IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

KIRK ROSS HARRISON,

Appellant,

NO. 66072

vs.

VIVIAN MARIE LEE HARRISON,

Respondent.

_____/

APPEAL FROM JUDGMENT
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
BRYCE DUCKWORTH, DISTRICT JUDGE

* * * * *

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Kirk R. Harrison
Ecker & Kainen Chartered
Kainen Law Group
Jolley Urga Wirth Woodbury & Standish
Standish Law Group, LLC
Standish Naimi Law Group

3. If litigant is using a pseudonym, the litigant's true name: None

DATED: June 7, 2015

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JURISDICTIONAL STATEMENT

The Decree of Divorce was filed on October 31, 2013. 15A.App.3254. A Motion to Alter, Amend, Correct and Clarify Judgment was filed on November 14, 2013, which tolled the appeal time. 16A.App.3316-3332. The Findings, Conclusions and Orders dealing with attorneys' fees was filed on February 10, 2014. Notice of Entry of the Order resolving the tolling motion was served via electronic mail on June 16, 2014. 16A.App.3407-3414. The appeal was timely, because it was filed on July 7, 2014 (16A.App.3415-3452), which was within 30 days after service of the notice of entry.

STATEMENT OF ISSUES

1. Whether NRS 125.150(3) authorizes the court to award fees based upon a legal recognized standard consistent with the laws of the State of Nevada or arbitrarily and capriciously without any legal standard.
2. Whether there must be a recognized justifiable basis for attorney's fees when a motion is filed under NRS 125.150(3) to avoid arbitrary and capricious awards and to discourage the filing of such motions unless there is a recognized justifiable basis.
3. Whether the court erred in applying *Sargeant v. Sargeant,* 88 Nev. 223, 495 P.2d 618 (1972) when there was no disparity in income between the parties, and respondent (Vivian) was "afforded her day in court without destroying her financial position," "able to meet her adversary in the courtroom on an equal basis," and did not have to spend a penny of her savings.
4. Whether the court erred in awarding attorneys fees when there was no evidence there was any cause and effect between the attorney's fees incurred by Vivian and the fact appellant (Kirk) participated in the drafting of affidavits and points and authorities, especially when it was evident that Vivian prepared an

extensive initial draft of her motion for custody and her own affidavit.

5. Whether the court erred in affirming the Discovery Commissioner's award of $5,000.00 against Kirk in the circumstances of this case.

6. Whether the court erred in failing to prevent or sanction Vivian's attorneys for unnecessarily prolonging the litigation to enable them to continue to "spend down" the community.

7. Whether the court erred in denying Kirk's motion for equitable relief when the granting of the motion was necessary to prevent manifest injustice.

8. Whether the court erred in denying Kirk's motion for attorney's fees when Vivian's attorneys clearly acted in bad faith and in violation of EDCR 7.60(b)(3) during the November 2011 mediation and unnecessarily prolonged the litigation thereafter.

9. Whether the court erred in agreeing (and essentially finding) that motions for partial summary judgment cannot be filed in family court under *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979), prior to custody being resolved and a party who filed such a motion would risk the ire of the court.

STATEMENT OF CASE

The complaint was served on September 14, 2011. 1A.App.1. Custody was resolved by stipulation and order on July 11, 2012. 7A.App.1408-1424. The balance of the case was resolved and confirmed on the record before the court on December 3, 2012. 15A.App.3254-3255.

There was no evidentiary hearing or trial. 16A.App.3336.[1] Only four depositions were taken. 8A.App.1565;9A.App.1836. Only five motions (Vivian initiated four of them) of any significance were filed prior to the hearing on the motion and counter motion for attorney's fees. 8A.App.1565;9A.App.1836.

On October 25, 2011, just 41 days after the service of the complaint, Vivian's attorneys represented to the court that the "vast majority" of the community was comprised of financial accounts, which were not in dispute. 16A.App.3454; 8A.App. 1593;9A.App.1836. Over 90 percent of the community estate was comprised of financial accounts, other liquid assets, and other assets which were never in dispute. 8A.App.1707;9A.App.1793.

There was a trial date of December 3, 2012, and the court made it clear the trial date would not be continued. Vivian's attorneys voiced their strong displeasure that the trial date was not continued. 8A.App.1722. The parties had a settlement meeting on November 29, 2012. 8A.App.1723. During that settlement meeting, the amount in controversy was less than $200,000. 8A.App.1793.

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[1] The hearing on the motion and counter motion for attorney's fees was on October 30, 2013 and the court's consideration of attorney's fees was only through January of 2013. There was an evidentiary hearing subsequently on January 22, 2014. 16A.App.3335-3336.

Vivian's attorneys and experts billed **$683,946.00** [$412,765.56 + $254,255.24 + $16,925.20] through January 30, 2013.[2] 9A.App.1799-1800. The court overstated the fees and costs paid by Vivian at $686,341.33 [$412,765.56 + $251,650.57 + $21,925.20] 16A.App.3341,3361. Kirk's attorneys and experts billed **$461,215.17** [$247,477.36 + $213,737.81] through January 15, 2013. 9A.App.1801-1802. The court understated the amount of fees and costs paid by Kirk at $448,738.21 [$235,154.40 + $213,583.81]. 16A.App.3341,3362.

Vivian's two law firms had sixteen different people billing time to this case, including eight different attorneys. 8A.App.1617-1618;9A.App.1836;10A.App.2051-2148. Vivian had two or three attorneys attend every hearing. Kirk had one or two. 8A.App.1608-1610;9A.App.1836. Vivian had three named partners attend a discovery hearing. Kirk had two. 8A.App.1610;9A.App.1836. Vivian had two named partners attend three of the four depositions. Kirk had one. 8A.App.1611-1613;9A.App.1836. Vivian hired an attorney from Reno and paid his and his partner's full hourly rates to travel to and from Las Vegas in what appears to be 22 plane rides just through December of 2012. 10A.App.2063-64,2068,2074,2076,2079,2080,2085(twice),2094-95. Both of Kirk's attorneys are in Las Vegas. For the preparation and participation in a two day mediation, Vivian's attorneys billed $40,725.00. Kirk's attorneys billed $27,400.00 for their preparation and participation. 8A.App.1613-1614. One of Vivian's attorneys billed approximately $85,050.00 to prepare a 56 page opposition and counter motion for

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[2] As of the filing of Kirk's reply in support of his counter motion for attorney's fees on October 21, 2013, it is estimated that Vivian's attorney's had billed **$1,000,000.00**. 15A.App.3078.

custody. 9A.App.1844-1846. At $450 per hour, that equates to 3.38 hours per page. 9A.App.1846.

Vivian paid $57,107.75 in attorney costs, which included airfare charges to and from Reno and stays at the Four Seasons Hotel and Green Valley Ranch Hotel & Spa. 8A.App.1623,1624;9A.App.1799,1800,1804,1836;10A.App.2071,2074,2079,2081, 2083,2085,2093,2095,2097. Kirk paid $20,157.67. 9A.App.1801-1802,1804,1836. Vivian had six custody experts, who charged $46,580.00. Kirk had four, who charged $27,500.00. 8A.App.1621-1623,1625-1626;9A.App.1804,1836. Vivian paid $14,176.87 to a personal property valuation expert. Kirk paid $2,000.00 to a personal property valuation expert for the identical scope of work. 8A.App.1624; 9A.App.1804,1836. Vivian had two financial experts who billed a total of $64,591.35. Kirk had one financial expert who billed a total of $17,800.00. 8A.App.1620-1621,1625;9A.App.1804,1836. Vivian paid real estate appraisers a total of $17,275.00. Kirk paid real estate appraisers, who appraised the same properties, a total of $11,400.00. 8A.App.1626-1627;9A.App.1804,1836.

Vivian filed a motion for attorney's fees and sanctions on April 3, 2013. 7A.App.1425. Kirk filed an opposition and counter motions, including a motion for fees and sanctions on May 28, 2013. 8A.App.1549. The court entered its Findings, Conclusions and Orders on February 10, 2014, wherein it awarded Vivian $91,240.00 in attorney's fees. 16A.App.3333,3358. Kirk appeals that award and the denial of his motion for equitable relief and counter motion for attorney's fees.

STATEMENT OF FACTS

In an effort to resolve this matter expeditiously and amicably, Kirk initiated a mediation with mediator Robert Lueck. 9A.App.1837-1838. Vivian was then represented by Robert Dickerson. In response to Dickerson's requests, Kirk produced substantial documentation at the beginning of both days of mediation, including a

current statement for every financial account, and then spent most of those two days (May 6 & 23, 2011) responding to questions from Dickerson. 9A.App.1839-1840. Dickerson was utilizing the services of Melissa Attanasio as a financial expert. There was also another meeting in Dickerson's office, where Kirk continued to answer questions by Dickerson and Attanasio. 6A.App.1318;9A.App.1839-1840. It was apparent that Dickerson did not want to resolve anything and Vivian terminated his services and the mediation on July 15, 2011. 8A.App.1585-1586; 9A.App.1836,1840,1870.

Kirk advised his counsel, Standish, that he wanted to schedule another mediation as soon as Vivian retained new counsel. Standish broached mediation during his first telephone call with Silverman on July 28, 2011. Vivian's attorneys were unwilling to schedule a mediation for a period of time. It then became clear that Vivian's attorneys would not participate in a mediation until after filing a motion for temporary custody. 8A.App.1705-1706;8A.App.1718-1719. The subsequent production of their billing records revealed Vivian's attorneys exchanged a "draft Motion" on September 2, 2011. 10A.App.2101.

As a consequence of Vivian's attorneys' refusal to schedule a mediation until after the filing of a motion for temporary custody, Kirk became concerned that Vivian's attorneys' ability to have the community pay their fees was an impediment to an expeditious resolution of the entire matter, and wanted to file a motion for partial summary judgment because more than 90 percent of the community was never in dispute. 8A.App.1719-1720. Kirk's attorneys advised him that *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979) precluded such a motion and Kirk would risk the ire of the court if he were to file such a motion. 8A.App.1707.

The district court later agreed with Kirk's attorneys' advice (i.e., that partial summary judgments are unavailable in family court before a custody determination);

the district court referred to it as "wise advice," noting that Kirk expressed frustration by "complaining that 'parties in Family Court are more hostages, than clients.'" 16A.App.3346. The district court therefore essentially determined that summary judgments are unavailable in family court while custody is still pending.

In an effort to avoid a costly and highly adversarial custody battle, on October 3, 2011, Kirk's counsel, Ed Kainen, requested Vivian's attorneys to stipulate to Dr. John Paglini doing an independent custody evaluation. This request was denied. 8A.App.1720.

As noted, Kirk initiated the second mediation between the parties. The parties selected Jim Jimmerson as the mediator. The second mediation finally took place on November 28 & 29, 2011. 8A.App.1720. Vivian's attorneys continued to utilize the financial services of Melissa Attanasio and on the eve of this mediation requested current statements for each financial account. 6A.App.1318. Vivian's attorneys had previously represented to the court that the "vast majority" of the community was not in dispute and this request, understandably, led Kirk and his attorneys to conclude that the updated statements was all the information Vivian's attorneys and Attanasio needed to settle the financial portion of the case. 16A.App.3454; 8A.App.1593;8A.App.1720;9A.App.1836. However, unbeknownst to Kirk and his attorneys, on the very eve of the mediation, on November 21, 2011, Vivian's attorneys were preparing requests for production and interrogatories seeking the discovery of 10 years of financial statements from every financial institution. 8A.App.1587;10A.App.2116.

At the beginning of the first joint session of the mediation, Vivian's counsel, Gary Silverman, in Vivian's presence, stated that the filing of the older daughters' affidavits was the most shocking outrageous thing he had ever seen a parent do in all the years he had practiced family law. Attorney Smith then agreed, stating that he

was of the same opinion.[3] 9A.App.1841,1843. Kirk, who has participated in hundreds of mediations, has never seen attorneys so obviously sabotage a mediation. 9A.App.1841.

During the joint session, Kirk proposed the parties: jointly retain a neutral national medical expert in narcissistic personality disorders; agree to a protocol where the neutral expert would be given all of the documents and interview all of the people necessary, including Vivian, Kirk, the two adult daughters, and Drs. Roitman and Thienhaus, so that he could make a fully informed decision about the cause of Vivian's behavior; and agree to be bound by whatever the neutral medical expert determined. 9A.App.1841. Silverman rejected the proposal without discussion. 9A.App.1841.

Kirk then made the same proposal, but with the modification that neither party would be bound by the neutral medical expert's determination, but the parties would agree, in good faith, to utilize that determination to jointly craft a custody arrangement which would both safeguard the minor children, Brooke and Rylee, and insure Vivian got the professional help she needed, if any. 9A.App.1841-1842. Kirk assumed that merely asking for an agreement where the parties agreed to negotiate a custody arrangement in good faith for the best interests of Brooke and Rylee would be readily accepted. However, Silverman summarily rejected that proposal without discussion as well. 9A.App.1841-1842. Nothing was resolved at the mediation 9A.App.1841-1842.

Kirk continued his efforts to have custody amicably and expeditiously resolved by a neutral third party determination. During the hearing before the court on

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[3] While being represented by Silverman and Smith, but prior to seeing the oldest daughters' affidavits, Vivian approached the parties' oldest daughter about providing an affidavit. 8A.App.1588;9A.App.1843.

February 1, 2012, Kirk's counsel proposed the court appoint a third party neutral medical expert. Kirk requested, as part of that evaluation, that Dr. Paglini interview not only Vivian, but Kirk, their oldest daughters, Dr. Roitman, and one of Vivian's three experts to be chosen by Vivian. 9A.App.1949-1950,1961-1962. Dr. Paglini could also interview any other percipient witness, including any and all of Vivian's friends, if he so desired. Under such parameters whereby Dr. Paglini would be enabled to make a fully informed opinion, Kirk, through counsel, represented to the court that he would agree to be bound by the psychological assessment Dr. Paglini made to the court, realizing the court would make the ultimate custody evaluation. 9A.App.1949-1950,1961-1962. Under such circumstances, Kirk believed that a prolonged and costly "war of the experts" was avoided. 9A.App.1953. The court confirmed it also had this understanding or, at least, hope this was the case during the hearing on February 1, 2012, stating:

> I'm looking for assistance on psychological assessments, who would essentially take what has been generated on both sides and provide the Court with a report that perhaps dispenses with the need to have a battle of the experts.

9A.App.1953.

Vivian once again opposed the appointment of a neutral medical expert to conduct an independent psychological assessment of Vivian. 9A.App.1954,1960. The court ultimately granted Kirk's request that Dr. Paglini be appointed to conduct an independent psychological assessment of Vivian. 7A.App.1405;9A.App.1970.

Kirk requested the court to stay the proceedings pending Dr. Paglini's determination, but Vivian opposed the stay. 9A.App.1950,1985-86. The court denied Kirk's request for a stay. 7A.App.1405;9A.App.1986.

Kirk again attempted to stay the proceedings pending Dr. Paglini's determination. Standish, in response to a request from Kirk, approached Vivian's

attorneys and made another request for a stay pending Dr. Paglini's determination. This request was also denied. 8A.App.1710.

The court appointed Dr. Paglini to conduct an independent psychological assessment on February 24, 2012, and while this assessment was pending, Vivian's attorneys subpoenaed the following irrelevant "medical records": (1) Costco Vision Center (where Kirk gets his eyes examined and buys his glasses); (2) Dr. Robert R. Earl (Kirk's dentist); (3) Dr. Grace Shin (Kirk's ophthalmologist); (4) Dr. Walter Schroeder (Kirk's Ear, Nose & Throat specialist); (5) Dr. Jason Zommick (Kirk's urologist), and (6) Dr. Warren Smith (a general practitioner). 8A.App.1619; 9A.App.1836.

While the Dr. Paglini assessment was pending, Vivian's attorneys took Dr. Roitman's and Kirk's depositions, noticed the parties' oldest daughter's deposition, and were scheduling the deposition of the parties' second oldest daughter. 8A.App.1591;9A.App.1836.

While the Dr. Paglini assessment was pending, Vivian's attorneys retained their fifth custody expert, who opined that Vivian's taking numerous drugs for over seven years was somehow acceptable, despite FDA warning labels that such drugs can only be taken for a few weeks. 4A.App.686,758,801-804; 8A.App.1591,1710; 9A.App.1836. Vivian's attorneys thereafter retained a sixth custody expert, an anthropologist, who opined a mother should sleep in the same bed with her teenage children. 4A.App.801-804;8A.App.1591,1710;9A.App.1836.

Kirk's attorneys were concerned with what they saw was going on with the case and advised Kirk that if he did not resolve custody, Vivian's attorneys would cause Kirk to incur an additional $1 million to $1.5 million before the case could be resolved. 8A.App.1710;9A.App1844.

Only Kirk agreed to be bound by Dr. Paglini's findings. Vivian did not. 15A.App.3080. Kirk realized that if Dr. Paglini found that Vivian had a narcissistic personality disorder, Vivian's attorneys would convince Vivian she had to be vindicated, and he believed that Vivian's attorneys were determined to put their family through extended discovery and an emotional trial even if they had to be paid millions of dollars to do so. 15A.App.3080-3081. When Dr. Roitman warned Kirk that Brooke and Rylee were at risk from the continuation of the already protracted divorce proceeding, Kirk concluded it would be better to settle custody prior to Dr. Paglini's findings when there would be perceived risk by Vivian, which she would want to avoid. 8A.App.1709;9A.App.1709;15A.App.3080-3081.

Kirk believed that if he waited for Dr. Paglini's findings, one of three outcomes were most likely. 15A.App.3081. First, if Dr. Paglini found Vivian had narcissistic personality disorder (NPD), with the encouragement of her attorneys, as just noted, Vivian would feel she needed to be vindicated in a full blown trial, preceded by the depositions of all of parties' adult children and all of the legion of experts retained in the case. *Id.* Second, if Dr. Paglini found there was another cause to Vivian's years of aberrant and delusional behavior, Vivian would need to be similarly vindicated. *Id.* And third, if Dr. Paglini ignored the years of aberrant and delusional behavior by Vivian and found Vivian did not have NPD or any other malady, it was becoming obvious to Kirk and his counsel that it would also be impossible to settle custody with joint physical custody without extensive discovery and a very expensive and emotionally horrific trial. 8A.App.1710;15A.App.3081.

Regardless of Dr. Paglini's findings, there was not a likely scenario that was going to be good for Brooke and Rylee or any other member of the family, including Vivian. 15A.App.3081. The depositions of the children and a full blown trial seemed inevitable. 15A.App.3081.

Therefore, the only viable option Kirk had to expeditiously settle custody for the best interests of his children was to follow the advice of Dr. Roitman and settle custody prior to Dr. Paglini making his determination. 15A.App.3081. Custody was resolved by stipulation and order on July 11, 2012. 7A.App.1408-1424.

During the hearing on July 18, 2012, Kirk's counsel represented to the court that the completion of Dr. Paglini's report would not be possible without additional input from Kirk. 16A.App.3350. On July 18, 2012, the court ordered: "Given the arguments presented today and given the fact that custody issues have been resolved, the court no longer needs any input from Dr. Paglini as he was initially appointed to assist the Court. Dr. Paglini is NOT to issue a report and his services are considered complete at this time."[4] 16A.App.3518(emphasis in original).

SUMMARY OF ARGUMENT

Awards of attorneys' fees are only allowed in limited circumstances, and only when legal requirements have been satisfied. Additionally, awards of attorneys' fees must be reasonable and justified. In the present case, there was no legal justification for the award of fees in Vivian's favor. And equally important, the fees sought and awarded were entirely unreasonable in the circumstance of this case. Similarly, there was no legal justification for denial of Kirk's request for fees, or for the district court's position regarding summary judgments in family court.

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[4] Despite this unequivocal language by the court that Dr. Paglini would need more input to complete his work, Dr. Paglini was retained to assist the court, the court no longer needed his input, and Dr. Paglini was therefore instructed not to complete his work, the court, nevertheless, would later criticize Kirk for not wanting Dr. Paglini to complete his work under such circumstances. 16A.App.3350.

ARGUMENT

A district court's award of attorneys' fees is generally reviewed for abuse of discretion, but de novo review applies to questions of law regarding attorneys' fees. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).

A. There Was No Disparity In Income or Wealth to Justify An Award of Attorney's Fees to Vivian

The court based its award upon NRS 125.150(3) in conjunction with *Sargeant, supra.* 16A.App.3383. In *Sargeant*, at the time of the divorce, the husband was worth $3,000,000.00, but the wife was only worth $44,200.00. In affirming an award of attorney's fees to the wife, this court found:

> The wife must be afforded her day in court without destroying her financial position. This would imply that she should be able to meet her adversary in the courtroom on an equal basis. Here, without the court's assistance, the wife would have had to liquidate her savings and jeopardize the child's and her future subsistence still without gaining parity with her husband.

Sargeant, 88 Nev. at 227, 495 P.2d at 621.

Here, the court noted, "there has been no showing that a disparity in income exists that justifies an award of fees." 16A.App.3374. There is no disparity in wealth between the parties that justifies an award of fees. 15.A.App.3260-3279.

Vivian was timely provided community funds to pay her attorneys. On September 8, 2011, Kirk paid $10,000.00 in community funds for a retainer for Smith. Kirk paid $25,000.00 in community funds for a retainer for Silverman. 8A.App.1689;9A.App.1836. On December 15, 2011, Kirk paid Smith directly $83,509.73 in full payment of his bill. 8A.App.1689;9A.App.1836. On February 24, 2012, the court ordered, "Each party shall be allocated three hundred fifty thousand dollars ($350,000.00) for preliminary ATTORNEY'S FEES which shall be paid by 3/1/12 or as soon as possible and shall be paid from community funds. Additionally the Defendant shall receive an equalizing payment of ATTORNEY'S

FEES to equal the amount the Plaintiff has paid." 7A.App.1406. This was all in addition to the $118,509.73 [$25,000+$10,000+$83,509.73], Kirk had already paid for Vivian's attorneys. In compliance with the court's order, Kirk made the payment of $350,000.00 to Vivian, and the equalization payment to Vivian of $81,833.52 on or about March 8, 2012. 8A.App.1689;9A.App.1836. Therefore, as of March 8, 2012, the community had provided Vivian a total of $550,343.25 [$118,509.73+ $350,000+$81,833.52] for attorney's fees. 8 A.App.1689;9A.App.1836.

Based on the foregoing, *Sargeant* does not apply because Vivian was, indisputably, "afforded her day in court without destroying her financial position," "able to meet her adversary in the courtroom on an equal basis," [*Sargeant*, 88 Nev. at 227, 495 P.2d at 621] and did not have to spend any of her savings. Despite these undeniable facts, the court's sole basis for the award of fees was Kirk's involvement in the preparation of affidavits and points and authorities, and the court's erroneous belief that this caused Vivian to be unable to "meet her adversary in the courtroom on an equal basis." The court wrote, "Indeed, the record established that Kirk benefitted from his experience as an attorney and his ability to prepare detailed and comprehensive papers in the prosecution of his claims." 16A.App.3353.

The court's "calculation" of the award is based upon the assumption that Kirk saved $48,517 because of his involvement in the preparation of affidavits and points and authorities.[5] 16A.App.3358. The court reached this erroneous conclusion, which had the effect of punishing Kirk for helping his lawyers, based upon an unsupported

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[5] The court made it clear that its award did not include "the time devoted by Kirk in the drafting of Dr. Roitman's report." 16A.App.3378. Just so the record is clear, Dr. Roitman drafted his own report; Kirk did not originate, write, draft, or prepare any of Dr. Roitman's opinions or analyses in this matter. 9A.App.1873-1875; 15A.App.3093-3094,3099.

extrapolation of Kirk's method of determining the general reasonableness of the time it takes to research and draft points and authorities, to include the preparation of affidavits and other exhibits.[6]

Based upon this extrapolation, the court wrote that Kirk's custody motion, which was 48 pages, should be considered to consist of 206 pages, which includes Kirk's affidavits and the parties' two oldest daughters' affidavits. 16A.App.3342-3343. The court then multiplied the hourly rate Kirk was charged of $500 per hour by 206, and concluded the 48 page motion should have cost Kirk $103,464 [sic – $103,000], and since Kirk was only billed $54,947 during that time period, the court, incredulously, concluded that Kirk paid "$48,517 less than the 'value' of the work product created." 16A.App.3343.

This flawed analysis fails to consider that on a page-by-page basis, it presumably takes substantially more time to research the law and write technical legal arguments than to draft paragraphs of a fact affidavit. This flawed analysis also ignores the fact that parties themselves may take the laboring oar in preparing their own affidavits. It also assumes that Vivian did not play a substantial role in the preparation of her affidavit and the affidavit of one of her friends, when it appeared that she did. 9A.App.1845.

Vivian was also intimately involved in preparing her opposition to Kirk's custody motion, as Vivian prepared the initial response to the motion, which, according to her attorneys' billing records, was so extensive it took Vivian's attorneys a significant number of hours to just read. 8A.App.1661-1662. On 10/7/2011, Smith

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[6] Over the years, Kirk developed what he found to be a reasonable standard to review bills for the preparation of points and authorities to insure his clients were not overbilled for the work performed. The standard was an average of one hour per page for both research and writing. 9A.App.1844-1845.

billed 1.5 hours to "Review clients response to Motion"; on the same day, attorney Taylor billed 1.8 hours to "Review client's response to Motion"; on 10/8/11, Smith has a block billing entry for 3.10 hours that includes, "Review client's outline of factual statement"; then on 10/10/11 Smith billed another 1.2 hours for "Review of Summary Motion prepared by client." 10A.App.2104-2105. On 10/22/11, Silverman billed 1.40 hours just to "Review Vivian's Affidavit." 10A.App.2060,2104-05. Vivian's intimate involvement in the preparation of her case was also otherwise confirmed: "She worked tirelessly with her lawyers to prepare a response that met all of the allegations in Kirk's motion." 13A.App.2643.

In addition, the court concluded that since Vivian exhausted the community funds she received for attorney's fees and Kirk retained $80,479.08, through the end of the disparate billing time periods used by the court, from the community funds he received for attorney's fees, that Kirk should be required to pay Vivian one-half of that amount, or approximately $40,240.00.[7] 16A.App.3343,3358. There is no evidence that Kirk caused Vivian to exhaust community funds. On the contrary, the overwhelming evidence is that the way Vivian's attorneys chose to manage her case caused Vivian to exhaust the community funds she received, i.e., two partners at depositions, three attorneys at a discovery hearing, two or three attorneys at every hearing, billing $40,750.00 to prepare and attend a two day mediation, billing over $85,000.00 to prepare a 56 page memorandum of points and authorities, and the like.

There is a multitude of obvious problems with the trial court's reasoning and analysis.

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[7] The court included Vivian's attorney's fees through January 19, 2013, but only included Kirk's attorney's fees through December 21, 2013. 16A.App3341.

1. The Trial Court's Expansion of *Sargeant* is Unreasonable and Would Result In Family Court Being Inundated With Motions for Attorney's Fees

NRS 125.150(3) provides in relevant part that "the court may award a reasonable attorney's fee to either party to an action for divorce if those fees are in issue under the pleadings." However, such an award cannot be arbitrary or capricious – there must be a recognized legal basis for the award.[8] The trial court obviously understood this fact by basing its award of fees "pursuant to NRS 125.150, **in conjunction with** establishing parity between the parties as discussed in *Sargeant, supra.*" 16A.App.3348 (emphasis added). But *Sargeant* was never intended to apply when there is no disparity of income between the parties, or where both parties had ample community funds to pay attorney's fees.

Five years after *Sargeant*, this court decided *Applebaum v. Applebaum*, 93 Nev. 382, 566 P.2d 85 (1977). In *Applebaum*, the parties entered into a property settlement agreement, which the wife attempted to have set aside. The trial court declared the property settlement agreement to be valid and granted the divorce. The trial court refused to award the husband attorney's fees under NRS 125.150(2). The husband appealed. This court affirmed, noting: "Indeed, the record shows that [the husband] was financially secure and well able to pay his own attorney's fees. (citations omitted) There was no abuse of discretion in denying his request for fees. To the contrary,

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[8] It is critical that an award of fees under NRS 125.150(3) can only be made if there is a legally recognized basis to do so, rather than just the arbitrary and capricious whim of the trial judge. This will stop the filing of motions for attorney's fees at the end of divorce cases as a matter of course. *Cracker Barrel Old Country Store v. Epperson*, 284 S.W. 3d 303,308 (Tenn. 2009) ("requiring each party to be responsible for their own fees promotes settlement."); *Litton Industries, Inc. v. Imo Industries, Inc.*, 200 N.J. 372, 385, 982 A.2d 420, 427 (2009)(the shifting of attorney's fees is disfavored by the courts). 16A.App.3474-3475.

evidence as to [the husband's] assets makes such a contention absurd." 93 Nev. at 387, 566 P.2d at 89 (emphasis added). There was no indication the wife had acted in bad faith, and, as noted by the court, the husband was financially secure and well able to pay his own attorney's fees. In the case at bar, Kirk has not acted in bad faith, and Vivian is "financially secure and well able to pay [her] own attorney's fees." Under these circumstances, it was "absurd" for the court to award Vivian fees on the basis of *Sargeant*.

2. There Was No Evidence That Kirk's Involvement in Preparing Affidavits and Points and Authorities Caused Vivian to Pay Any Additional Attorney's Fees

As previously noted, the basis for the court's ruling was the court's mistaken belief that "the record established that Kirk benefitted from his experience as an attorney and his ability to prepare detailed and comprehensive papers in the prosecution of his claims." 16A.App.3353. The only record regarding whether Kirk benefitted from his involvement was provided by the sworn testimony of Kirk's attorneys. Standish, who rewrote the custody motion, testified that because of Kirk's lack of experience in family court, Standish believed it would have been more efficient for him to draft the motion from the beginning. He also testified his office prepared other motions in which Kirk had little, if any, involvement. 8A.App.1706. Ed Kainen testified (in an affidavit) that Kirk had no experience in family court and it would have been less expensive if he would have prepared the points and authorities without Kirk's involvement. 8A.App.1721-1722.

There is not one case that stands for the proposition that if one party does some of his or her own legal work, then he or she must pay the legal fees of the opposing party. Such an unwarranted and illogical extension of the current law would be a slippery slope for litigants. Kainen testified that he has had a number of clients who prepared affidavits, drafted motions, and performed other legal work:

> 21. During the course of my career, I have had a number of clients who performed tasks that would otherwise be performed by an attorney and/or a paralegal. I had one client who prepared all of the deposition summaries. I have had numerous clients who have prepared most of the responses to discovery, including drafting responses to interrogatories. I have had several clients who have organized, copied and prepared indexes of documents produced. I have had a number of clients who have prepared affidavits, and even draft Motions.

8A.App.1722.

Under the court's expansion of *Sargeant*, if a party prepared questions for his attorney to ask during a deposition, prepared drafts of written discovery responses, or drafted affidavits–all of these practices are fairly common–liability would be triggered. Similarly, if the client was a close friend of the attorney and the attorney significantly discounted his bills, based upon the court's rationale, liability would also be triggered.

Vivian's lead attorneys billed $375.00 and $450.00 per hour. Both of Kirk's attorneys billed $500.00 per hour. Under the court's expansion of *Sargeant,* Vivian should pay Kirk for part of his attorney's fees to enable Kirk to "meet [his] adversary in the courtroom on an equal basis."

Although not a basis for the court's ruling, the court noted: "The tone of the custody litigation was set by Kirk's filing of his Custody Motion (Sep. 14, 2011)." 16A.App.3350. Kirk's intention was to successfully mediate the entire case without ever filing a motion for custody. However, Vivian's attorneys refused to mediate until after a motion for custody was filed, thus forcing the filing of a motion. The court also noted: "The precipitating salvo, however, was fired by way of Kirk's Custody Motion (Sep. 14, 2011)." 16A.App.3352. Kirk respectfully submits this would be true in every custody case where a motion for custody is filed. However, setting the "tone" of the litigation and being forced to file the "precipitating salvo" are not recognized bases for an award of attorney's fees under EDCR 7.60(b).

Importantly, there was no finding by the court that Kirk filed any document that was "obviously frivolous, unnecessary or unwarranted." There was also no finding that Kirk, "so multiplied] the proceedings in a case as to increase costs unreasonably and vexatiously." The court also noted that each side submitted *unilateral* expert reports, which *"all* failed to include the participation of the other party." 16A.App.3352(emphasis in original).

In summary, there was not a disparity in income and no disproportionate wealth between Vivian and Kirk. Vivian has millions of dollars. 15A.App.3254-3283. At no time during the case did Kirk act in bad faith. On the contrary, Kirk diligently attempted, in good faith, to resolve the matter amicably and expeditiously. There is simply no legally recognized basis to compel Kirk to pay any more of Vivian's attorney's fees than he has already paid. The fact that Kirk participated in the drafting of affidavits and points and authorities is not a recognized legal basis to compel Kirk to pay additional monies to Vivian for her attorney's fees, nor should it be. This is especially true when Vivian also participated in drafting affidavits and points and authorities. There was absolutely no showing whatsoever of a causal relationship between Kirk's involvement and Vivian being required to pay any more attorney's fees than she otherwise would have paid.

B. The Trial Court Erred in Affirming the Sanction by the Discovery Commissioner, Who was Unaware of Kirk's Full Compliance and Who Issued the Sanction For Reasons Having Nothing To Do With This Case

As noted earlier, unbeknownst to Kirk and his attorneys at the time, on the eve of the mediation on November 28 & 29, 2011, Vivian's attorneys were preparing extensive discovery primarily concerning financial information, including thirty-four requests for production and twenty-four interrogatories. 8A.App.1587; 10A.App.2116;6A.App.1350-1389.

There was a hearing on December 5, 2011. Despite taking seven weeks to file an opposition and counter motion to Kirk's motion for custody, Vivian strenuously argued Kirk should only have a couple of weeks to file his opposition and reply. 6A.App.1313,1319;17A.App.3523. Kirk argued that with all of the intervening holidays, he should at least be allowed an amount of time equivalent to the time Vivian had taken. However, the court ordered Kirk's opposition and reply to be filed by January 4, 2012. 9A.App.1922. After successfully limiting Kirk's time to respond to Vivian's 56 page opposition and counter motion to less than 30 days, during the holidays, on December 6, 2011, the day after the hearing, Vivian served her extensive interrogatories and requests for production. 8A.App.1587; 9A.App.1836.

The majority of the requests were unnecessary because more than 87 percent of the community estate were comprised of financial accounts over which there was no dispute, and Vivian, who has a degree in accounting and a masters in taxation, had prepared the parties tax returns and accounted for the parties' income. 6A.App.1314;15A.App.3102;17A.App.3533. Kirk and his attorneys had no choice but to use the limited time to focus upon the best interests of Brooke and Rylee and the custody motions. 6A.App.1320.

Then on January 3, 2012, Vivian filed Defendant's Motion to Resolve Temporary Financial Issues; Payment of Incurred and Ongoing Attorney's Fees and Expert Fees; and For Other Related Relief. The timing of this filing was also not coincidental. 6A.App.1320.

Despite all the gamesmanship, Kirk had complied with the subject discovery requests prior to the March 9, 2012 hearing. 9A.App.1824-1834. After only one extension, initial responses were provided just fifteen days late. 17A.App.3537. Kirk's response was thorough and complete. 9A.App.2015.

In addition to the 6,500 documents Kirk had produced in response to Vivian's most recent request, Vivian's attorneys knew that Kirk had produced extensive documentation in response to Dickerson's requests. 6A.App.1326-1327,1329-1348. They also knew that in response to their own request, Kirk had also provided considerable documentation on the eve of the mediation on November 28 & 29, 2011. 6A.App.1318-1319. An estimated 800 documents had been provided in response to the prior multiple requests. 9A.App.2014

Despite this fact, Vivian's attorney misrepresented to the Discovery Commissioner during the hearing that Kirk had provided nothing. More specifically, "We've requested discovery, **they have provided nothing**." 9A.App.2009 (emphasis added). This misrepresentation was later reinforced to the Commissioner: "We never got them." And again: "We still have not received the documents." And: "We're still waiting." 9A.App.2010. Only after the Discovery Commissioner ruled against Kirk, did Vivian's attorneys acknowledge, for the first time, that the documents had already been provided. 17A.App.3537.

It was evident the Discovery Commissioner was not prepared for the hearing and was erroneously led to believe, by Vivian's attorneys, that Kirk was stonewalling, and the Commissioner awarded $5,000.00 in sanctions. 17A.App.3538. In addition, Kirk had filed a motion for protective order. Despite the fact the Discovery Commissioner had signed an order shortening time for the motion for protective order, setting it for the same hearing date, it was apparent he had never read the motion. 9A.App.2009;17A.App.3538. Although he refused to hear argument on the motion for protective order, he issued rulings adverse to the motion. 17A.App.3538.

It was apparent during the hearing that the Discovery Commissioner either ignored or failed to comprehend that: (1) many of the documents requested had been previously provided; (2) the timing of the request was tactically done to frustrate the

ability to timely comply, given the work that had to be done in the custody litigation; (3) that responses had been given and were only 15 days late, and; (4) many of the documents requested were attorney-client privileged relating to Kirk's prior law practice and mediator privileged relating to Kirk's mediation practice. 17A.App.3536-3537.

Kainen submitted an affidavit in support of Plaintiff's Objection to Discovery Commissioner's Report and Recommendations, which explained, in large part, why the Discovery Commissioner was not concerned during the hearing about what really had occurred. 17A.App.3535-3536. More specifically, Kainen had offended and embarrassed the Discovery Commissioner during a bench bar meeting attended by about 100 members of the family bar and a significant percentage of the family bar bench. Kainen admitted his comments "were inordinately harsh and were perceived as a direct attack on Commissioner Beecroft." 17A.App.3535-3536.

The next time Kainen appeared in front of the Discovery Commissioner was the hearing on March 9, 2012. It quickly became apparent to Kainen that the Discovery Commissioner was personally upset with him and was carrying a grudge. 17A.App.3536,3538.

Without taking any oral argument on fees, the Discovery Commissioner awarded $5,000.00 in fees against Kirk. This was entirely inconsistent with any discovery hearing Kainen had ever seen, and it appeared to Kainen to be "payback entirely related to my complaints about Commissioner Beecroft in the open forum of the bench bar meeting." 17A.App.3539. This award was made despite this being the first and only discovery dispute that was brought before the Discovery Commissioner and no prior adverse discovery rulings, sanctions or awards had ever been issued. 17A.App.3539.

Under these circumstances, where Vivian's attorneys repeatedly misrepresented that Kirk had "provided nothing," there had been a significant portion of the requested documents produced prior to the requests, there had been substantial good faith compliance with the requests, the Discovery Commissioner had not read Kirk's motion for protective order, the Discovery Commissioner was not prepared for the hearing, and the Discovery Commissioner was clearly upset with Kainen, the award of $5,000.00 must be reversed. Kirk should not be penalized for what was primarily an unrelated personal issue between the Discovery Commissioner and Kainen.

C. Vivian's Attorneys Should Be Required To Return Money To Vivian for Improperly Spending Down the Community

1. Vivian's Problems Were Undeniable and The Need for Her To Get The Help She Needed Was Obvious

Kirk was confronted with a horrendous situation for his family. Vivian had been abusing controlled substances in the same pharmaceutical family as amphetamines ("Speed") for **over seven years** – since June of 2004. 4A.App.801-804. Vivian's drug abuse has been irrefutably confirmed from records produced by the multiple diet mills, physicians, and pharmacies she utilized. 4A.App.801-804.

Vivian had issues which were causing a multitude of significant problems for the children. 9A.App.1848-1849. Vivian's continued behavior over time should have been the focus of the case.

2. Kirk's Goal Has Always Been To Get Vivian Help

Kirk wanted Vivian happy; he wanted his children to have a good caring mother. 8A.App.1568,1836-1838. When Vivian no longer wanted to take care of their young daughters, Kirk left his law practice to take care of them full time. 4A.App.755. However, Vivian deteriorated more and more each year. Kirk wanted to help, so he called people who were involved in family issues and asked for the name of the best psychiatrist in Southern Nevada; he was referred to Dr. Norton

Roitman. 4A.App.755-757. Kirk provided information to Dr. Roitman and identified for Dr. Roitman Kirk's most important goal, which was to "figure a way for Vivian to feel good about herself" and to help Vivian. 4A.App.757,794.

Kirk's goal never changed. His focus continued to be upon solving a problem. That is why Kirk made the two proposals during the mediation on November 28, 2011, and he had no problem agreeing to be bound by the findings of an informed competent third party expert. 9A.App.1841-1842. After Vivian's attorneys summarily rejected those proposals during the mediation, Kirk proposed that the court retain Dr. Paglini to make an informed determination for the same reason. As noted, Kirk agreed to be bound by that determination, despite the fact Vivian did not. 9A.App.1949-1950,1961-1962.

3. Vivian's Attorneys Had A Different Agenda

Kirk first met Vivian's attorney, Smith, at the family law courthouse on October 25, 2011. Smith volunteered his view of his responsibility in the case: "**It's my job to make you the bad guy.**" 4A.App.675 (emphasis added).

4. Vivian Was Incited So She Would Not Amicably Resolve Custody

Vivian's attorneys unduly prolonged this litigation by overtly and openly inciting Vivian. As evidenced by what they have filed in this matter, Vivian's attorneys have told Vivian: (1) "[Kirk] has a deep seated hatred for Vivian" (2A.App.365); (2) "Kirk is so blinded by his disdain for his wife" (2A.App.373); (3) "[Kirk] is angry and bitter towards her, and his opinion of her is so degrading and demeaning" (5A.App.936); (4) "Kirk intended to embarrass Vivian in the community" (5A.App.937); (5) "Kirk treats Vivian, both personally and in this litigation, with the utmost contempt" (6A.App.1295); and (6) "In his quest to destroy Vivian in the custody litigation, Kirk has invested all of the efforts by his counsel into that endeavor" (6A.App.1295).

While they repeatedly incited Vivian, her attorneys knew, based upon her own prior statements to her own doctors and her own doctors' diagnoses of Vivian, that Vivian had a "depressive disorder," "major depression disorder," "generalized anxiety disorder," suffered from severe insomnia, and "was very tense, irritable, and reactive to her family dynamics **manifesting as frequent arguments and anger on her part.**" 4A.App.900-912;914-923 (emphasis added). Vivian's attorneys incitement of Vivian has not only unduly prolonged the litigation, but has unnecessarily increased the litigation costs.

5. In Order To Insure Their Continued Ability To Spend Down the Community, Vivian's Attorneys Entered Into The November 2011 Mediation In Bad Faith

Vivian's attorneys entered into the mediation with Jimmerson in bad faith; sabotaged the mediation; summarily rejected Kirk's proposals to use a neutral national medical expert to resolve custody issues; and openly and repeatedly advised Vivian not to settle, causing her to ultimately abruptly leave the mediation and drive away, which effectively ended the mediation and Kirk's good faith efforts to settle. 8A.App.1587-1589;1676-1677.

As a consequence, they have been able to continue to "spend down the community."[9]

6. How Vivian's Attorneys Spent Down the Community

The overbilling by Vivian's attorneys is obvious, egregious, pervasive, and undeniable. It is unethical for attorneys to charge or collect unreasonable fees and expenses. Nev. Rule Prof. Conduct 1.5(a)

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[9] "Spend down the community" is a euphemism used by divorce attorneys to describe when a divorce attorney unethically charges and collects fees from the community for "services" which were unnecessarily incurred or over-charges for necessary services. 8A.App.1730.

The court in *Bowen v. Allied Property and Casualty Insurance Company*, 2013 WL 942443 (D.Neb.March 11, 2013) did what courts should do when evaluating the appropriateness of attorney's fees charged–the court analyzed whether the amount of the attorneys' fees were appropriate in the context of the case. Are they reasonable in light of the amount in controversy, the result obtained and the complexities of the case?

This case was never complex. The questions regarding custody were very straightforward. Kirk's request that Dr. Paglini be appointed to make a neutral medical third party determination, and Kirk's agreement to be bound by that determination, should have reasonably ended the custody issue – it appeared to have reasonably ended the need to have a battle of the experts in the court's eyes. 9A.App.1953.

In connection with the financial aspect of the case, over 90 percent of the community assets were never in dispute. 9A.App.1793. For most of the case the amount in controversy was zero. When Kirk's attorneys were finally able to get Vivian's attorneys to sit down to resolve the financial portion of the case, with the trial starting the following week, the amount in dispute was less than $200,000. 9A.App.1793. There is nothing inherently complex with, "You take half and I will take half."

In *Ackermann v. Carlson Industries, LLC*, 2004 WL 3708670 (C.D. Cal. March 8, 2004), the court, in reviewing the attorney billing invoices, made an observation which is highly relevant here, "[M]any of the descriptions provided in the billing reports are too vague for the Court to make a determination as to their reasonableness. Other time entries indicate either a lack of efficiency or **an overzealousness suggestive of a litigation strategy based more on the attorneys' fees which could be generated than on a reasonable reflection of the complexity**

of the case." *Id.* at 3 (emphasis added). As a consequence, the court made huge reductions in attorney billed hours on the basis the "time was unnecessary, overstaffed, inefficient or vaguely described": 201 hours to 81.2 hours; 26.1 hours to 4.6 hours; 26.4 hours to 8.5 hours, and; 14.8 hours to 4.1 hours. *Id.* at 3.

Similarly, in *Alutiiq International Solutions, LLC v. Lyon*, 2012 WL 4182026 (D. Nev. Sept. 17, 2012), the court made the following reductions in attorney billed hours: 34 hours to 8 hours; 8.9 hours to 7.3 hours; 11.4 hours to 5.5 hours, and; 6.6 hours to 3 hours.

a. Team Approach

Vivian's two law firms had sixteen different people billing time to this case, including eight different attorneys. 8A.App.1617-1618;9A.App.1836;10A.App.2051-2148.

Vivian's attorneys may have "preferred" to have sixteen different people billing the file, it does not mean it was reasonably necessary. *Sabatini v. Corning-Painted Post Area School District*, 190 F.Supp.2d 509, 521 (W.D. New York 2001).

The court in *Ackermann v. Carlson Industries, LLC*, 2004 WL 3708670 (C.D. Cal. 2004) identified some of the problems caused by overstaffing a case, "In assessing the reasonable number of hours, the Court initially notes that nothing about this case warranted the involvement of seven attorneys and two paralegals on behalf of Plaintiffs. The overstaffing of this case resulted in an excessive number of conferences between lawyers, preparation of memoranda, review of memoranda, and e-mail commentary concerning conferences and memoranda." *Id.* at 3. The court went on to note that one firm's legal staff of attorneys "did little, if any, legal work on the case that was not . . . duplicate of work performed by [the other law firm]. *Id.*

b. Duplicate Billing

Vivian had two or three attorneys attend every hearing. Kirk had one or two. 8A.App.1608-1610;9A.App.1836. Vivian had three named partners attend a discovery hearing. Kirk had two. 8A.App.1610;9A.App.1836. Vivian had two named partners attend three of the four depositions. Kirk had one. 8A.App.1611-1613;9A.App.1836. Vivian hired an attorney from Reno and paid his and his partner's full hourly rates to travel to and from Las Vegas in what appears to be twenty-two plane rides just through December of 2012. 10A.App.2063,2064,2068,2074,2076,2079,2080,2085(twice),2094,2095. Both of Kirk's attorneys are in Las Vegas. For the preparation and participation in a two day mediation, Vivian's attorneys billed $40,725.00. Kirk's attorneys billed only $27,400.00. 8A.App.1613-1614.

The duplication of services in cases where more than one or two attorneys is used is not acceptable and constitutes overbilling. *Bowen v. Allied Property and Casualty Insurance Company*, 2013 WL 942443 (D. Neb. 2013). In *Anderson v. Rochester-Genesee Regional Transportation Authority*, 388 F. Supp.2d 159, 164 (W.D.N.Y. 2005), the court took strong exception to multiple attorneys billing for attending court hearings and settlement conferences, noting it was duplicative, and finding, "A significant factor that unnecessarily inflated the time charged by plaintiffs' counsel was the frequent attendance of multiple attorneys for court appearances and other matters, where two or even one attorney would have sufficed." See also *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) (if multiple attorneys attend a hearing when one would suffice, compensation should be denied for the excess time).

As previously noted, attorneys Silverman or DeCaria attended hearings in Las Vegas when their attendance was not necessary, such as when DeCaria, in addition

to attorneys Smith and Taylor, attended the hearing on February 24, 2012, when the court had previously made it clear he was merely going to rule from the bench and was not looking for any argument. 8A.App.1608-1609;9A.App.1836,1942,1963-1964,1968. Similarly, three named partners attended a discovery hearing. 8A.App.1610; 9A.App.1836,2009; 10A.App.2142.

In *Corbett v. Wild West Enterprises, Inc.*, 713 F. Supp. 1360 (D. Nev. 1989), the court was confronted with a similar scenario. The court identified what it described as "patent exaggeration" of attorneys' billed time:

> There is also no legitimate reason to have two attorneys at a scheduling conference. They are routine, a fact known to Mr. Schroeder, and usually entail the setting of discovery deadlines. This is all that occurred here. Mr. Schroeder billed *one* hour for the ten minutes. Ms. Coplick billed three hours for travel to Reno, five hours for court conference and travel back home, or *two hours* for the ten minutes, plus the additional six hours for travel.
>
> The same events occurred on October 7, 1988, the date of the pretrial conference. Pretrial conferences involve a few more matters and begin at 9:30 a.m. Fridays. The pretrial conference here began at 9:31 and ended at 9:50 a.m. Any lingering discovery problems were resolved and the trial date was set. All this information could have been conveyed to Mr. Schroeder by telephone. Twenty minutes to thirty minutes were billable. Yet, Mr. Schroeder again billed one hour, Ms. Coplick bill her usual *two* hours plus six hours travel and an additional 4.5 hours, and Mr. Davis—who in his affidavit says he intended to let Ms. Coplick litigate the action—billed *one* hour. The sum total of their services charged $1,075 for attendance and $1,800 for travel for $40–$60 worth of services.
>
> This is not the last of the examples of patent exaggeration which the Court can spot in spite of lumping and inadequate descriptions. * * * These examples show a pattern of patent exaggeration the depths of which cannot be fully discovered in light of the other documenting deficiencies. This flaw alone warrants substantial reduction of Counsel's "reasonable hours."

Corbett at 1365-66.

The *Corbett* court concluded that "patent exaggeration justifies reduction, and lumping and inadequate description provide additional support for reduction." *Corbett* at 1366.

In *El Escorial Owners' Association v. DLC Plastering, Inc.*, 65 Cal. Rptr. 3d 524, 548 (Ct. App. 2007), the court found, "A court may substantially reduce fees where multiple counsel represent a party leading to duplication of effort."

c. Excessive Brief Preparation Billing

One of Vivian's attorneys billed approximately $85,000.00 to prepare a 56 page opposition and counter motion for custody. 9A.App.1844-1846. At $450.00 per hour, that equates to 3.38 hours per page. 9A.App.1846.

In *Bowen v. Allied Property and Casualty Insurance Company*, 2013 WL 942443 (D. Neb. 2013) two briefs totaled 50 pages. The attorneys billed 132.10 hours to prepare the two briefs (2.64 hours per page). The court cut the time by more than half, allowing only 60 hours total (1.20 hours per page). *Id.* at 4.

d. Block Billing and Vague Billing

"Block billing" is "the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Welch v. Metropolitan Life Insurance Company*, 480 F.3d 942, 945 (9th Cir. 2007). This is significant because: "The party seeking fees bears the burden of documenting the hours expended in the litigation and must submit evidence in support of the hours worked." *Melone v. Paul Evert's RV Country, Inc.*, 2012 WL 1142638 (D. Nev. April 4, 2012) at 4, citing *Welch*. The Ninth Circuit in *Welch* stated "[i]t was reasonable for the district court to conclude that [plaintiff] failed to carry her burden, because block billing makes it more difficult to determine how much time was spent on particular activities." 480 F.3d at 948.

The court in *Corbett v. Wild West Enterprises, Inc.*, 713 F. Supp. 1360, 1366 (D. Nev. 1989) noted the negative impact of lumping and inadequate description when used together:

> [T]he harmonic effect created by lumping and inadequate documentation amplifies exponentially the impediments in evaluating whether specific hours were expended reasonably on specific duties.

Silverman's invoices are replete with lumping or block billing type entries that do not identify how much time was spent on each task performed that day. 10A.App.2051-2098. Smith's invoices are also replete with lumping or block billing entries with the same deficiency.[10] 10A.App.2100-2148.

A court, very recently confronted with the same situation, deducted the full amount billed on each day the time was block billed. *Bowen v. Allied Property and Casualty Insurance Company*, 2013 WL 942443, *4 (D. Neb.) (March 11, 2013) (court deducted entire days for which blocked billing was used).

e. Subpoenaing Irrelevant "Medical Records"

It was clearly unnecessary for Vivian's attorneys to spend their time obtaining records from the Costco Optical Department, Dr. Earl (Kirk's dentist), Dr. Grace Shin (Kirk's ophthalmologist), Dr. Schroeder (Kirk's ear, nose & throat physician), etc. 8A.App.1619;9A.App.1836.

f. Subpoenaing Unnecessary and Duplicate Financial Records

All assets had been fully disclosed prior to the mediation in November 2011. 9A.App.1794-1795.

Vivian has a degree in accounting, a master's degree in taxation, and worked as an auditor. 9A.App.1848. Vivian–not Kirk–prepared their joint tax return each year for over 20 years. 9A.App.1847. Vivian was aware of every financial account. 8A.App.1619 ;9A.App.1836,1847.

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[10] The California State Bar Committee on Mandatory Fee Arbitration concluded that block billing "may increase time by 10% to 30%." *See* The State Bar of California Committee on Mandatory Fee Arbitration, Arbitration Advisory 03-01 (2003).

Vivian was present when Dickerson questioned Kirk about financial matters for two days. 9A.App.1839-1840,1855. As previously noted, current statements for every financial account were provided to Melissa Attanasio in May of 2011. 8A.App.1620;9A.App.1836,1839-18401855. On the eve of the mediation in November 2011, Vivian's attorneys requested then current statements from every financial account be provided. Kirk promptly provided those statements. 8A.App.1620;9A.App.1836,1855.

Despite all of the foregoing, Vivian's attorneys subsequently charged and collected unreasonable fees and costs in connection with the discovery of financial records from **fourteen** different financial institutions. The details of this discovery is set forth in Exhibit 5(b) entitled, "Unnecessary and Duplicative Discovery of Financial Records." 9A.App.1857-1860. The court will see that Kirk did everything he could to prevent this unnecessary and wasteful expenditure of money. 9A.App.1855.

g. Attorney Costs Were Excessive

Vivian paid $57,107.75 in attorney costs, which included airfare charges to and from Reno and stays at the Four Seasons Hotel and Green Valley Ranch Hotel & Spa. 8A.App.1623,1624;9A.App.1799,1800,1804,1836;10A.App.2071,2074,2079,2081 ,2083,2085,2093,2095,2097. In contrast, Kirk paid only $20,157.67. 9A.App.1801-1802,1804,1836. Vivian's costs were excessive.

h. Designating Six Custody Experts, Two of Whom Were Designated *After* The Court Appointed an Independent Expert with the Expectation the "Battle of the Experts" was Avoided

Vivian had six custody experts who charged $46,580.00. Kirk had four, who charged $27,500.00. 8A.App.1621-1623,1625-1626;9A.App.1804,1836. Four of Vivian's custody experts were retained after Kirk had offered to be bound by the

determination of a neutral expert on November 28, 2011. Two of the experts were retained after the court appointed Dr. Paglini to make an independent determination. Three of the experts were cumulative, as they were all retained to testify about narcissistic personality disorders. 8A.App.1622-1623.

i. Vivian's Personal Property Valuation Expert Overbilled

Vivian paid $14,176.87 to a personal property valuation expert. 8A.App.1624;9A.App.1804,1836. Kirk paid $2,000.00 to a personal property valuation expert for the identical scope of work. 8A.App.1624;9A.App.1804,1836. Both experts made the same number of trips and generated the same work product. 8A.App.1624;9A.App.1804,1836.

j. Vivian's Financial and Forensic Accounting Experts Overbilled

Vivian had two financial experts who billed a total of $64,591.35. 8A.App.1620-1621,1625;9A.App.1804,1836. Kirk had one financial expert who billed a total of $17,800.00. 8A.App.1620-1621,1625;9A.App.1804,1836.

Vivian's two financial experts were paid $64,591.35 although over 90 percent of the community property was never in dispute, the amount in controversy was zero for most of the case, and the parties knew the amount in controversy was never going to be significant. 8A.App.1625;9A.App.1804,1836.

k. Vivian's Real Estate Appraisers Overbilled

Vivian paid real estate appraisers a total of $17,275.00. Kirk paid real estate appraisers, who appraised the same properties, a total of $11,400.00. 8A.App.1626-1627;9A.App.1804,1836.

l. Vivian's Attorneys Delayed the Financial Resolution And Made Misrepresentations Which Caused Kirk Significant Damages

Vivian's attorneys refused to provide the appraisals for the marital residence and Lido lot, for seven months and six months, respectively. 8A.App.1593-1594,1652;9A.App.1836.

Vivian's attorneys, after assuring both the court and Kirk's attorneys it would be provided to Kirk's attorneys, hid the appraisal of the Harrison family ranch, and unreasonably caused Kirk's attorneys to take the deposition of their appraiser in St. George, Utah, who they terminated, via email, the day of the deposition, then made material misrepresentations to Kirk's attorneys during the deposition that they never received a written opinion from the appraiser, when, in fact, they did and they had it in their briefcase at the deposition. 8A.App.1594-1600,1652,1686;9A.App.1836.

Vivian's attorneys mislead Kirk with an appraisal of the marital residence which they knew was fraudulent based upon another appraisal the appraiser performed that was in their possession, which was later provided to Kirk in error. 8A.App.1678-1686.

7. Based Upon All of the Foregoing, This Court Should Reverse The Trial Court's Denial Of Kirk's Motion for Equitable Relief

During the hearing on December 5, 2011, Vivian's attorney stated, "Frankly, Judge, I think we need to keep this case under control, or it's going to be outrageous in terms of its scope over really nothing." 9A.App.1916. Kirk could not agree more with that statement. Unfortunately, that is precisely what Vivian's attorneys did – they, unilaterally made this case outrageous in terms of its scope "over really nothing." Kirk urges this court to stop this obviously outrageous behavior and to send an unequivocal message to Vivian's attorneys and any other divorce attorneys who place their own financial interests above the best interests of their clients and their clients minor children.

What has occurred in this case is not the "substantial justice" contemplated and required by NRS 125.090, nor the "inexpensive determination" to which parties are entitled to in every action. Kirk respectfully submits that when the conduct of attorneys is so egregious as to deny the parties justice, then the courts must affirmatively act to insure that justice is provided. Courts have an affirmative duty to protect the parties before it from manifest injustice. *Zimny v. Cooper-Jarrett, Inc.*, 513 A.2d 1235 (Conn. 1986). Overbilling by attorneys is manifest injustice. Under NRS 125.090 and NRCP 1, this court has the inherent power to take affirmative action to protect the parties before it from the abuses of their own attorneys.[11]

Vivian is aware that it does not take two named partners to take or defend a deposition, or three named partners to attend hearings, that it is patently unethical for an attorney to bill a client 26 hours in what are still 24 hour days, 8A.App.1613-1614, and it should not cost over $85,000.00 to prepare a 56 page opposition, etc.

Courts must be vigilant in protecting the parties before them, especially from their own attorneys. The fraudulent and highly unethical practice of "spending down the community" should receive zero tolerance by this court. The only protection parties and their children have in family court from such abuses are the judges.

Kirk, Vivian, and their children look to this court to insure that justice ultimately prevails for their family and, more importantly, to insure that what happened here, which appears to be business as usual, never happens again to the families and children of this State. This court has the authority pursuant to NRS

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[11] A divorce client does not need two named partners to take or defend a deposition, or three named partners to attend hearings; and it is patently improper for an attorney to bill a client 48 hours in two days, which is what occurred here. 8A.App.1613-14.

125.090, to insure "substantial justice" and pursuant to NRCP 1, "to secure the just, speedy, and inexpensive determination of every action."

Kirk, respectfully, requests the court to reverse the trial court's denial of Kirk's Motion for Equitable Relief which sought an order requiring Vivian's attorneys to pay Vivian the sum of $505,000.00 which are the fees and costs billed to Vivian by her attorneys after the November 2011 mediation through January of 2013 [$875,000 - $370,000]. 8A.App.1696-97; 9A.App.1794.

D. The Court's Denial Of Kirk's Motion for Attorney's Fees and Sanctions Should Be Reversed

Kirk respectfully requests the court to reverse the trial court's denial of Kirk's Motion for Fees and Sanctions. Vivian's attorneys clearly acted in bad faith and in violation of EDCR 7.60(b)(3) during the November 2011 mediation and unnecessarily prolonged the litigation thereafter. As between Vivian and Kirk, Vivian's attorneys are her agents and Vivian is responsible for the damages caused by their misconduct. Therefore, Vivian should pay Kirk for all fees and costs incurred by Kirk in this litigation from the preparation for the mediation with Jimmerson forward through January of 2013. The court is respectfully requested to order Vivian to pay Kirk the sum of $370,000.00. 9A.App.1794.

E. It is Critical that This Court Confirms that Motions for Partial Summary Judgment Can and Should Be Filed Prior To Custody Being Resolved and that Such Motions Are Strongly Favored

In family court, the attorneys for the parties have the ability to compel the community to pay their fees and costs. However, in family court, according to the trial court and Kirk's attorneys, the parties are deprived of the right to file motions for

partial summary judgment under NRCP 56.[12] 8A.App.1569,1707; 9A.App.1836; 16A.App.3346. As a consequence, families are essentially financial hostages if attorneys are motivated and enabled to prolong proceedings, which otherwise would be expeditiously resolved. There is nothing complicated about dividing assets on a 50-50 basis. Most importantly, the minor children of the families become emotional hostages to the unduly and needlessly prolonged proceedings.

As explained above, the district court agreed with Kirk's attorneys' observation that summary judgments are not available in family court before custody determinations. Contrary to the trial court's interpretation, NRCP 56 applies to family court proceedings and must be "construed and administered to secure the just, speedy, and inexpensive determination of every action." NRCP 56 is one of the most important rules utilized "to secure the just, speedy, and inexpensive determination of [actions]." *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 123 P.3d 748 (2005) (purpose of summary judgment is to avoid needless trial).

In *Wood v. Safeway, Inc.*, 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005) this court held that "Rule 56 should not be regarded as 'a disfavored procedural shortcut' but instead 'as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.'" Rule 56 must be applied in family court as an integral part of the Nevada Rules and "to secure the just, speedy and inexpensive determination of every action."

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12 The court made it clear that not only would it have been a futile act to file a motion for partial summary judgment, but Kirk would have incurred the ire of the court for doing so, while the court was determining the custody of his children. 16A.App.3346.

The trial court's reliance upon *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979) is misplaced. 8A.App.1707 (counsel advises Kirk that motions for partial summary judgment are precluded in family court, pursuant to *Gojack*); 16A.App.3346 (district court refers to counsel's advice and rules that this was "wise advice"). *Gojack* does ***not*** stand for the proposition this court abolished the utilization of NRCP 56 in family court.

In *Gojack*, the trial court ordered a bifurcated trial, with the hearing on the divorce taking place ***before*** the hearing on the determination of property rights. This court found the trial court properly could order separate trials under NRCP 42(b), but the trial for the divorce had to be last in accordance with NRS 125.150(1). This court held a final decree of divorce cannot be entered without first disposing of the community property of the parties. 95 Nev. at 445, 596 P.2d at 239. Unfortunately, in so holding, the court used the phrase "without contemporaneously disposing of the community property of the parties" rather than "without first disposing of the community property of the parties" or, alternatively, "without contemporaneously disposing of the community property of the parties, if such community property had not been previously disposed by the court."

In making its holding, this court relied upon language in NRS 125.150(1): In granting a divorce, the court: . . . (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if he court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition." A common sense interpretation of this language is simply that the property must be resolved prior to the entry of the decree of divorce – if it hasn't been resolved prior to that time, it must be done then. There is nothing in that language which mandates that all of the community property of the parties can

only be disposed of contemporaneously with the granting of the decree of divorce. The word "contemporaneously" does not appear in the statute. There is nothing in that language which precludes the entry of a prior partial summary judgment of some of the community property of the parties prior to granting a divorce.

If the interpretation implicitly made by the trial court in this case was correct and consistently applied to statutory interpretation, then NRCP 56 would be rendered a nullity in every civil action. NRCP 39(b) provides in pertinent part: "Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court." The phrase "tried by the court" means a trial by the court. An obviously flawed argument would be that all issues in a case must be tried either by a jury or by the court pursuant to NRCP 38 and 39. Therefore, any summary adjudication by the court prior to such a trial would not be permitted. Such an absurd result is simply not the law.

Under the facts of this case, to discourage the filing of a motion for partial summary judgment (especially with the threat it would risk the ire of the court while custody was still pending) was a substantial injustice and resulted in the needlessly expensive and unnecessarily prolonged ultimate resolution of this action. The trial court noted its disapproval of Kirk's comments: "Kirk expressed frustration about being thwarted in his desire to resolve these financial issues expeditiously, complaining that 'parties in Family Court are more hostages, than clients.'" 16A.App.3346. The trial court then went on to criticize Kirk for not utilizing NRS 125.141. 16A.App.3346-3348.

The trial court's recommended use of NRS 125.141 (offer of judgment) because of the alleged absence of Rule 56 is insufficient, because it fails to divide the community assets. NRS 125.141(2). 16A.App.3346-3348.

There is no justifiable reason why motions for partial summary judgment should not be filed before custody is resolved. If the community property is divided early in the litigation, it will promote speedy and less expensive litigation.

The interpretation by the trial court unreasonably handcuffs family courts from carrying out their charge under NRCP 1 and NRS 125.090. Kirk respectfully urges this court to confirm that Rule 56 is favored in family court and that motions for partial summary judgment may be filed as soon as possible and before the resolution of custody.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed; and the district court should be ordered to vacate the award of attorneys' fees against Kirk, and to award appropriate fees in Kirk's favor.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version X5 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 11,540 words.

3. 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 appropriate references to 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.

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I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this 8 day of July, 2015, Appellant's Opening Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I filed the 17 volumes of Appellant's Appendix by hand with the Clerk of the Nevada Supreme Court, along with a disk of the Appendix, and I mailed disks of the Appendix, by U. S. mail, postage prepaid, to:

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