

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAT SONGER

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Tracie K. Lindeman  
Clerk of Supreme Court  
Case No. 67414 District Court Case No. CV35969

Appellants,

v.

RAYMOND DELUCCHI and  
TOMMY HOLLIS,

Respondents

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**RESPONDENTS' ANSWERING BRIEF**

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1                   **DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1**

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

- 6           1. Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel  
7           Marks. There are no parent corporations.

8                   **STATEMENT OF FACTS/PROCEDURAL HISTORY**

9           On January 5, 2014 Arbitrator Katherine Harris issued her Opinion and  
10 Award in American Arbitration Association Case No. 79 390 00124 12  
11 reinstating wrongfully terminated Pahrump Valley Fire and Rescue Paramedic  
12 Raymond Delucchi and Emergency Medical Technician Tommy Hollis with  
13 retroactive backpay and benefits. (J.A. 0240-0276). In that Opinion and Award  
14 Arbitrator Harris found that the recommendations for termination were the result  
15 of an investigation and report by Appellant Pat Songer who was a third-party  
16 investigator hired by the Town of Pahrump. (J.A. 0252–0258). The Arbitrator  
17 found that Songer’s report arising out of his investigation of Delucchi and Hollis  
18 intentionally contained “material misrepresentations”. (J.A. 0256, 0271, 0273).

19           Based upon the Arbitrator’s findings that the allegations against them in  
20 Songer’s report were intentionally false, Delucchi and Hollis filed suit against  
21 Songer and the law firm of Erickson, Thorpe & Swainston (hereafter “ETS”) on

1 June 4, 2014 for defamation and intentional infliction of emotional distress. (J.A.  
2 0003-0009). Songer filed a Special Motion to Dismiss on July 24, 2014 alleging  
3 that Delucchi and Hollis' lawsuit was a Strategic Lawsuit Against Public  
4 Participation (SLAP) because Songer's report was protected speech within the  
5 meaning of the First Amendment and Nevada's Anti-SLAPP statutes. (J.A. 0010–  
6 0040). Delucchi and Hollis filed an opposition arguing that communications  
7 under a contract for hire are not protected by the Anti-SLAPP statutes, that the  
8 arbitrator's findings of intentional falsehood could not be re-litigated by Songer  
9 under issue preclusion, and that the 2013 statutory amendments to the Anti–  
10 SLAPP statute should not be applied to Songer's statements made prior to the  
11 date of the amendments. (J.A. 0041–0566).

12 On November 19, 2014 the district court filed its “Order Granting  
13 Defendant Pat Songer's Special Motion to Dismiss Pursuant to NRS 41.660”.  
14 (J.A. at 0983-0986). That Order stated at its conclusion:

15 IT IS HEREBY ORDERED that Defendant Pat Songer's Special  
16 Motion to Dismiss Pursuant to NRS §41.660 is GRANTED and the  
17 case will be dismissed with prejudice once the Court has awarded  
18 fees and costs. The Court will hold a hearing on Defendant Pat  
19 Songer's Motion for Fees and Costs on December 2, 2014 at 1:30  
20 p.m.

19 (J.A. at 0986).

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1 Delucchi and Hollis filed an Amended Notice Of Appeal from the  
2 underlying dismissal on December 17, 2014. (Respondents Supplemental  
3 Appendix “R.S.A.” at 101-109).<sup>1</sup> That appeal was docketed as No. 66858. On  
4 December 29, 2014 the Order awarding attorney’s fees was filed. Appellant Pat  
5 Songer filed a Notice of Appeal on January 29, 2015. (J.A. 0993-0994). It was  
6 assigned this Docket No. 67414.

7 On April 14, 2015 this Court issued an Order to Show Cause in Docket No.  
8 66858 suggesting that the appeal might be premature as no final judgment had  
9 been entered in the district court below. On May 6, 2015 Delucchi and Hollis  
10 filed their Response in Docket No. 66858 arguing that the November 19, 2014  
11 was a final judgment, or alternatively became a final judgment upon entry of the  
12 December 29, 2014 Order awarding the attorney’s fees. This would have rendered  
13 the Notice of Appeal premature but still effective pursuant to NRAP 4(a)(6). Pat  
14 Songer had an opportunity and did in fact file a Reply in Docket No. 66858 so as  
15 to be heard on the jurisdictional issue.

16 On June 1, 2015 this Court issued its Order Dismissing Appeal in Docket  
17 No. 66858. That Order stated “We disagree with appellant’s contention that a  
18 dismissal took effect upon the subsequent entry of an order awarding fees and  
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20 <sup>1</sup> The document is entitled “Amended Notice of Appeal” because Delucchi and  
21 Hollis filed a Notice of Appeal on October 27, 2014 under the belief that the  
Order dismissing the Complaint filed by Defendant ETS dismissed the entire  
Complaint.

1 costs where appellants represent that the order ‘does not state that the action is  
2 dismissed as of the filing of that Order.’” That order further stated “Appellants  
3 [Delucchi and Hollis] may file a notice of appeal from any final judgment entered  
4 in this matter”.

5 On June 24, 2015 this Court issued an Order to Show Cause why the  
6 appeal should not be dismissed as premature in this Docket No 67414. This Order  
7 was identical to the Order previously filed in Docket No. 66858. There was no  
8 reason to believe that the result would be any different than that filed in Docket  
9 No. 66858. As was the case in connection with the Order to Show Cause in  
10 Docket No. 66858, Delucchi and Hollis were to be given an opportunity to file a  
11 Reply to any Response to the Order to Show Cause directed at Songer.

12 Because this Court in Docket No. 66858 held that there was no final  
13 judgment, and directed that Delucchi and Hollis may file a notice of appeal from  
14 any final judgment entered in the matter, on September 15, 2015 the district court  
15 entered a new “Order of Dismissal”. (R.S.A. at 110-115). A new Notice of  
16 Appeal was filed with the district court. (R.S.A. at 116-124). That appeal of the  
17 Order Granting of the Motion to Dismiss has been Docketed as No. 68994.

18 One day after entry of the “Order of Dismissal” by the district court, and  
19 prior to the due date for Delucchi and Hollis to file their Reply to Songer’s  
20 Response to the Order to show cause, this Court issued its Order Reinstating  
21 Briefing on September 16, 2015 stating “appellant has demonstrated that the

1 order awarding attorney's fees and costs appeal from constituted a final  
2 appealable judgment".

3 **ARGUMENT**

4 **I. THIS COURT SHOULD DISMISS THIS APPEAL AS PREMATURE**  
5 **OR ALTERNATIVELY CONSOLIDATE THE APPEAL WITH**  
6 **DOCKET NO. 68994.**

7 Appellant Songer, like Delucchi and Hollis, believed that the November  
8 19, 2014 "Order Granting Defendant Pat Songer's Special Motion to Dismiss  
9 Pursuant to NRS 41.660" was a final judgment. In the March 10, 2015 docketing  
10 statement filed by Appellant Songer, under the section entitled "Substantive  
11 Appealability" Songer cites as authority NRAP 8(b) claiming that the Order  
12 awarding attorney's fees was a "Special Order after Judgment".

13 Songer was a party to Docket No. 66858. The determination in that Docket  
14 that the November 19, 2014 Order was not a final judgment is binding on Songer.  
15 Accordingly, this appeal should likewise be dismissed as a result of a  
16 jurisdictional defect.

17 Songer did not file a cross-appeal in Docket No. 68994 regarding the  
18 amount of attorney's fees awarded. This is understandable given that Songer was  
19 likely relying upon this Court's Order of September 16, 2015 "Order Reinstating  
20 Briefing". If this court feels that dismissing the appeal would work a hardship in  
21 light of the confusion created by the diametrically conflicting and contradictory  
Orders addressing the jurisdiction issuing in Docket No. 66858 and this case

(67414), then this court should simply order the appeals consolidated and addressed the issue of attorney's fees at the same time that it addresses Delucchi's and Hollis' appeal on the merits of the dismissal.

**II. SONGER HAS FAILED TO DEMONSTRATE THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN CONNECTION WITH THE AMOUNT OF ATTORNEY'S FEES AWARD.**

As noted in Songer's Opening Brief, the computation of award of attorney's fees is to be based upon the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Those factors are (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived. 85 Nev. at 349, 455 P.2d at 33. As noted by this Court in *University of Nevada v. Tarkanian*, 110 Nev. 581, 595 879 P.2d 1180, 1189 (1994) "district courts have considerable discretion in determining attorney's fees".

It must be emphasized at the outset that Songer's Opening Brief *does not* assert that the district court failed to consider the *Brunzell* factors. Rather, the Brief argues (1) that the district court improperly based its decision regarding the

1 hourly rate based upon a comparison of what was billed by co-Defendant ETS,  
2 and (2) that the court abused its discretion by failing to utilize prevailing market  
3 rates in its fee award. These arguments are without merit.

4 **A. Comparison To What Was Billed By The Co-Defendant**

5 The district court noted that the amount billed by the attorneys for ETS  
6 were similar to the amount billed by Songer's attorney. Songer argues that this  
7 was a violation of *Brunzell* because it was not an evaluation of the abilities,  
8 training, education etc. of Songer's counsel Joseph P. Garin, Esq. However, what  
9 Songer overlooks is the fact that co-Defendant ETS also filed a Special Motion to  
10 Dismiss on the same ground seeking the same relief. (R.S.A. at 001-100). As  
11 such, it was not unreasonable for the district court to look at the amount of time  
12 and what was billed by counsel for the other Defendant in considering *Brunzell*  
13 factor (2) "the character of the work to be done: its difficulty, its intricacy, its  
14 importance, time and skill required" and (3) "the work actually performed by the  
15 lawyer: the skill, time and attention given to the work".

16 **B. The Rate Utilized**

17 Songer's Motion for Attorney's Fees and Costs correctly cited *Blum v.*  
18 *Stetson*, 465 U.S. 886, 895 (1984) that rates are to be calculated based upon the  
19 prevailing market rate in the relevant community. (J.A. 0858). However, the  
20 relevant community is the Fifth Judicial District comprising the counties of Nye

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1 and Esmeralda. Songer's Motion presented no affidavits or other evidence  
2 regarding what the prevailing rates are in Nye County or Esmeralda County.

3 To the contrary, Songer's Motion argues that the court should utilize  
4 something known as the *Laffey* Matrix to set a market rate of \$520, and then  
5 adjust that rate to \$499.20 for "Southern Nevada" claiming that this rate is "based  
6 on the average of the rates paid in the Denver, Phoenix and Sacramento areas".  
7 (J.A. at 0861). This Court may have noticed that Nye County and Esmeralda  
8 County bear very little resemblance to the Denver, Phoenix or Sacramento  
9 metropolitan areas. In the absence of actual evidence as to what the market rates  
10 would be in Pahrump, Nevada (where the case was filed and heard), it cannot be  
11 argued that the district court's award of fees actually billed constituted an abuse  
12 of discretion.

13 Songer's Opening brief argues that the fees awarded were not at "the  
14 prevailing market rate" because counsel was charging insurance companies pre-  
15 negotiated below-market rates. However, Songer's counsel presented no evidence  
16 to support this argument to the district court below. The Declaration of Joseph P.  
17 Garin, Esq. in support of the Motion only states that he billed to client at a rate of  
18 \$235 per hour and his hourly rates for non-insurance company engagements  
19 "ranged between \$350 and \$425 per hour depending upon the complexity of the  
20 matter and other factors." (J.A. at 0867-0868).

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1       The mere fact that an attorney may charge a private pay client a greater  
2 hourly rate than insurance company does not establish the higher rate as the  
3 “prevailing market rate”. If this were the case, “prevailing market rate” would be  
4 defined by highest amount an attorney could charge any client.

5       There are numerous reasons why certain clients are charged a greater or  
6 lesser rate than other clients. Insurance companies traditionally command a lower  
7 market rate because of the volume of business they provide and the lesser risk in  
8 connection with collectability of accounts receivable. If the market power of  
9 insurance companies dictates that attorneys are to charge \$235 per hour for  
10 insurance defense work, this is evidence that \$235 per hour is the prevailing  
11 market rate for the type of insurance defense work performed by Songer’s  
12 attorney in this case.

13       Garin’s own Declaration in support of the Motion for Attorney’s Fees  
14 states that it is the “complexity of the matter and other factors” which determines  
15 the rate that he charges. (J.A. at 0868). This is simply a reiteration of factor (2) of  
16 *Brunzell*.

17       There has been no showing or demonstration that the nature or character of  
18 the work performed in this matter was so extraordinary so as to warrant an  
19 amount greater than the \$235 per hour awarded by the court. To the contrary, the  
20 three issue(s) were straightforward: (1) Do the Anti-SLAPP statutes apply to  
21 vendors and contractors, (2) were in the arbitrator’s findings that the statements of

1 Appellant Songer were false entitled to issue preclusion effect, and (3) did the  
2 2013 amendments to the Anti-SLAPP statutes apply retroactively.<sup>2</sup>

3 In *Brunzell* the Court noted “We will not substitute our opinion for that of  
4 the trial court unless as a matter of law there has been an abuse of discretion. The  
5 value to be placed on the services rendered by counsel lies in the exercise of  
6 sound discretion by the trier of the facts”. 85 Nev. at 349, 455 P.2d at 33-34. The  
7 amount awarded by the district court was well within the exercise of its sound  
8 discretion, and this Court should likewise not substitute its opinion.

9 **CONCLUSION**

10 For all of the reasons set forth above, the decision of the district court as to  
11 the amount of attorney’s fees awarded, in the event that the award is not  
12 otherwise overturned in Docket No. 68994, should be affirmed.

13 DATED this 25th day of November, 2015.

14 LAW OFFICE OF DANIEL MARKS

15 /s/ Adam Levine, Esq.  
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<sup>2</sup> These are the issues which are before the court in Docket No. 68994.

**CERTIFICATE OF COMPLIANCE WITH**  
**NRAP 28(e) AND NRAP 32(a)(8)**

I hereby certify that I have read this Answering 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 it complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the Answering Brief regarding any material issue which may have been overlooked to be supported by a reference to the page of the transcript or appendix where the matter overlooked is to be found. I further certify that this Answering Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14, has 10 pages, double spaced, and contains 2,259 words. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of November, 2015.

LAW OFFICE OF DANIEL MARKS

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## **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 25th day of November, 2015, I did serve the above and forgoing ANSWERING BRIEF, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service to the following:

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/s/ Glenda Guo, Paralegal.  
An employee of the  
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