IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. HUNTER

Appellant,

vs.

WILLIAM GANG, ,

Respondent.

Supreme Court Case No.: 59691
Dist. Court Case No.: A-09-604877-C

REPLY BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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

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

The following law firm has represented Appellant in this litigation:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEVADA AUTHORITY

Rules

Statutes

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

INTRODUCTION

The gross abuse of discretion that occurred in this matter is amply illustrated in Gang's Answer Brief. Unable to cite to authority supporting the dismissal of a claim for failure to prosecute where the next required action in the case is for the defendant to answer, Gang first asserts that Hunter's action to quiet title to the slim strip of land contained the flood-channeling berm was based solely on an adverse possession theory. Thus, Gang simply pretends the prescriptive easement, irrevocable license, and acquiescence theories stated in the Complaint do not exist. That strategy was employed because Respondent hopes to capitalize on what he contends is a pleading defect for the adverse possession claim. However, dismissal was neither sought nor granted on such grounds. Moreover, the grant of a dismissal with prejudice without granting leave to amend would itself be an abuse of discretion.

Next, well aware that no evidence in the record supports the "factual findings" recited by the District Court, Gang instead makes repeated citations to statements of counsel. Respondent even illustrates his brief with photographs that were *never* submitted into the proceedings below, thus improperly introducing new and unauthenticated evidence to this Court. In short, through his actions, Respondent has confirmed that the record does not have *any* evidence to support the lower court ruling.

Despite the conspicuous lack of record support for the lower court's rulings, and Gang's own improper attempts to mislead this Court regarding such lack of evidence, Gang contends that Hunter has abused the appellate process and should therefore be required to pay fees and costs for having pursued a purportedly frivolous appeal. However, the only honest assessment that can be made in this

matter is that this appeal was occasioned by Gang's "imposition on the court below" and that the defense of this appeal has been a misuse of this Court's processes. Accordingly, it is Hunter who should be granted an award of attorney's fees under NRAP 38.

THIS COURT SHOULD DISREGARD RESPONDENT'S FACTUAL ASSERTIONS

This Court should disregard the bulk of Gang's description of the "facts" in this matter, as Gang has failed to cite to *evidence* in the record to support such facts. For example, Gang improperly attempted to supplement the Court record by including annotated photographs with the fact statement. *See* Answer Brief, 9, 10, 11, and 13. However, no photographs were ever submitted to the lower court in the proceedings below. This Court has long held that it will not consider matters that were not presented to the district court and thus are not properly part of the record on appeal. *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 635 P.2d 276 (1981). Nor does this Court generally consider issues that are raised for the first time on appeal. *Canyon Villas v. State, Tax Comm'n*, 124 Nev. __, 192 P.3d 746, 754-55, n.27 (2008).

Additionally, Gang's factual statement relies repeatedly upon citations to argument by counsel asserting various acts by Hunter, rather than to any part of the record that contains actual evidence of such conduct. These "facts" are located in the Answer Brief at page 8, lines 13-16; page 9, lines 1-4, 17-19 , with lines 5-16 taken up by an unsupported photograph; page 10, lines 3-7, with lines 8-18 consisting of an unsupported photograph; page 11, lines 3-8, with lines 9-20 consisting of an unsupported photograph; page 12, lines 12-18, with 1 -11 containing an unsupported photograph, and page 13, lines 6-13. Indeed, the only

"facts" presented by Gang that do find legitimate support in the record are the following:

> Gang and Hunter own adjoining properties in Mountain Springs, Nevada. The north side of the Hunter property borders the south side of the Gang property.

See Answer Brief, 8:11-13, citing to allegations in the Verified Complaint (**A. 2:3-7, 1:23-2:7, 2:6-7.**) Thus, Gang's "Factual Statement" is a lengthy attempt at misleading this Court regarding the facts contained in the record. Moreover, wholly absent from Respondent's factual statement are the ***undisputed*** facts that the landscaping on what is *now* Respondent's property occurred more than 30 years ago in order to prevent further damage to Appellant's Property by flooding from run-off, and that the work was done with the knowledge of the person who owned the property at that time. **See A. at 3-4, ¶¶ 4-12.**

Even in recounting *procedural* facts, Gang attempts to mislead this Court. Gang stated "Hunter then filed the underlying suit against Gang claiming ownership through adverse possession of the 7,000-8,000 square feet of Gang's property that Hunter landscaped on." *Answer Brief*, 9:19-10:2. However, Respondent wholly failed to note that Appellant's claim for adverse possession was only one of *several* theories alleged, despite the irrevocable license, prescriptive easement, and acquiescence theories contained in the Complaint. ***See Complaint,* A. 1-5.** In addition, in his procedural recitation, Respondent also not only improperly included argument within his factual statement, but supported that argument with an inaccurate statement of the law.[1]

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[1] Respondent contends that a failure to *pay* property tax is dispositive of an adverse possession claim. However, under Nevada law, an adverse possession claimant need only pay or *tender* property taxes. NRS 11.251. Moreover, contrary to Gang's assertion, the silence of the record regarding payment of taxes does not warrant an assumption that neither payment nor tender has been made.

Additionally, Gang attempts to justify the District Court's dismissal based upon statements contained in the affidavit of counsel presented in briefing for the subsequently-filed motion for attorney's fees, even though such "evidence" clearly could not have been considered by the District Court in its dismissal. ***See Answer***, 21:17-23:3. In short, Gang has continued his practice of reviling Hunter with spurious assertions, while steadfastly resisting any determination of the dispute on the merits of the allegations. This Court should not condone such conduct. The judgment of dismissal and the grant of attorney's fees should be reversed, and the matter remanded for resolution on the merits.

LEGAL ARGUMENT

The District Court abused its discretion in granting dismissal for failure to prosecute where it was Gang who delayed in taking the next action due, *i.e.*, filing an answer. Additionally, the District Court abused its discretion in issuing orders containing factual findings despite the complete absence of evidence to support such findings. These actions cannot be justified by exercise of the Court' inherent powers or by theories never raised below. 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 THE COMPLAINT WITH PREJUDICE

Well aware that the requirements of NRCP 41(e) were not satisfied here, Gang contends that the dismissal with prejudice can be affirmed on other grounds, including through resort to the District Court's inherent powers or by recasting it as a dismissal under NRCP 12(b)(5). Neither theory has merit. By adopting NRCP 41(e), this Court has set the parameters for dismissal for failure to prosecute; resort

to inherent powers of dismissal is inapposite. Nor could dismissal of the complaint be justified on the basis for failure to state a claim, as Hunter adequately pleaded facts that, presumed true, entitle him to relief. Accordingly, the judgment of dismissal with prejudice must be reversed.

A. The Dismissal Cannot be Justified by the District Court's Inherent Powers.

"Inherent judicial power is not infinite . . . and it must be exercised within the confines of valid existing law." *Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428 (2007). Invocation of inherent authority is "limited to acts that are reasonably necessary for the judiciary's proper operation" and "should be exercised only when established methods fail or in an emergency situation." *Id.* Here, an established method addressing failure to prosecute exists in the form of NRCP 41(e), and there was no emergency situation. Accordingly, even had the District Court intended to resort to its "inherent authority," a premise unsupported by the record, such resort could only be viewed as an abuse of discretion, given its disregard of existing law.

Gang asserts that the District Court has inherent discretion to dismiss on such grounds at any time. However, rules established by *this* Court may limit a district court's inherent authority. This Court's adoption of NRCP 41 constitutes a definition of the inherent authority to dismiss.[2] "Should less than five, but more than two, years pass, the court in its discretion may dismiss the case." *Dubin v. Harrell*, 79 Nev. 467, 471, 386 P.2d 729, 731 (1963) (interpreting Rule 41(e)).

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[2] Indeed, NRCP 41 does act as a limitation on a court's discretion, as it removes discretion to refrain from dismissal where a case is more than five years old, this court have repeatedly determined the rule is mandatory. *See, e.g., Johnson v. Harber*, 94 Nev. 524, 526, 582 P.2d 800, 801 (1978) (collecting cases). Furthermore, this Court has haled that a motion is required to dismiss under NRCP 41. *Deal v. Baines*, 110 Nev. 509, 513, 874 P.2d 775, 778 (1994).

Thus, dismissal on such grounds where less than two years have passed should be presumed an abuse of discretion.

This Court has never directly addressed the issue of whether, notwithstanding the time limit set forth in NRC 41(e), a district court may dismiss a case for failure of prosecution where less than two years have passed. Gang cites to numerous cases in support of his claim of inherent authority to dismiss at any time. However, in those cases where there had been less than two years since the filing of the complaint, the dismissals had been based on grounds other than failure to prosecute. For example, in *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974), the cited authority for the dismissal–which occurred due to the failure of the plaintiff to appear at the scheduled trial–was NRCP 41(b), which authorizes dismissal for a failure to comply with court rules or an order. In *Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1963), the District Court dismissed the case because the plaintiff has failed to complete arbitration within the required one-year deadline of the Court Annexed Arbitration program. In *Volpert v. Papagna*, 85 Nev. 437, 440, 456 P.2d 848, 849 (1969), the plaintiff protested the dismissal because the *amended* complaint had been filed less than two years before the dismissal; more than two years had passed since the original complaint had been filed.

This Court has never upheld a dismissal for want of prosecution where, as here, the plaintiff's purported lack of diligence consisted solely of refraining from seeking a default for the defendant's failure to file a timely answer to the

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complaint.[3] Gang recounts Hunter's purported failures to respond to *settlement inquiries* as evidence of a lack of diligence in pursuing the action. Answer Brief, 21:10-23:3. However, Gang himself admitted that *he* asked for a delay to file an Answer in order to pursue settlement opportunities. Accordingly, the purported lack of diligence on Hunter's part consists solely of not seeking a default during the entire period in which Gang himself admits he continued to make settlement inquiries.

This Court has upheld discretionary dismissals for failure to prosecute where the defendants were not even *served* for more than two years, *Hassett v. St. Mary's Hosp. Ass'n*, 86 Nev. 900, 902, 478 P.2d 154, 155 (1970); where the plaintiff and counsel failed to appear at the scheduled trial, *Moore v. Cherry*, *supr.*, and where arbitration was interrupted through the dilatory conduct of the plaintiff, *Walls v. Brewster*, *supra.*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1963). None of these cases are remotely similar to the facts here, where Gang himself initiated the delay, and where the only action to be taken by Hunter would have been to commence default proceedings.

Gang tries to evade the two year minimum set forth in NRCP 41(e) by claiming that the rule is irrelevant because he never cited to it in his Motion. However, Gang's Motion cited to a decision of this Court that was itself an interpretation of NRCP 41(e). Specifically, Gang's Motion stated the following:

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[3] Gang makes the absurd argument that Hunter could not have sought default because he never sent the three day notice of intent to take default required by the Nevada ethical rules and NRCP 55. Answer Brief, 25:12-18. However, the fact that Hunter did not take *any* of the steps necessary for default simply demonstrates his forbearance toward Gang; beyond patiently waiting for Gang to answer, taking whatever steps necessary to initiate a default was the *only* avenue open to Hunter. Thus, the fact remains that Hunter has been punished for not initiating a default.

> The duty rests upon the plaintiff to use diligence to expedite the case to final proceeding. *Thran v. First Judicial Disrict Ct*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963). Defendant on the other hand is required only to meet the plaintiff step by step as required. *Id.*

A. 16:20-23. In *Thran*, this Court ***construed NRCP 41(e),*** stating:

> We are of the opinion that NRCP 41(e) is clear and unambiguous and requires no construction other than its own language. Whenever plaintiff has failed for two years after action is filed to bring it to trial, the court may exercise its discretion as to dismissing it, but when it is not brought to trial within five years, the court in the absence of a written stipulation extending time, shall dismiss it. In the latter case the exercise of discretion is not involved.

Thran v. First Judicial Disrict Ct, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963). Thus, under the express authority cited by Gang, a district court has discretion to dismiss a case more than two years after filing, a situation that did not exist here.

Moreover, the District Court's order, drafted by Gang, repeated *Thran*'s explanation that a defendant is obligated to "***meet the plaintiff step by step***." **A. 28:4-18.** Here, however, it is undisputed that Gang did not "meet the Plaintiff step by step" because he never filed an answer. Instead, he chose to capitalize on Hunter's forbearance from seeking a default. The District Court's "conclusion" that *Gang* was prejudiced in these circumstances, and thus dismissal was warranted, cannot be reconciled with the undisputed facts.

B. The Dismissal Cannot Be Justified on the Basis of a Purported Pleading Deficiency.

Gang next tries to evade the requirements of NRCP 41(e) by claiming that dismissal was warranted because, he claims, Hunter failed to plead an essential element in his claim for adverse possession. In other words, even though such an argument was never made in his Motion to Dismiss, Gang essentially evokes NRCP 12(b)(5).[4] However, had the district considered this argument, dismissal

[4] Gang did not actually identify his alternative theory, nor did he set forth the standard of review for a dismissal under NRCP 12(b)(5). Such a dismissal is review *de novo*, with all facts in the complaint presumed to be true, and all inferences made in favor of the Plaintiff. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

with prejudice would have been error. A complaint may be dismissed pursuant to NRCP 12(b)(5) "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Gang cannot satisfy the requirements for dismissal under Rule 12(b)(5).

1. The Complaint sought relief other than adverse possession.

Contrary to Gang's pretense, the Complaint in this matter was not limited to a claim of adverse possession. The Complaint alleged that Hunter's land was damaged by flooding from what is now Gang's property, and that to prevent further damage, Hunter created a berm on a strip of that property in 1983. The berm was created with the knowledge of Gang's predecessor in interest, and Gang succeeded to the property with knowledge of the berm. The continued existence of the berm is necessary to prevent damage from flooding to Hunter's property. **A. 2-3, ¶¶ 4-12.** Based on these facts, Hunter sought to quiet title, ***Id.*****at 3, ¶¶ 13-17;** sought injunctive relief ***on the basis of an irrevocable license, Id.*** **at 4- 5, ¶¶ 17-30**; adverse possession, ***Id.*** **at ¶¶ 31-34**; and sought a declaration that

> (1)Plaintiff has adversely possessed the Disputed Property, and therefore, is the owner of the Disputed Property;
>
> (ii) Defendant's predecessor in interest ***granted an irrevocable license to enjoy use of the Disputed Property*** and Defendant, through the actions of his predecessor in interest, is enjoined from interfering with that irrevocable license;
>
> (iii) ***an easement has been created, through Defendant's predecessor in interest***, such that, Plaintiff is entitled to possession and use of the Disputed Property, and Defendant is estopped from revoking the easement; *or*
>
> (iv) that a boundary dispute existed between Plaintiff and Defendant's predecessor in interest, and that, Defendant's predecessor in interest ***acquiescenced [sic] to the boundary of the parties' respective***

properties, such that Plaintiff took possession of the Disputed Property.

***Id.* at 5-6, ¶¶ 35-38 (emphasis added).** Thus, it apparent that several claims in addition to adverse possession were alleged.

The Complaint stated a viable claim for easement by prescription. Under Nevada law, the elements necessary to prove a prescriptive easement are adverse, continuous, open and peaceable use for a five-year period. *Jordan v. Bailey*, 113 Nev. 1038, 1045, 944 P.2d 828, 832 (1997); *Stix v. La Rue*, 78 Nev. 9, 11, 368 P.2d 167, 168 (1962) ("The elements of an easement by prescription are five years' adverse, continuous, open and peaceable use."). The factual allegations here were thus sufficient to state a prima facie case for an easement by prescription.

The Complaint also stated a viable claim that Hunter held an irrevocable license to use the strip of land. An irrevocable license to use land is created when the licensee expends resources in reliance on the use of land belonging to another. *Lee v. McLeod,* 12 Nev. 280 (1877) (holding that an exercised parol license is irrevocable); *Sheehan v. Kasper,* 41 Nev. 27, 165 P. 632 (1917) (licensee entitled to continue to use ditch and power line over land of another, even though no consideration paid for the use, because of expenditures for the ditch and power line). Based on the allegation that Hunter created a berm, it is reasonable to infer that he expended time, money, labor, or materials to do so. See *Masini v. Fraser*, 102 Nev. 634, 635, 729 P.2d 1358, 1359 (1986) (requiring non-trivial expenditure of time, money, labor or materials for creation of irrevocable license). Under Nevada law, such expenditures made with the knowledge of the landowner results in an irrevocable license. *Lee, supra*, *Sheehan*, *supra.*

Finally, the Complaint stated a viable claim that the property owners had reached acquiescence as to property boundaries. "[A]acquiescence may be used to show an agreed boundary where there has been shown: (a) dispute or uncertainty as to the boundary; (b) possession to a certain line; (c) possession for a specified

time; (d) acquiescence to that possession, from which an agreement is implied." *Sceirine v. Densmore*, 87 Nev. 9, 12, 479 P.2d 779, 780 (1971). The factual allegations here were sufficient to establish this claim as well.

Significantly, each of the above theories for relief do *not* include payment of property tax among their essential elements. Thus, the *only* purported deficiency in pleading cited by Gang could have no impact on the viability of any of these theories for recovery. Accordingly, the dismissal here cannot be justified by the absence of an allegation regarding payment or tender of payment of property tax.

2. Dismissal with Prejudice on the Basis of Rule 12(b)(5) Would Have Been an Abuse of Discretion.

Even if the cause of action for adverse possession were deemed technically deficient due to a lack of an allegation, had this issue actually been raised in the lower court, Hunter would have been entitled to leave to amend to allege tender of payment of taxes. See *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003)("[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy."). A District Court abuses its discretion when it refuses leave to amend when a case is early in the pleading stages and the complaint states other viable claims for relief. *Cohen, supra.* Here, because Gang had never filed an Answer, the case was very early in the pleading stages, and, as shown above, other viable claims for relief were stated. Accordingly, the District Court's dismissal of the Complaint with prejudice cannot be affirmed on the ground that the adverse possession claim lack an essential element.

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

A court's factual findings must be based upon substantial evidence presented

in the record. Here, Gang never submitted any evidence regarding the merits of the action, and therefore, the findings that purport to resolve the merits constitute an abuse of discretion. *NOLM, LLC v. County of Clark,* 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004).

Gang has failed to show that the District Court's findings are supported by *any* evidence contained in the record. To the contrary, Gang cites only to the arguments of counsel during the hearing on the motion to dismiss, and to the factual findings themselves, as proof that the findings are "true." *See Answer Brief*, fn. 100 and 104. However, "[a]rguments of counsel are not evidence and do not establish the facts of the case." *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993); *see also*, *Rudin v. State*, 120 Nev. 121, 138, 86 P.3d 572, 583 (2004) (holding that statement of attorney is not evidence). Nor can the court's own findings constitute the evidence to support such findings.

Gang inaccurately asserts that Hunter did not identify the objectionable factual findings. *Answer Brief*, 30:19. This is simply false. Hunter noted in the *Opening Brief*, p. 16, and restates here, that there is no evidence in the record to support Paragraphs 2- 7; 9, the final sentence of Paragraph 10, or Paragraphs 11-17 of the District Court's findings of fact. **A. 36-39.** Gang coyly claims that Hunter did not indicate which findings are "inaccurate." However, this Court is no more able to determine the truth or falsity of these allegations by Gang than was the lower court, ***because there was no evidence to support any of them.*** Indeed, for many of the "findings," the *only* appearance of the "fact" in the record is in the *Findings of Facts* – a fact demonstrated by Gang's own citation to the factual findings as purported support for them.

Because the findings here are unsupported by any evidence, the judgments must be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING GANG HIS ATTORNEYS FEES, AS THERE WAS NO EVIDENCE TO SUPPORT A FINDING THAT THE COMPLAINT WAS FRIVOLOUS AND GANG'S DESIGNATION AS PREVAILING PARTY WAS A PRODUCT OF AN ABUSE OF DISCRETION.

As shown above, there is no merit to Gang's contention that Hunter's Complaint was based solely on adverse possession, or to his claim that the adverse possession claim itself was futile. Accordingly, the entire basis on which he contends the District Court's judgment as to fees may be affirmed is equally meritless.

Under Nevada law, an award of fees under NRS 18.010 (2)(a) must be supported by a District Court finding that claimed action was filed without reasonable ground or to harass the prevailing party. Moreover, there must be evidence in the record to support such a finding. *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 failure to make findings supported by the record is an abuse of discretion. *Miller v. Jones,* 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998).

Because no evidence supports the District Court's purported factual findings of frivolity here, and because the basis on which Gang was deemed the prevailing party has been shown to have been an abuse of discretion, the award of fees and costs must be reversed.

IV. HUNTER, RATHER THAN GANG, IS ENTITLED TO FEES INCURRED FOR THIS APPEAL, AS THIS APPEAL WAS THE RESULT OF IMPOSITION ON THE LOWER COURT

As shown above, the judgments below cannot be sustained, as they were entered in the complete absence of any supporting evidence. Given Hunter's plain entitlement to reversal of the judgments, there is no merit to Gang's request for

fees pursuant to NRAP 38.

On the contrary, it is apparent that it is Gang who has presented arguments that are obviously without merit. Indeed, during the hearing before the Court below, the absurdity of the requested dismissal for failure to prosecute was amply revealed by Gang's own counsel, who, despite bringing a motion to dismiss, stated what *actually* needed to occur in the case:

> Mr. Gang needs a shot to file his counterclaim and we need to move forward . . . .

A. 31: 24-25. The filing of a counterclaim (or, at minimum, an answer) was, indeed, all that was needed for this case to move forward. But instead of taking that necessary action, Gang persuaded the District Court to dismiss the action.

Gang then submitted no less than *two* proposed orders with a string of "factual findings" that Gang assuredly knew were unsupported by any evidence, given that Gang never presented any evidence in the matter. These facts support a conclusion that Gang imposed upon the District Court below, and then abused this Court's appellate processes by defending those actions. Accordingly, this Court should award Hunter his fees and costs on appeal. See NRAP 38.

CONCLUSION

The judgments should be reversed, and the cause remanded for resolution on the merits. The entry of judgment and award of fees and costs in this matter constitutes a gross abuse of discretion, as the lack of evidence to support the

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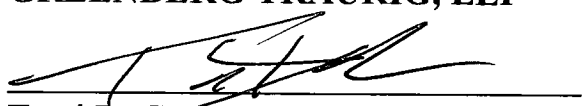
judgments is apparent. The Judgment and award of costs and fees must be reversed.

Respectfully submitted this 21st day of May 2014.

GREENBERG TRAURIG, LLP



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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

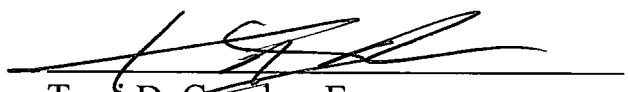
I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14.

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 4155 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 21st day of May 2014.

GREENBERG TRAURIG, LLP



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CERTIFICATE OF SERVICE

This is to certify that on May 21, 2014, 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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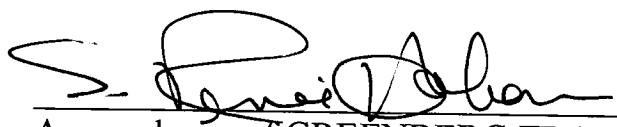

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