IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES R. KOZAK, ESQ,

Petitioner,

vs.

THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CHURCHILL and THOMAS STOCKARD DISTRICT JUDGE, DEPARTMENT I

Respondents,

and

SHAUGHNAN L. HUGHES and JUSTIN M. TOWNSEND, ESQ.

Real Parties in Interest

Case. No. 74857

Dist. Ct. Case No. 15-10DC-0876

KOZAK'S NRAP 40B PETITION FOR REVIEW

In this proceeding, Charles Kozak, Esq. challenges a District Court Order awarding Real Parties $16,500 in NRCP 11 sanctions against him. A0188 @Vol.1.

On January 12, 2018, Kozak filed his Petition for Writ of Mandamus, contesting the award.

On June 13, 2018, the Court of Appeals entered its Order Denying Petition for Writ of Mandamus.

On June 29, 2018, Kozak filed his NRAP 40 Petition for Rehearing.

On August 24, 2018 and without explanation, the Court of Appeals denied Rehearing in its single page Order. (See Documents 1-3 attached hereto).

Pursuant to NRAP 40B, Kozak hereby moves the Supreme Court for review.

This case is proper for review as it presents questions of first impression of general statewide significance. It involves fundamental issues of statewide public importance. It involves a decision by the Court of Appeals which conflicts with Nevada Supreme Court precedence.

The questions presented by this Petition are as follows:

(1) Can one substantially comply with the 21-day safe harbor period of NRCP 11?

(2) When one fails to comply with the safe harbor period, must the opposing party show she was prejudiced by the failure in order to avoid sanctions?

(3) Can a Motion requesting sanctions under NRCP 16.1, NRCP 37 and 10JDCR 25 be combined with a request for sanctions under NRCP 11?

(4) Can the Court of Appeals affirm a District Court's award of NRCP 11 sanctions by ignoring the Rule then simply citing to NRCP 16.1, NRCP 37 and 10JDCR 25 as authority?

(5) Does the decision of the Court of Appeals in this matter conflict with the holding in Ford Motor Credit Company v. Crawford 109 Nev. 616, 855 P.2d 1024 (1993)?

Since NRCP 11 was amended in 2005 to comport with its federal

counterpart, few published Opinions by the Nevada Supreme Court exists on the subject. A shepardizing of Ford Motor reveals it has not been cited since its publication. An updated, comprehensive, published analysis of NRCP 11 is due. Counsel and litigants across the state are affected by the sanctioning implications of Rule 11.

When denying Kozak a Writ of Mandamus, the Court of Appeals not only overlooked material facts as well as controlling law but neglected issues which would alter the outcome of this proceeding.

THE COURT OF APPEALS FAILED TO ADDRESS NRCP 11 AND ISSUED A DECISION WHICH CONFLICTS WITH A PRIOR PUBLISHED OPINION OF THE NEVADA SUPREME COURT.

In its Order Denying Petition for Writ of Mandamus, the Court of Appeals failed to address NRCP 11 under which Kozak was sanctioned. Instead, when affirming the $16,500 awarded in NRCP 11 sanctions, it found: "Having considered the documents before us, we conclude that the district court had the authority to sanction petitioner and that the court properly determined that the imposition of the sanctions at issue here were warranted. See NRCP 16.1 and 37, 10JDCR 25; *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 680, 268 P.3d 224, 229 (2011)." 6/13/18 Order at page 2. Here, the Court of Appeals **implied** that the Rule 11 sanctions imposed on Kozak were proper recourse for a Rule 16.1, 37 and/or 25 violation which it did not even identify. Such a ruling is in

conflict with the prior Opinion in Ford Motor Credit Company v. Crawford 109 Nev. 616, 855 P.2d 1024 which held that NRCP 11 is not implicated by violations of other Rules.

THE DISTRICT COURT ERRED WHEN AWARDING RULE 11 SANCTIONS AND THE COURT OF APPEALS IGNORED THE LAW CITED BY KOZAK.

On August 26, 2016, Plaintiff Shaughnan Hughes filed a Motion for Sanctions in #15-10DC-0876 where he argued that Defendant Elizabeth Howard and her attorney Charles Kozak were subject to sanctions for various violations of NRCP 11. Due to these alleged violations, Hughes argued that he incurred unnecessary attorney fees and sought an award of such. A0001 @Vol.1. Prior to filing his Motion, Hughes failed to first serve it on Howard and afford the 21- day "safe harbor" period mandated by NRCP 11(c)(1)(A). 1/12/18 Brief @1:25-2:5.

On September 14, 2016, Howard filed her Verified Opposition to Motion for Sanctions where she made issue that Hughes violated the mandates of NRCP 11(c)(1)(A) by not first serving her a copy of the Motion and awaiting the "21 days" prior to filing it with the Court. A0029, A0080:28 @Vol.1 and 1/12/18 Brief @2:6-11.

Following Hughes' Reply, the District Court entered its Order on March 1, 2017 granting, in part, the Motion for Sanctions. In so granting, the Order states: "The Court finds that Mr. Hughes substantially complied with the 21-day

requirement under NRCP 11 and even if he did not, Ms. Howard was not prejudiced by any failure to strictly comply with the technical requirements of NRCP 11(c)(1)(A).... although Mr. Kozak states that he had no prior notice of the Motion, the record is clear that Mr. Kozak had prior notice of many of Mr. Hughes' claims of sanctionable conduct. In fact, the issues related to Ms. Howard's counterclaims, discovery, and the early case conference report were raised at the May 17, 2016 hearing." A0099, A0101:13-A0102:2 @Vol.1 and 1/12/18 Brief @2:12-25.

The District Court would go on to find that "Mr. Kozak's delay in addressing the dismissed counterclaims" and "failure to file an early case conference report" timely warranted Rule 11 sanctions for which "Mr. Kozak shall personally pay attorney's fees incurred by Mr. Hughes". A0103:17-A0104:2 and A0104:9-21 @Vol.1. Counsel for Hughes was instructed to "submit an affidavit establishing the costs of attorney fees pertinent to the awards" by "no later than March 17, 2017." A0107:1-2 @Vol.1 and 1/12/18 Brief @2:26-3:7.

In his March 15, 2017 Affidavit, Justin Townsend, asserted he's an "associate attorney", bills at a rate of "$275.00 per hour" and spent "107.55 hours" for which "attorneys' fees in the total amount of $29,576.25" were incurred relating to the sanctioned conduct. A0109 @Vol.1 and 1/12/18 Brief @3:8-13.

Howard opposed the Affidavit and moved for reconsideration of the District Court's March 1st Order. A0114 and A0120 @Vol.1. The Court denied reconsideration and awarded Hughes sanctions "in the sum of $16,500, which shall be paid by Mr. Kozak." A0188 and A0192 @Vol.1. In awarding sanctions, the District Court abused its discretion. 1/12/18 Brief @3:14-20.

NRCP 11 holds:

> ...
>
> (c) **Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (1) **How Initiated**.
>
> (A) **By Motion**. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
>
> ...

> (2) **Nature of Sanction; Limitations**. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
>
> ...
>
> (d) **Applicability to Discovery**. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 16.1, 16.2 and 26 through 37. Sanctions for refusal to make discovery are governed by Rules 26(g) and 37.

The "**DRAFTER'S NOTES 2004 AMENDMENT**" under NRCP 11 state: "The rule is amended to conform to the federal rule, as amended in 1993, in its entirety." 1/12/18 Brief @3:21-5:4.

The "**ADVISORY COMMITTEE NOTES**" for the 1993 Amendment of FRCP 11 state: "New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37." "**Subdivision (d)**. Rules 26(g) and 37 establish certification standards and sanctions that apply to all discovery disclosures, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct

rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result." 1/12/18 Brief @5:5-17.

Discussing subdivisions (b) and (c), the Advisory Committee Notes state: "The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court ..." "Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses." "That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position." 1/12/18 Brief @5:18-28.

"Since the purpose of Rule 11 sanctions is to deter rather than compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances ... some or all of this payment [can] be made to those injured by the violation.... Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement.... The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses." Id. 1/12/18 Brief @6:1-13.

"Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely.... Given the 'safe harbor' provisions ... a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)." Id. 1/12/18 Brief @6:19-25.

"Rule 11 motions ... should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared ... to intimidate an adversary into withdrawing contentions that are fairly debatable ..." Id. 1/12/18 Brief @6:19-25.

"The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served.... To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion." Id. 1/12/18 Brief @6:26-7:8.

"Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly,

as under current law, the standard for appellate review of these decisions will be for abuse of discretion." Id. 1/12/18 Brief @7:9-14.

Citing the Advisory Committee Notes, the Court of Appeals in Barber v. Miller 146 F.3d 707 (9th 1998) reversed the district court's award of Rule 11 sanctions "because the motion for sanctions was not served upon Carlsen 21 days before filing". In reversing the award of sanctions, the Ninth Circuit opined: "There is no doubt that Carlsen's patent claim, upon which federal jurisdiction was founded, was not 'warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law.' See Fed.R.Civ.P. 11(b)(2). It is also abundantly clear that Imageware gave Carlsen repeated notice of that deficiency. Unfortunately, for Imageware, however, it did not follow the procedure required by Rule 11(c)(1)(A) for an award of sanctions upon its motion." Id. at 709. 1/12/18 Brief @7:15-10:7.

In Radcliff v. Rainbow Construction 254 F.3d 772 (9th 2001), a $75,000 award of Rule 11 sanctions was reversed. There, the district court concluded that sanctions were warranted due to its finding that in alleging a conspiracy between Rainbow and the District Attorney's Office, plaintiffs failed to identify allegations that were "'likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.'" Id. at 788. 1/12/18 Brief @11:7-14.

Opining the district court abused its discretion when awarding the amount,

the Ninth Circuit cited: "Rule 11(c)(1)(A) provides strict procedural requirements for the parties to follow when they move for sanctions under Rule 11." To be in compliance, Rainbow was required to serve its Rule 11 Motion on plaintiffs and await 21 days "before filing the motion with the court." However, "Rainbow did not follow this procedure. Rainbow filed its Rule 11 motion along with a motion for summary judgment with the court on August 18, 1998. Rainbow did not serve the plaintiffs with the motion in advance of filing and thus did not comply with the twenty-one -day advance service provision. Having not followed this procedure, Rainbow was not entitled to obtain an award from the plaintiffs." Id. at 788-789. 1/12/18 Brief @11:15-12:3.

The Opinion went on to note: "The district court concluded that, even though the defendants did not give twenty-one- day advance service to the plaintiffs, a 'literal application of the safe harbor provision' was unnecessary in this case. The court decided that because Rainbow had filed a Rule 11 motion in response to plaintiff's first amended complaint, and three months had passed between the motion and the court's order concerning sanctions, the plaintiffs and their attorneys had been given adequate notice and opportunity to withdraw the challenged allegation. As a result, the court ruled that Rule 11(c)(1)(A)'s 'safe harbor' provision had been satisfied, notwithstanding the lack of advanced service on the plaintiffs." The district court's analogy in this regard was firmly rejected on

appeal. The Ninth Circuit concluded: "Because Rainbow did not follow the mandatory service procedure of Rule 11(c)(1)(A), we reverse the award of sanctions." Id. at 789. 1/12/18 Brief @12:4-21.

"The Ninth Circuit strictly construes the safe harbor requirements of Rule 11(c)(1)(A) and considers the rule's requirements to be mandatory." Woods v. Truckee Meadows Water Authority 2007 WL 2264509 *3 (D.Nev. Aug. 6, 2007). "Rule 11 explicitly requires that a party filing a Rule 11 motion must serve the motion on the opposing party 21 days before filing the motion with the Court." O'Connell v. Smith 2008 WL 477875 *1 (D.Ariz. Feb. 19, 2008) (finding motion filed with court and served on defendants same day improper). A party's "notice of intent in the form of letters or telephone conversations, under Ninth circuit jurisprudence, does not satisfy the procedural requirements of Rule 11's 'safe harbor' provisions." Lack of "prejudice is not the correct legal test under Rule 11 – the test is simply whether the moving party has served a 'filing ready' motion to the opposing party 21 or more days before it is filed with the court." Certain Underwriters at Lloyd's London v. Rauw 2007 WL 2729117 *5 (N.D.Cal. Sept. 18, 2007). '"The requirements of the rule are straightforward: The party seeking sanctions must serve the Rule 11 motion on the opposing party at least twenty-one days before filing the motion with the district court…It is clear from the language of the rule that it imposes mandatory obligations upon the party seeking sanctions,

so that the failure to comply with the procedural requirements precludes the imposition of the requested sanctions....If those conditions are not satisfied, the Rule 11 motion for sanctions may not be filed with the district court. If a non-compliant motion nonetheless is filed with the court, the district court lacks authority to impose the requested sanctions."' Hohu v. Hatch 940 F.Supp.2d 1161, 1177 (N.D.Cal. 2013). 5/2/18 Reply Brief @2:8-3:16.

In the matter at hand, not only did the District Court err by sanctioning Kozak in defiance of the "21 day" service mandate but it also erred by awarding sanctions for "discovery" conduct which is expressly exempted under NRCP 11(d). A0099 @Vol.1 and 1/12/18 Brief @14:1-6.

Notably, the District Court **did not** award sanctions against Kozak under either NRCP 16.1, NRCP 37 or 10JDCR 25, nor could it have. NRCP 11(c)(1)(A) specifically prohibits any other requests from being joined in a Rule 11 Motion. NRCP 1 dictates: "These rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." 5/2/18 Reply Brief @1:19-22 and 5:4-8.

Regarding Howard's NRCP 60 Motion, Kozak filed it well within the "6 months" allowed under subsection (b). On January 12, 2016, Hughes filed his Notice of Entry of Order Granting Plaintiff's Motion to Dismiss Counterclaim. RP1058 @Vol.1. On May 16, 2016, Howard moved to set aside the dismissal.

RP1092 @Vol.1. 5/2/18 Reply Brief @6:14-20.

In Socialist Republic of Romania v. Wildenstein 147 F.R.D. 62 (S.D.N.Y. 1993), the Romanian government filed an FRCP 60(b) Motion to relieve it from a Judgment **entered 6 years earlier** which dismissed the action for failure to comply with discovery. Although the Court found the Motion "untimely", it found Rule 11 sanctions **were not** appropriate since no demonstration was made that '"after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."' Id. at 66. 5/2/18 Reply Brief @6:21-7:4.

In Pease v. Pakhoed 980 F.2d 995 (5th 1993), Pease filed suit against his former employer Pakhoed alleging wrongful discharge and age discrimination. When Pakhoed moved for a more definite statement, Pease failed to respond. Subsequently, the District Court entered an Order requiring Pease to submit an Amended Complaint containing a more definite statement within thirty days. When Pease failed to respond to the Order, Pakhoed filed a Motion to Dismiss. Following a hearing that Pease's counsel failed to attend, the District Court dismissed the action with prejudice. **Three months later**, Pease hired new counsel who filed a Rule 60 Motion for Relief from Judgment. The District Court denied the Motion. Two months later, Pakhoed moved for sanctions claiming that Pease's Rule 60

Motion violated FRCP 11. After the District Court denied this Motion too, both parties appealed. In affirming the District Court's rulings, the Fifth Circuit Opinion relates that Pakhoed essentially argued "Pease's counsel failed to make sufficient pre-filing inquiries to support the allegations contained within Pease's Rule 60(b) Motion for Relief." According to Pakhoed, the Motion "was both factually and legally untenable and simply served to prop up a meritless claim." Although the Fifth agreed "with the district court that Pease's Rule 60(b) claims are unavailing", it concluded that "his contentions are not so abusive or frivolous as to violate Rule 11. At very least, Pease's arguments fall within the protective ambit of Rule 11's 'good faith argument' provision..." Id. at 1001. Although the District Court felt Howard's NRCP 60(b) Motion was delayed, it made no finding that the "contentions" in the Motion are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law". A0099 @Vol.1 and 5/2/18 Reply Brief @7:5-8:4.

THE COURT OF APPEALS FAILED TO ADDRESS THE REASONABLENESS OF ATTORNEY FEES DIRECTLY INCURRED.

Even when acts are sanctionable, "'[a] district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct.... Proportionate sanctions are those which are "roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.'" Emerson v.

Eighth Judicial District Court 127 Nev. 672, 681, 263 P.3d 224, 230 (2011). There, a $19,330 sanction against attorney Emerson was upheld for his improper statements to the jury **which resulted in a new trial**. The amount was based on various costs and attorney fees incurred during the original trial along with the cost of an expert witness who testified. Id. at 767, 226. By comparison, Kozak was sanctioned $16,500 for filing a Case Conference Report untimely and filing an NRCP 60(b) Motion **well within the 6 month period allowed by Rule**. A 0103:21 @Vol.1 and 1/12/18 Brief @14:7-24.

In Rhein Medical v. Koehler 889 F.Supp. 1511 (M.D.Fla. 1995), a $500 fine payable to the Clerk, half to be paid by Rhein and the other half by Rhein's attorney, was found to be an appropriate Rule 11 sanction for filings intended to delay and gain a strategic advantage. Although the Court in Kuhns v. CoreStates Financial 998 F.Supp. 573 (E.D.Pa. 1998) found the action barred by "res judicata", it found that the filing of the action **did not** warrant Rule 11 sanctions. "[T]he 1993 amendments are viewed to discourage imposition of monetary and other sanctions under the Rule where conduct does not reach the point of clear abuse." Id. at 577. Only under unusual circumstances should a court even direct a monetary sanction be paid to those injured by a Rule 11 violation. Myers v. Sessoms & Rogers 781 F.Supp.2d 264, 271-272 (E.D.N.Car. 2011) (attorney sanctioned $250 amount). 1/12/18 Brief @15: 1-20.

When attorney fees are awarded for violation of Rule 11, the fees must be "reasonable". NRCP 11(c)(A)(2). "[W]hile it is within the trial court's discretion to determine the reasonable amount of attorney fees under a statute or rule, in exercising that discretion, the court must evaluate the factors set forth in *Brunzell v. Golden Gate National Bank.*" Miller v. Wilfong 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). The factors to be evaluated are as follows: "(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." Additionally, "good judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weight". Brunzell v. Golden Gate National Bank 85 Nev. 345, 349-350, 455 P.2d 31, 33 (1969). 1/12/18 Brief @13:21-16:14.

In Shuette v. Beazer Homes 121 Nev. 837, 124 P.3d 530 (2005), the Supreme Court reversed a Judgment on jury verdict and an award of attorney fees. In discussing attorney fees, the Opinion relates that a trial court "must" conduct its analysis of the amount in light of the factors enumerated in Brunzell. "[T]he result

will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination." Id. at 865, 549. 1/12/18 Brief @16:15-22.

When the district court fails to render findings of reasonableness under the Brunzell factors, it has abused its discretion. Argentina Consolidated Mining v. Jolley Urga Wirth Woodbury & Standish 216 P.3d 779, 788 (Nev. 2009). A district court that fails to provide analysis or specific findings regarding the reasonableness of the fees awarded has abused its discretion. Barney v. Mt. Rose Heating & Air Conditioning 192 P.3d 730, 732 (Nev. 2008). A mere recital by the district court that it has considered the "required factors" does not "insulate the order from reversal." Harmon v. San Diego County 664 F.2d 770, 772 (9th 1981) (finding district court's Order, which related only number of hours expended and applicable rate of pay per hour, was insufficient in that it did not relate application of required factors). The district court must "demonstrate that it considered the required factors, and the award must be supported by substantial evidence." Logan v. Abe 350 P.3d 1139, 1143 (Nev. 2015). In Songer v. Delucchi 2016 WL 3488644 (unpublished Nevada Supreme Court June 23, 2016), it was concluded "that the district court abused its discretion by failing to adequately address the *Brunzell* factors and by failing to provide sufficient reasoning and findings in support of its decision to award attorney fees.... [T]he record on appeal in this case

does not clearly demonstrate that the district court considered the factors or include evidence that clearly supports the amount of fees awarded." Id. at *1 (citing Logan). 1/12/18 Brief @16:24-17:22.

"To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed reasonable, and is referred to – for convenience – as the prevailing market rate." Blum v. Stenson 104 S.Ct. 1541, 1547, 465 U.S. 886, 895 fn. 11 (1984). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.... The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with prevailing market rates.... Satisfactory evidence at a minimum is more than the affidavit of the attorney performing the work." Norman v. Housing Authority 836 F.2d 1292, 1299 (11th 1988). "[F]ee counsel bears the burden in the first instance of supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate." Id. at 1303. "The court's order on attorney's fees must allow meaningful review – the district court must articulate the decisions it made, give principled

reasons for those decisions, and show its calculation." Id. at 1304. 1/12/18 Brief @17:24-18:20.

In the matter at hand, Hughes' counsel Townsend did not address the Brunzell factors nor did he provide any evidence of the "prevailing market rate". A 0109 @Vol. 1. While granting a $16,500 amount in sanctions, the District Court failed to articulate how it arrived at the figure. Although it stated, in a conclusory manner, that it "considered" the Brunzell factors, the District Court failed to provide sufficient reasoning and findings to support the amount awarded. The District Court failed to address the "prevailing market rate". A 0192 @Vol.1. Apparently, the District Court determined the amount in a capricious and arbitrary manner. 1/12/18 Brief @18:21-19:4.

Per NRCP 11(c)(2), a court may order "payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." In affirming the $16,500 sanction, the Court of Appeals failed to address the "reasonableness" factors under Brunzell or the "prevailing rate". No explanation has been given as to how a $16,500 amount was incurred as a direct result of filing a Case Conference Report untimely and filing an NRCP 60(b) Motion **well within the 6 month period allowed by Rule**. 6/13/18 Order.

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CONCLUSION

As shown, reversal of the $16,500 sanction is warranted.

CERTIFICATE OF COMPLIANCE

I certify that I have read this Petition and that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

I certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 40B(d). This Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman and contains 4,641 words when applying the exemptions of NRAP 32(a)(7)(C).

Pursuant to NRS 239B.030, the undersigned certifies no Social Security numbers are contained in this document.

Dated this 10th day of September 2018.

Submitted by:

/s/ Charles R. Kozak
Charles R. Kozak, Esq.
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Petitioner appearing pro se

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September 2018, I electronically filed **Kozak's NRAP 40B Petition for Review** with the Clerk of the Court using the electronic filing system which will send a notice of electronic filing to the following:

Justin Townsend, Esq.
Allison MacKenzie, Ltd.
Attorneys for Shaughnan L. Hughes
402 North Division Street
Carson City, NV 89703

/s/ Dedra Sonne
Dedra Sonne
Employee of Kozak & Associates, LLC

LIST OF NRAP 40B(d) REQUIRED DOCUMENTS

Document

1 Court of Appeals' Order Denying Petition for Writ filed 6/13/18

2 Kozak's NRAP 40 Petition for Rehearing filed 6/29/18

3 Court of Appeals' Order Denying Rehearing filed 8/24/18

DOCUMENT 1

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Real Parties in Interest.

No. 74857

FILED

JUN 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order sanctioning petitioner.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of mandamus will not issue, however, if the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.170; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Further, mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991). Petitioner bears the burden of demonstrating that

18-901302

extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Having considered the documents before us, we conclude that the district court had the authority to sanction petitioner and that the court properly determined that the imposition of the sanctions at issue here were warranted. *See* NRCP 16.1 and 37; 10JDCR 25; *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011). Additionally, as the sanction was limited to fees incurred in relation to the sanctioned conduct, the sanction was reasonably proportionate to the misconduct. *See Emerson*, 127 Nev. at 681-82, 263 P.3d at 230 (discussing the requirement that sanctions be reasonably proportionate to the misconduct and holding an award of fees and costs as a sanction was proportionate where it was limited to fees and costs incurred because of the misconduct). We therefore conclude that the district court did not manifestly abuse its discretion in sanctioning petitioner and thus, petitioner has failed to demonstrate that extraordinary writ relief is warranted. *See Merits Incentives, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 689, 694, 262 P.3d 720, 723 (2011); *Pan*, 120 Nev. at 228, 88 P.3d at 844. Accordingly, we deny the petition. *See* NRAP 21(b)(1); *Smith*, 107 Nev. at 677, 818 P.2d at 851.

It is so ORDERED.

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Thomas L. Stockard, District Judge
Kozak & Associates, LLC
Allison MacKenzie, Ltd.
Churchill County Clerk

DOCUMENT 2

DOCUMENT 2

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES R. KOZAK, ESQ,

Petitioner,

vs.

THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CHURCHILL and THOMAS STOCKARD DISTRICT JUDGE, DEPARTMENT I

Respondents,

and

SHAUGHNAN L. HUGHES and JUSTIN M. TOWNSEND, ESQ.

Real Parties in Interest

Case. No. 74857

Dist. Ct. Case No. 15-10DC-0876

KOZAK'S NRAP 40 PETITION FOR REHEARING

On June 13, 2018, this Court entered its Order Denying Petition for Writ of Mandamus. Charles Kozak hereby moves for rehearing.

Rehearing is warranted when the Court has overlooked or misapprehended material facts or questions of law or when it has overlooked, misapplied or failed to consider legal authority controlling a dispositive issue in the case. NRAP 40(c)(2) and Rivero v. Rivero 125 Nev. 410, 416, 216 P.3d 213, 218 (2009) (even when rehearing denied, court can still issue new disposition). In American Casualty v. Hotel and Restaurant Employees 113 Nev. 764, 766, 942 P.2d 172, 174 (1997), the Court found rehearing appropriate to address an issue, neglected in the

initial appellate Opinion, which would alter the outcome of the Appeal.

In this proceeding, Kozak challenges a District Court Order awarding $16,500 in NRCP 11 sanctions. As the Supreme Court has opined, Mandamus will lie to control discretion which is manifestly abused or exercised in an arbitrary or capricious manner. Washoe County District Attorney v. Second Judicial District Court 116 Nev. 629, 636, 5 P.3d 562, 566 (2000) (granting Petition, finding district court manifestly abused its discretion in imposing NRCP 11 sanctions against D.A. because Order of sanctions was based on erroneous view of law). 5/2/18 Reply Brief @1:1-10.

When denying Kozak Mandamus on June 13, 2018, the Court of Appeals not only overlooked material facts as well as controlling law but neglected issues which would alter the outcome of this proceeding.

THE COURT OF APPEALS FAILED TO ADDRESS NRCP 11.

On August 26, 2016, Plaintiff Shaughnan Hughes filed a Motion for Sanctions in #15-10DC-0876 where he argued that Defendant Elizabeth Howard and her attorney Charles Kozak are subject to sanctions for various violations of NRCP 11. Due to these alleged violations, Hughes argued that he incurred unnecessary attorney fees and sought an award of such fees. A0001 @Vol. 1. Prior to filing his Motion, Hughes failed to first serve it on Howard and afford the

21- day "safe harbor" period mandated by NRCP 11(c)(1)(A). 1/11/18 Brief @1:25-2:5.

On September 14, 2016, Howard filed her Verified Opposition to Motion for Sanctions where she made issue that Hughes violated the mandates of NRCP 11(c)(1)(A) by not first serving her a copy of the Motion and awaiting the "21 days" prior to filing it with the Court. A0029, A0080:28 @Vol. 1 and 1/11/18 Brief @2:6-11.

Following Hughes' Reply, the District Court entered its Order on March 1, 2017 granting, in part, the Motion for Sanctions. In so granting, the Order states: "The Court finds that Mr. Hughes substantially complied with the 21-day requirement under NRCP 11 and even if he did not, Ms. Howard was not prejudiced by any failure to strictly comply with the technical requirements of NRCP 11(c)(1)(A).... although Mr. Kozak states that he had no prior notice of the Motion, the record is clear that Mr. Kozak had prior notice of many of Mr. Hughes' claims of sanctionable conduct. In fact, the issues related to Ms. Howard's counterclaims, discovery, and the early case conference report were raised at the May 17, 2016 hearing." A0099, A0101:13-A0102:2 @Vol. 1 and 1/11/18 Brief @2:12-25.

The District Court would go on to find that "Mr. Kozak's delay in addressing the dismissed counterclaims" and "failure to file an early case

conference report" timely warranted Rule 11 sanctions for which "Mr. Kozak shall personally pay attorney's fees incurred by Mr. Hughes". A0103:17-A0104:2 and A0104:9-21 @Vol. 1. Counsel for Hughes was instructed to "submit an affidavit establishing the costs of attorney fees pertinent to the awards" by "no later than March 17, 2017." A0107:1-2 @Vol. 1 and 1/11/18 Brief @2:26-3:7.

In his March 15, 2017 Affidavit, counsel for Hughes, Justin Townsend, asserted that he is an "associate attorney", bills at a rate of "$275.00 per hour" and spent "107.55 hours" for which "attorneys' fees in the total amount of $29,576.25" were incurred relating to the sanctioned conduct. A0109 @Vol. 1 and 1/11/18 Brief @3:8-13.

Howard would oppose the Affidavit and move for reconsideration of the District Court's March 1st Order. A0114 and A0120 @Vol. 1. The Court would deny reconsideration and award Hughes sanctions "in the sum of $16,500, which shall be paid by Mr. Kozak." A0188 and A0192 @Vol. 1. In awarding sanctions, the District Court abused its discretion. 1/11/18 Brief @3:14-20.

NRCP 11 holds:

> ...
>
> (c) **Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below,

impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) **How Initiated.**

(A) **By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

...

(2) **Nature of Sanction; Limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

...

(d) **Applicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 16.1, 16.2 and 26 through 37. Sanctions for refusal to make discovery are governed by Rules 26(g) and 37.

According to the "**DRAFTER'S NOTES 2004 AMENDMENT**" under NRCP 11: "The rule is amended to conform to the federal rule, as amended in 1993, in its entirety." 1/11/18 Brief @3:21-5:4.

According to the "**ADVISORY COMMITTEE NOTES**" for the 1993 Amendment of FRCP 11: "New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37." "**Subdivision (d).** Rules 26(g) and 37 establish certification standards and sanctions that apply to all discovery disclosures, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result." 1/11/18 Brief @5:5-17.

Discussing subdivisions (b) and (c), the Advisory Committee Notes state: "The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court ..." "Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses." "That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position."

1/11/18 Brief @5:18-28.

"Since the purpose of Rule 11 sanctions is to deter rather than compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances … some or all of this payment [can] be made to those injured by the violation…. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement…. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses." Id. 1/11/18 Brief @6:1-13.

"Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely…. Given the 'safe harbor' provisions … a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)." Id. 1/11/18 Brief @6:19-25.

"Rule 11 motions … should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared … to intimidate an adversary into withdrawing contentions that are fairly debatable …" Id. 1/11/18 Brief @6:19-25.

"The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served.... To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion." Id. 1/11/18 Brief @6:26-7:8.

"Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion." Id. 1/11/18 Brief @7:9-14.

Citing the Advisory Committee Notes, the Court of Appeals in Barber v. Miller 146 F.3d 707 (9th 1998) reversed the district court's award of Rule 11 sanctions "because the motion for sanctions was not served upon Carlsen 21 days before filing". In reversing the award of sanctions, the Ninth Circuit opined: "There is no doubt that Carlsen's patent claim, upon which federal jurisdiction was founded, was not 'warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law.' See Fed.R.Civ.P. 11(b)(2). It is also abundantly clear that Imageware gave Carlsen repeated notice of that

deficiency. Unfortunately, for Imageware, however, it did not follow the procedure required by Rule 11(c)(1)(A) for an award of sanctions upon its motion." Id. at 709. 1/11/18 Brief @7:15-10:7.

In Radcliff v. Rainbow Construction Co. 254 F.3d 772 (9th 2001), a $75,000 award of Rule 11 sanctions was reversed. There, the district court concluded that sanctions were warranted due to its finding that in alleging a conspiracy between Rainbow and the District Attorney's Office, plaintiffs failed to identify allegations that were "'likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.'" Id. at 788. 1/11/18 Brief @11:7-14.

Opining that the district court abused its discretion when awarding the amount, the Ninth Circuit cited: "Rule 11(c)(1)(A) provides strict procedural requirements for the parties to follow when they move for sanctions under Rule 11." To be in compliance, Rainbow was required to serve its Rule 11 Motion on plaintiffs and await 21 days "before filing the motion with the court." However, "Rainbow did not follow this procedure. Rainbow filed its Rule 11 motion along with a motion for summary judgment with the court on August 18, 1998. Rainbow did not serve the plaintiffs with the motion in advance of filing and thus did not comply with the twenty-one day advance service provision. Having not followed this procedure, Rainbow was not entitled to obtain an award from the plaintiffs." Id. at 788-789. 1/11/18 Brief @11:15-12:3.

The Opinion would go on to note: "The district court concluded that, even though the defendants did not give twenty-one- day advance service to the plaintiffs, a 'literal application of the safe harbor provision' was unnecessary in this case. The court decided that because Rainbow had filed a Rule 11 motion in response to plaintiff's first amended complaint, and three months had passed between the motion and the court's order concerning sanctions, the plaintiffs and their attorneys had been given adequate notice and opportunity to withdraw the challenged allegation. As a result, the court ruled that Rule 11(c)(1)(A)'s 'safe harbor' provision had been satisfied, notwithstanding the lack of advanced service on the plaintiffs." The district court's analogy in this regard was firmly rejected on appeal. The Ninth Circuit would conclude: "Because Rainbow did not follow the mandatory service procedure of Rule 11(c)(1)(A), we reverse the award of sanctions." Id. at 789. 1/11/18 Brief @12:4-21.

"The Ninth Circuit strictly construes the safe harbor requirements of Rule 11(c)(1)(A) and considers the rule's requirements to be mandatory." Woods v. Truckee Meadows Water Authority 2007 WL 2264509 *3 (D.Nev. Aug. 6, 2007). "Rule 11 explicitly requires that a party filing a Rule 11 motion must serve the motion on the opposing party 21 days before filing the motion with the Court." O'Connell v. Smith 2008 WL 477875 *1 (D.Ariz. Feb. 19, 2008) (finding motion filed with court and served on defendants same day improper). A party's "notice of

intent in the form of letters or telephone conversations, under Ninth circuit jurisprudence, does not satisfy the procedural requirements of Rule 11's 'safe harbor' provisions." Lack of "prejudice is not the correct legal test under Rule 11 – the test is simply whether the moving party has served a 'filing ready' motion to the opposing party 21 or more days before it is filed with the court." Certain Underwriters at Lloyd's London v. Rauw 2007 WL 2729117 *5 (N.D.Cal. Sept. 18, 2007). '"The requirements of the rule are straightforward: The party seeking sanctions must serve the Rule 11 motion on the opposing party at least twenty-one days before filing the motion with the district court...It is clear from the language of the rule that it imposes mandatory obligations upon the party seeking sanctions, so that the failure to comply with the procedural requirements precludes the imposition of the requested sanctions....If those conditions are not satisfied, the Rule 11 motion for sanctions may not be filed with the district court. If a non-compliant motion nonetheless is filed with the court, the district court lacks authority to impose the requested sanctions."' Hohu v. Hatch 940 F.Supp.2d 1161, 1177 (N.D.Cal. 2013). 5/2/18 Reply Brief @2:8-3:16.

In the matter at hand, not only did the District Court err by sanctioning counsel Kozak in defiance of the "21 day" service mandate but it also erred by awarding sanctions for "discovery" conduct which is expressly exempted under NRCP 11(d). A0099 @Vol. 1 and 1/11/18 Brief @14:1-6.

Notably, the District Court **did not** award sanctions against Kozak under either NRCP 16.1, NRCP 37 or 10JDCR 25, nor could it have. NRCP 11(c)(1)(A) specifically prohibits any other requests from being joined in a Rule 11 Motion. Pursuant to NRCP 1 Scope of Rules: "These rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." 5/2/18 Reply Brief @1:19-22 and 5:4-8.

Regarding Howard's NRCP 60 Motion, Kozak filed it well within the "6 months" allowed under subsection (b). On January 12, 2016, Hughes filed his Notice of Entry of Order Granting Plaintiff's Motion to Dismiss Counterclaim. RP1058 @Vol. 1. On May 16, 2016, Howard moved to set aside the dismissal. RP1092 @Vol. 1. 5/2/18 Reply Brief @6:14-20.

In Socialist Republic of Romania v. Wildenstein & Company 147 F.R.D. 62 (S.D.N.Y. 1993), the Romanian government filed an FRCP 60(b) Motion to relieve it from a Judgment **entered 6 years earlier** which dismissed the action for failure to comply with discovery. Although the Court found the Motion "untimely", it found Rule 11 sanctions **were not** appropriate since no demonstration was made that ""after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or

a good faith argument for the extension, modification or reversal of existing law."' Id. at 66. 5/2/18 Reply Brief @6:21-7:4.

In Pease v. Pakhoed Corp. 980 F.2d 995 (5th 1993), Pease filed suit against his former employer Pakhoed alleging wrongful discharge and age discrimination. When Pakhoed moved for a more definite statement, Pease failed to respond. Subsequently, the District Court entered an Order requiring Pease to submit an Amended Complaint containing a more definite statement within thirty days. When Pease failed to respond to the Order, Pakhoed filed a Motion to Dismiss. Following a hearing that Pease's counsel failed to attend, the District Court dismissed the action with prejudice. **Three months later**, Pease hired new counsel who filed a Rule 60 Motion for Relief from Judgment. The District Court denied the Motion. Two months later, Pakhoed moved for sanctions claiming that Pease's Rule 60 Motion violated FRCP 11. After the District Court denied this Motion too, both parties appealed. In affirming the District Court's rulings, the Fifth Circuit Opinion relates that Pakhoed essentially argued "Pease's counsel failed to make sufficient pre-filing inquiries to support the allegations contained within Pease's Rule 60(b) Motion for Relief." According to Pakhoed, the Motion "was both factually and legally untenable and simply served to prop up a meritless claim." Although the Fifth agreed "with the district court that Pease's Rule 60(b) claims are unavailing", it concluded that "his contentions are not so abusive or frivolous as to violate Rule

11. At very least, Pease's arguments fall within the protective ambit of Rule 11's 'good faith argument' provision..." Id. at 1001. Although the District Court felt Howard's NRCP 60(b) Motion was delayed, it made no finding that the "contentions" in the Motion are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law". A0099 @Vol. 1 and 5/2/18 Reply Brief @7:5-8:4.

THE COURT OF APPEALS FAILED TO ADDRESS THE REASONABLENESS OF TOWNSEND'S FEES DIRECTLY INCURRED.

Even when acts are sanctionable, "'[a] district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct.... Proportionate sanctions are those which are "roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.'" Emerson v. Eighth Judicial District Court 127 Nev. 672, 681, 263 P.3d 224, 230 (2011). There, a $19,330 sanction against attorney Phillip Emerson was upheld for his improper statements to the jury **which resulted in a new trial**. The amount was based on various costs and attorney fees incurred during the original trial along with the cost of an expert witness who testified. Id. at 767, 226. 1/11/18 Brief @14:7-18.

By comparison, counsel Kozak was sanctioned $16,500 for filing an untimely Case Conference Report and filing a delayed NRCP 60(b) Motion which

was **well within the 6 month period allowed by Rule**. A 0103:21 @Vol. 1 and 1/11/18 Brief @14:19-24.

In Rhein Medical v. Koehler 889 F.Supp. 1511 (M.D.Fla. 1995), a $500 fine payable to the Clerk, half to be paid by Rhein and the other half by Rhein's attorney, was found to be an appropriate Rule 11 sanction for filings intended to delay and gain a strategic advantage. Although the Court in Kuhns v. CoreStates Financial 998 F.Supp. 573 (E.D.Pa. 1998) found the action barred by "res judicata", it found that the filing of the action **did not** warrant Rule 11 sanctions. "[T]he 1993 amendments are viewed to discourage imposition of monetary and other sanctions under the Rule where conduct does not reach the point of clear abuse." Id. at 577. 1/11/18 Brief @15:1-20.

Only under unusual circumstances should a court even direct a monetary sanction be paid to those injured by a Rule 11 violation. Myers v. Sessoms & Rogers, P.A. 781 F.Supp.2d 264, 271-272 (E.D.N.Car. 2011) (attorney sanctioned $250 amount).

When attorney fees are awarded for violation of Rule 11, the fees must be "reasonable". NRCP 11(c)(A)(2). "[W]hile it is within the trial court's discretion to determine the reasonable amount of attorney fees under a statute or rule, in exercising that discretion, the court must evaluate the factors set forth in *Brunzell v. Golden Gate National Bank.* Miller v. Wilfong 121 Nev. 619, 623, 119 P.3d

727, 730 (2005). The factors to be evaluated are as follows: "(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." Additionally, "good judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weight". Brunzell v. Golden Gate National Bank 85 Nev. 345, 349-350, 455 P.2d 31, 33 (1969). 1/11/18 Brief @13:21-16:14.

In Shuette v. Beazer Homes 121 Nev. 837, 124 P.3d 530 (2005), the Supreme Court reversed a Judgment on jury verdict and an award of attorney fees. In discussing attorney fees, the Opinion relates that a trial court "must" conduct its analysis of the amount in light of the factors enumerated in Brunzell. "[T]he result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination." Id. at 865, 549. 1/11/18 Brief @16:15-22.

When the district court fails to render findings of reasonableness under the Brunzell factors, it has abused its discretion. Argentina Consolidated Mining Co.

v. Jolley Urga Wirth Woodbury & Standish 216 P.3d 779, 788 (Nev. 2009). A district court that fails to provide analysis or specific findings regarding the reasonableness of the fees awarded has abused its discretion. Barney v. Mt. Rose Heating & Air Conditioning 192 P.3d 730, 732 (Nev. 2008). A mere recital by the district court that it has considered the "required factors" does not "insulate the order from reversal." Harmon v. San Diego County 664 F.2d 770, 772 (9th 1981) (finding district court's Order, which related only number of hours expended and applicable rate of pay per hour, was insufficient in that it did not relate application of required factors). The district court must "demonstrate that it considered the required factors, and the award must be supported by substantial evidence." Logan v. Abe 350 P.3d 1139, 1143 (Nev. 2015). In Songer v. Delucchi 2016 WL 3488644 (unpublished Supreme Court of Nevada June 23, 2016), it was concluded "that the district court abused its discretion by failing to adequately address the *Brunzell* factors and by failing to provide sufficient reasoning and findings in support of its decision to award attorney fees.... [T]he record on appeal in this case does not clearly demonstrate that the district court considered the factors or include evidence that clearly supports the amount of fees awarded." Id. at *1 (citing Logan). 1/11/18 Brief @16:24-17:22.

"To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's

own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed reasonable, and is referred to – for convenience – as the prevailing market rate." Blum v. Stenson 104 S.Ct. 1541, 1547, 465 U.S. 886, 895 fn. 11 (1984). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.... The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with prevailing market rates.... Satisfactory evidence at a minimum is more than the affidavit of the attorney performing the work." Norman v. Housing Authority 836 F.2d 1292, 1299 (11th 1988). "[F]ee counsel bears the burden in the first instance of supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate." Id. at 1303. "The court's order on attorney's fees must allow meaningful review – the district court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation." Id. at 1304. 1/11/18 Brief @17:24-18:20.

In the matter at hand, Hughes' counsel Justin Townsend did not address the Brunzell factors nor did he provide any evidence of the "prevailing market rate". A 0109 @Vol. 1. While granting a $16,500 amount in sanctions, the District Court

failed to articulate how it arrived at the figure. Although it stated, in a conclusory manner, that it "considered" the Brunzell factors, the District Court failed to provide sufficient reasoning and findings to support the amount awarded. The District Court failed to address the "prevailing market rate". A 0192 @Vol. 1. Apparently, the District Court determined the amount in a capricious and arbitrary manner. 1/11/18 Brief @18:21-19:4.

Per NRCP 11(c)(2), a court may order "payment to the movant of some or all of the **reasonable attorneys' fees** and other expenses **incurred as a direct result of the violation**." (Emphasis added). In affirming the $16,500 sanction, the Court of Appeals failed to address the "reasonableness" factors under Brunzell or the "prevailing rate". No explanation has been given as to how a $16,500 amount was **incurred as a direct result of** filing an untimely Case Conference Report and filing a delayed NRCP 60(b) Motion which was **well within the 6 month period allowed by Rule.**

CONCLUSION

As shown, the Order awarding sanctions has no basis in law and reversal is warranted.

CERTIFICATE OF COMPLIANCE

I certify that I have read this Petition and that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

I certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 40(b)(3). This Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman and contains 4,362 words when applying the exemptions of NRAP 32(a)(7)(C).

Pursuant to NRS 239B.030, the undersigned certifies no Social Security numbers are contained in this document.

Dated this 29th day of June 2018.

Submitted by:

Charles R. Kozak, Esq.
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Petitioner appearing pro se

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June 2018, I placed in a sealed envelope and mailed by U.S. Postal Service, first-class, and postage prepaid a copy of **Kozak's NRAP 40 Petition for Rehearing** to the following:

Justin Townsend, Esq.
Allison MacKenzie, Ltd.
Attorneys for Shaughnan L. Hughes
402 North Division Street
Carson City, NV 89703

Judge Thomas L. Stockard
Tenth Judicial District Court
73 North Maine Street
Suite B
Fallon, NV 89406

Dedra Sonne
Employee of Kozak & Associates, LLC

DOCUMENT 3

DOCUMENT 3

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES R. KOZAK, ESQ.,
Petitioner,
vs.
THE TENTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CHURCHILL; AND THE HONORABLE THOMAS L. STOCKARD, DISTRICT JUDGE,
Respondents,
and
SHAUGHNAN L. HUGHES; AND JUSTIN M. TOWNSEND, ESQ.,
Real Parties in Interest.

No. 74857

FILED

AUG 24 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Thomas L. Stockard, District Judge
Kozak & Associates, LLC
Allison MacKenzie, Ltd.
Churchill County Clerk

18-901897