
11 ownership of approximately 7,000-8,000 square feet of the Gang property for  
12 no cost. Hunter utilized 7,000-8,000 square feet of the Gang property. And,  
13 while this suit was pending, Hunter also used the Gang property as a  
14 construction site while installing, without Gang's permission, 24-inch pipes  
15 believed to be on Gang's property.

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17 <sup>121</sup> In addition to the adverse possession claim, Hunter brought quiet title and  
18 declaratory and injunctive relief claims. The quiet title claim for ownership of  
19 the Gang property is without reasonable ground because its legal theory is  
20 based on Hunter's fatally flawed adverse possession claim. Further, the  
21 declaratory and injunctive relief claims are not separate causes of action or  
22 independent grounds for relief, but are remedies. Moreover, quiet title actions  
23 are merely a species of declaratory judgment actions and are, therefore,  
inherently redundant of declaratory relief claims. See Kress v. Corey, 65 Nev.  
1, 189 P.2d 352, 364 (1948) ("For many years prior to the adoption of  
[declaratory judgment] statutes courts have nonetheless been rendering  
declaratory judgments, that is, the declaration of the pre-existing rights of the  
litigants without any coercive decree, in such cases as quiet title suits....").  
Thus, Hunter brought the Complaint without reasonable ground.

1        ***Conclusion***

2        NRS 18.010(2)(b) advocates for awards of attorney fees when claims are  
3 brought without reasonable ground.<sup>122</sup> A claim is frivolous or groundless if  
4 there is no credible evidence to support it.<sup>123</sup> Hunter's claims were groundless  
5 because there is no credible evidence to support them. Hunter did not allege  
6 that he paid property taxes and disregarded Nevada law requiring the payment  
7 of property taxes to assert a viable adverse possession claim. Yet, in his appeal,  
8 Hunter continues to contend he is entitled to adverse possession in what is  
9 clearly a blatant maneuver to mislead this Court into reversing the District  
10 Court and prolonging a fatally flawed litigation.

11        **E. THE DISTRICT COURT PROPERLY EXERCISED ITS**  
12        **DISCRETION IN AWARDING ATTORNEY FEES AND**  
13        **COSTS TO GANG AS THE PREVAILING PARTY.**

14        ***Legal Issue***

15        Whether the District Court properly exercised its discretion in dismissing  
16 the case for lack of prosecution.

17        ***Rule***

18        NRS 18.010(2)(b) and NRS 18.020 allow, and in the case of NRS 18.020  
19 make mandatory, the award of attorney fees and costs to the prevailing party.<sup>124</sup>  
20

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21        <sup>122</sup> See NRS 18.010(2)(b).

22        <sup>123</sup> Rodriguez, 125 Nev. at 588, 216 P.3d at 800.

23        <sup>124</sup> See NRS 18.010(2)(b) and NRS 18.020.

1        *Analysis*

2        Hunter asserts the District Court abused its discretion when it awarded  
3 Gang attorney fees and costs because Gang should not have been the prevailing  
4 party. However, as the case currently stands, Gang successfully dismissed  
5 Hunter's Complaint, is the prevailing party in this matter, and was entitled to  
6 seek his attorney fees and an award of costs as the prevailing party.

7        *Conclusion*

8        Therefore, the District Court did not abuse its discretion in awarding  
9 Gang attorney fees and costs as the prevailing party in this matter because Gang  
10 was the prevailing party.

11        **F. HUNTER CANNOT ESTABLISH THAT THE DISTRICT**  
12        **COURT ABUSED ITS DISCRETION IN DISMISSING THE**  
13        **CASE FOR LACK OF PROSECUTION, CONSIDERING**  
14        **THE MERITS, OR AWARDING FEES AND COSTS.**

15        Unless Hunter is able to demonstrate that ““there has been a gross abuse  
16 of discretion on the part of the trial court in dismissing an action for lack of  
17 prosecution its decision will not be disturbed on appeal.””<sup>125</sup> Indeed, the  
18 Nevada Supreme Court has repeatedly held:

19        ... that the only limitations upon the discretionary power of the  
20 court to dismiss an action for delay in its prosecution is that such  
21 power must not be abused; and said, ‘Unless it is made to appear  
22 that there has been a gross abuse of discretion on the part of the

23        <sup>125</sup> Northern Illinois Corporation v. Miller, 78 Nev. at 216, 370 P.2d at 956  
(quoting Harris v. Harris, 65 Nev. 342, 196 P.2d 402 (1948)).

1 trial court in dismissing an action for lack of prosecution its  
2 decision will not be disturbed on appeal.’<sup>126</sup>

3 Thus, Hunter is facing a heightened standard he cannot satisfy.

4 **G. GANG IS ENTITLED TO HIS ATTORNEY FEES AND**  
5 **COSTS BECAUSE THIS APPEAL IS FRIVOLOUS.**

6 An appeal is frivolous if the result is foreordained by the lack of  
7 substance to the appellant’s arguments.<sup>127</sup> When an appeal is doomed to failure,  
8 and an objectively reasonable litigant should have realized that from the outset,  
9 the appeal is frivolous.<sup>128</sup> “Frivolous appeal” is defined as “[o]ne in which no  
10 justiciable question has been presented and appeal is readily recognizable as  
11 devoid of merit in that there is little prospect that it can ever succeed.”<sup>129</sup>

12 With reference to frivolous appeals, this Court has announced, “We wish  
13 . . . to put litigants and attorneys on notice that willful abuse of court process in  
14 the trial court may well give rise to an inference of abuse of appellate process  
15 on appeal, rendering the possibility of sanctions under NRAP 38 more likely  
16 than in other cases.”<sup>130</sup> When an appellant’s contentions on appeal are so  
17 lacking in merit as to constitute a frivolous appeal and a misuse of the appellate

18 <sup>126</sup> Volpert v. Popagna, 85 Nev. at 440, 456 P.2d at 850 (quoting Harris v.  
19 Harris, 65 Nev. 342, 196 P.2d 402 (1948)).

20 <sup>127</sup> In re Bagdade, 334 F.3d 568, 581 (7th Cir. 2003).

21 <sup>128</sup> Toscano v. Chandris, S.A., 934 F.2d 383, 387 (1st Cir. 1991).

22 <sup>129</sup> Black’s Law Dictionary, 668 (6th ed. 1990) (citations omitted).

23 <sup>130</sup> Young v. Johnny Ribeiro Building, Inc., 106 Nev. 88, 95, 787 P.2d 777, 781  
(1990).

1 process of this court, this Court is authorized pursuant to NRAP 38 to impose  
2 sanctions against the offending party.<sup>131</sup>

3 One of the purposes of sanctions pursuant to NRAP 38 is “to discourage  
4 like conduct in the future.”<sup>132</sup> It is very clear that this Court’s prior written, but  
5 unpublished, admonitions did not deter Hunter from pursuing a frivolous appeal  
6 that attempts to mislead this Court into believing that the legal pursuit of  
7 adverse possession is still viable.

8 Here, Hunter’s appeal is frivolous because he continues to assert he is  
9 entitled to Gang’s property, but cannot satisfy the elements of the claim without  
10 having paid the related property taxes. Therefore, this Court should require  
11 Hunter to pay Gang’s reasonable attorney fees and costs incurred in this  
12 appeal,<sup>133</sup> with the amount to be determined either by this Court or by the  
13 District Court upon remand.<sup>134</sup>

14 \_\_\_\_\_  
15 <sup>131</sup> Works v. Kuhn, 103 Nev. 65, 69, 732 P.2d 1373, 1376 (1987).

16 <sup>132</sup> NRAP 38(b).

17 <sup>133</sup> Such a sanction is not without precedent in Nevada. In Lioce v. Cohen, 149  
18 P.3d 916 (Nev. 2006), this Court required Phil Emerson, Esq. and his clients in  
19 two separate Supreme Court cases to pay the opposing parties’ attorney’s fees  
20 and costs incurred in a previous trial **and** on appeal to be determined by the  
21 district court. Id. at 931–932. In issuing this sanction, the Court referenced  
22 various occasions in which it had previously issued monetary sanctions, even  
23 personally against the offending counsel. See id. at n.42 (citing Greene v. State,  
113 Nev. 157, 170, 931 P.2d 54, 62 (1997) (issuing monetary sanctions, on  
appeal, against trial counsel for an improper opening statement and the failure  
to observe the district court’s admonitions); McGuire v. State, 100 Nev. 153,  
159–60, 677 P.2d 1060, 1065 (1984) (issuing monetary sanctions, on appeal,  
against trial counsel for attorney misconduct during trial); see also Randolph v.  
State, 117 Nev. 970, 982, 36 P.3d 424, 432, n.16 (2001) (ordering trial counsel  
to show cause why we should not sanction him, on appeal, for misconduct  
during trial); Williams v. State, 103 Nev. 106, 112, 734 P.2d 700, 704, n.6

1 **VII. CONCLUSION**

2 This case is about judicial discretion and the inherent power courts  
3 possess to dismiss cases for lack of prosecution and frivolousness. The District  
4 Court properly exercised its inherent power and related discretion when it  
5 considered the merits, dismissed the case for lack of prosecution, and, based on  
6 the frivolous nature of Hunter's claims, granted Gang's request for attorney fees  
7 and costs. Hunter cannot establish that the District Court abused its discretion  
8 when it dismissed the case or entered the fees and costs award. As a result, this  
9 Court should affirm the District Court's Orders and award Gang his attorney  
10 fees and costs under NRAP 38.

11 Dated this 28th day of February, 2014.

12 MARQUIS AURBACH COFFING

13 By /s/ Tye S. Hanseen

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18 (1987) (stating that we will impose sanctions on attorneys who "cannot conform  
19 to the proper norms of professional behavior, whether inside or outside the  
courtroom").

20 <sup>134</sup> Although NRAP 38 references this Court's determination of the amount of  
21 attorney's fees and costs incurred on appeal to award as sanctions against the  
offending party, Lioce remanded for the district court to determine the amount.  
22 Id. at 931–932. In a previous opinion, this Court has also clarified that the  
district court has the initial duty to determine the reasonableness of the amount  
23 of attorney's fees and costs, even those that are incurred on appeal. See Musso  
v. Binick, 104 Nev. 613, 614–615, 764 P.2d 477, 477–478 (1988).

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1 in conformity with the requirements of the Nevada Rules of Appellate  
2 Procedure.

3 Dated this 28th day of February, 2014.

4 MARQUIS AURBACH COFFING

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