IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES R. KOZAK, ESQ.,
Petitioner,

vs.

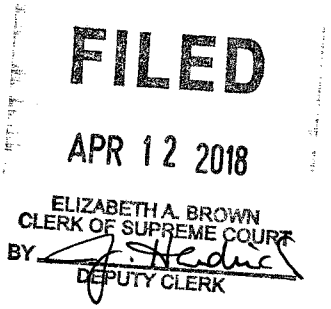
THE TENTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CHURCHILL; AND THE HONORABLE THOMAS L. STOCKARD, DISTRICT JUDGE,
Respondents,

and

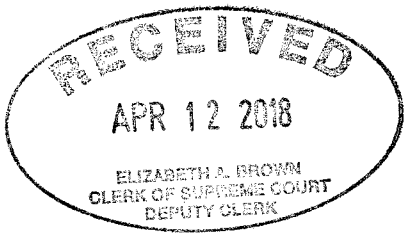
SHAUGHNAN L. HUGHES; AND JUSTIN M. TOWNSEND, ESQ.,
Real Parties in Interest.
_____/

Case No. 74857

District Court Case No. 15-10DC-0876



ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS



JUSTIN M. TOWNSEND, ESQ.
Nevada State Bar No. 12293
ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703-4168
Telephone: (775) 687-0202
Facsimile: (775) 882-7918
jtownsend@allisonmackenzie.com

Attorneys for Real Parties in Interest

18-900743

NRAP 26.1 DISCLOSURE STATEMENT

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 judges of this court may evaluate possible disqualification or recusal.

None.

DATED this 12th day of April, 2018.

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
(775) 687-0202

By: _____
JUSTIN M. TOWNSEND, NSB 12293
jtownsend@allisonmackenzie.com

Attorneys for Real Parties in Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

I.

STATEMENT OF ISSUES

1. The District Court did not err in sanctioning Petitioner, CHARLES R. KOZAK, ESQ. ("KOZAK"), where KOZAK failed to timely file and/or serve several documents, including without limitation virtually every document required by NRCP 16.1 even after repeated reminders to do so by the District Court and by real party in interest, JUSTIN M. TOWNSEND, ESQ ("TOWNSEND").

2. The District Court did not err in concluding that the safe harbor provisions of NRCP 11 had been afforded to KOZAK prior to submission to the District Court of the August 26, 2016 Motion for Sanctions where (a) KOZAK had been informed during a May 17, 2016 pretrial conference that real party in interest, SHAUGHNAN L. HUGHES ("HUGHES"), would be seeking sanctions for KOZAK's repeated and ongoing failures to comply with NRCP 16.1; (b) KOZAK filed an individual Case Conference Report for his client more than ten months late despite repeated verbal and written reminders to file it by the District Court and by TOWNSEND; and (c) the August 26, 2016 Motion for Sanctions was not submitted to the District Court until the filing of a Request for Submission on September 19, 2016, more than twenty-one days after service of the same on KOZAK and his client.

3. The District Court did not err in sanctioning KOZAK, even if the safe harbor provisions of NRCP 11 were not followed, where HUGHES sought sanctions pursuant to NRCP 26 and 37 and Tenth Judicial District Court Rules ("10JDCR") 8(6) and 25, none of which are subject to the safe harbor provisions of NRCP 11.

4. The District Court did not err in sanctioning KOZAK, even if the safe harbor provisions of NRCP 11 were not followed, where much of the conduct for which he was sanctioned involved the late filing of documents, which cannot be cured.

5. The District Court did not err in sanctioning KOZAK where KOZAK has yet to cure much of the conduct for which he was sanctioned.

II.

STATEMENT OF FACTS

On July 27, 2015, HUGHES, pursuant to the provisions of NRS Chapter 39, filed an action for partition of certain real property located at 11633 Fulkerson Road, Fallon, Nevada 89406 (the "Property"), title to which is held jointly by HUGHES and Elizabeth Howard ("Howard"), the Defendant in the underlying District Court matter. RPI003-006. A summons was issued for Howard on that same date and was thereafter delivered with a copy of the Complaint to the Churchill County Sheriff's Office for service thereof on Howard. RPI001-002. The Sheriff's Office made several attempts to serve Howard between August 5, 2015 and September 15, 2015. The Sheriff's Office was unable to serve her but did leave cards at the Property, which is where she resided, requesting that she contact the Sheriff's Office. She never did. A0074. On September 15, 2015, the Sheriff's Office provided to HUGHES' counsel a Return of Non-Service. RPI007.[1]

On September 21, 2015, TOWNSEND filed an Affidavit in Support of Service by Publication of Summons. RPI008-009. On September 23, 2015, the District Court issued an Order Granting Publication of Summons. RPI010-011. On November 2, 2015, TOWNSEND filed a Proof of Publication in which it was

[1] Real Parties in Interest submit herewith an appendix entitled "Appendix of Real Parties in Interest" with pages bates stamped RPI001 to RPI377.

noted that the Summons was published in the Lahontan Valley News commencing on September 30, 2015 and ending on October 21, 2015. RPI012-013. Sometime in early October, TOWNSEND received a call from an attorney claiming to represent Howard. The attorney, who said she was in Las Vegas, requested information about the litigation. In response, TOWNSEND asked that she enter an appearance so that the matter could move forward. That attorney never entered an appearance nor did she contact TOWNSEND again. A0075.

A few days later, still prior to the completion of service by publication, KOZAK contacted TOWNSEND and noted that he had been retained to represent Howard. KOZAK and TOWNSEND briefly discussed the matter and TOWNSEND requested that KOZAK enter an appearance so this matter could proceed. A0075. He did not enter an appearance at that time. In fact, neither KOZAK nor Howard filed anything in this matter prior to the deadline to file a pleading in response to the Complaint, which was due no later than November 17, 2015. On November 17, 2015, TOWNSEND verified with the District Court that nothing had been filed. Upon learning that nothing had been filed, TOWNSEND prepared and sent a letter to KOZAK with a Notice of Intent to Take Default if no responsive pleading was filed by Friday, November 20, 2015. RPI014-015.

Other than any inference this Court may make about Howard's evasion of service, this is the first instance in which Howard and KOZAK clearly failed to

adhere to applicable rules, specifically NRCP 12, which requires the filing of a responsive pleading within 20 days after being served with the summons and complaint. It is also worth noting that this was KOZAK's and Howard's first opportunity to comply with the rules in this matter. It would not, however, be their last time to disregard the rules.

Just after midnight on Saturday, November 21, 2015, KOZAK faxed to TOWNSEND a copy of Defendant's Answer and Counterclaim. RPI016-029. The pleading was not actually filed until November 24, 2015, four days late.

On December 10, 2015, HUGHES timely filed a Motion to Dismiss; Motion to Strike, noting that Howard had failed to plead fraud with particularity as required by NRCP 9(b) and had failed to plead any other claim for which relief can be granted as required by NRCP 12(b)(5). RPI030-049. HUGHES also moved to strike all allegations of a scandalous, immaterial, or impertinent nature pursuant to NRCP 12(f), in which he noted the numerous allegations contained in the Counterclaim that were designed to denigrate HUGHES and his family and were immaterial to the claims Howard had alleged. HUGHES also posited in his Motion to Dismiss that the motive for filing the Counterclaim was to delay these proceedings and to drive up HUGHES' litigation costs. Drawing inferences from all that Howard and KOZAK did to utterly disregard the rules time and time again

as shown herein, which in reality delayed the proceedings, HUGHES' early concerns regarding Howard's motives have been proven to be accurate.

Service of HUGHES' Motion to Dismiss; Motion to Strike was accomplished by placing a true and correct copy thereof in a sealed postage prepaid envelope in the United States mail in Carson City, Nevada on December 10, 2015 addressed to KOZAK pursuant to NRCP (5)(b)(2)(B). RPI042. According to 10JDCR 15(9), an opposition to a motion is due "[w]ithin 10 days after the service of the motion." The date of service and intermediate Saturdays, Sundays, and legal holidays are not counted when computing the time for filing the opposition pursuant to 10JDCR 4(1). In addition, 3 calendar days are added to the prescribed period for service by mail. 10JDCR 4(3). By the foregoing calculations, Howard's Opposition was due Sunday, December 27, 2015. According to 10JDCR 4(2), Defendant would not be required to file on a Sunday, but should have filed no later than the following judicial day, which was Monday, December 28, 2015.

On Tuesday, December 29, 2015, TOWNSEND confirmed with the District Court that no Opposition had been filed and on that date HUGHES filed a Reply to the Failure to Oppose Motion to Dismiss; Motion to Strike together with a Request for Submission. RPI050-053. The aforementioned Reply was served on Howard by placing a true and correct copy thereof in the mail addressed to KOZAK.

RPI053. On January 7, 2016, the District Court, having not received any opposition to HUGHES' Motion to Dismiss; Motion to Strike, entered an Order Granting the Motion to Dismiss; Motion to Strike in its entirety. RPI056-057. On January 11, 2016, HUGHES filed a Notice of Entry of the aforementioned Order and served the same on Howard by placing a true and correct copy thereof in the mail addressed to KOZAK. RPI058-063.

On December 14, 2015, TOWNSEND contacted KOZAK and suggested that the NRCP 16.1 early case conference be continued for a period of up to 90 days as allowed by NRCP 16.1, pending the outcome of HUGHES' Motion to Dismiss. KOZAK agreed. TOWNSEND followed this up with a confirming email dated December 14, 2015, to which KOZAK never responded. A0031; A0075.

On or about February 4, 2016, after the District Court had granted HUGHES' Motion to Dismiss, TOWNSEND called KOZAK to arrange the NRCP 16.1 early case conference. During this call, TOWNSEND and KOZAK agreed on a date for a telephonic early case conference. A0075. On February 4, 2016, HUGHES also served Howard with a Notice of Early Case Conference and Request for Production of Documents. RPI064-066.

The early case conference was held telephonically on February 16, 2016. When TOWNSEND began speaking about the procedures for this matter as the same are set forth in NRS Chapter 39, KOZAK stated to him that he had never

even looked at NRS Chapter 39. When TOWNSEND suggested to KOZAK that the case conference was going to be difficult if KOZAK was not familiar with the statutes that govern this dispute and the procedures for resolving the same, KOZAK offered nothing but a chuckle. A0075. Needless to say, the case management conference was not as productive as it should have been had KOZAK followed NRCP 16.1(b)(1), which mandates that the attorneys for the parties attend the early case conference to "confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case." KOZAK did not take the early case conference seriously and had made no inquiry whatsoever of NRS Chapter 39 in preparation for the conference. Therefore, a meaningful consideration of the nature and basis of HUGHES' partition claim during the early case conference was not possible.

NRCP 16.1(a)(1) mandates that the parties provide certain initial disclosures "at or within 14 days of the [early case] conference." Failure to abide by this rule is sanctionable under the specific sanctions provided for in NRCP 37(c)(1) in addition to those provided in NRCP 11 and 10JDCR 25. NRCP 37(c)(1) provides that the District Court may prohibit the violating party from using at trial any material not timely or properly disclosed pursuant to NRCP 16.1.

As noted above, HUGHES served on Howard a Notice of Early Case Conference and Request for Production of Documents. RPI064-066. The Request

for Production of Documents noted the deadline to provide the initial disclosures required by NRCP 16.1(a)(1), which was 14 days after the February 16, 2016 early case conference, or March 1, 2016.

NRCP 16.1 also provides that "[w]ithin 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, **each party must serve and file a case conference report**." (emphasis added). Therefore, the case conference report was due on or before March 14, 2016.

On March 1, 2016, HUGHES timely served Howard with his NRCP 16.1 initial disclosures. RPI067-071. TOWNSEND also provided to KOZAK on March 1, 2016 a draft Joint Case Conference Report. On the evening of March 7, 2016, KOZAK's office sent via email to TOWNSEND's office a revised draft Joint Case Conference Report and stated that "[t]he initial disclosure will be sent tomorrow, 3/8/16." A0037. The initial disclosures were not sent as promised on March 8, 2016.

Indeed, at a pretrial conference held on May 17, 2016 the District Court, on learning that Howard had not yet served HUGHES with her initial disclosures, ordered KOZAK to serve the undersigned with the same no later than May 19, 2016 via Reno-Carson Messenger Service ("RCMS"). RPI118; RPI136-137. When RCMS came to TOWNSEND's office on May 19, 2016 for the last time that

day, no initial disclosures were delivered. TOWNSEND sent an email to KOZAK asking for the status of the disclosures and KOZAK responded that he "was under the impression they went out [on the 19th]". A0039-0040. The initial disclosures were finally received by TOWNSEND on May 20, 2016, nearly three months after they were due. RPI170-180.

As it concerns the draft joint case conference report, KOZAK's May 7, 2016, revisions included two changes that TOWNSEND could not agree to, including an assertion that Howard had demanded a jury trial, which was simply untrue. On March 8, 2016, TOWNSEND sent an email to KOZAK in which he outlined his concerns with only two of KOZAK's revisions and noted that all other revisions were accepted. Whereas the case conference report was due to be filed on Monday, March 14, 2016, TOWNSEND requested that KOZAK respond no later than Friday, March 11, 2016. A0042. He never responded, so HUGHES sent his individual Case Conference Report on March 14, 2016 to be filed with the Court. A copy of HUGHES' Case Conference Report was served on Howard on the same day. RPI072-088.

At the May 17, 2016 pretrial conference, which was requested by HUGHES as a means of raising before the District Court the many issues with KOZAK's failures to follow the rules, the District Court noted that it had not received a case conference report from Howard. RPI111-112. TOWNSEND also noted that he

had not been served with a copy of a case conference report from Howard. KOZAK insisted at the pretrial conference that he had filed Howard's individual Case Conference Report, so the District Court requested that KOZAK have his office fax or email proof of the same. RPI119-121. In response thereto, KOZAK's office emailed a copy of Howard's Case Conference Report, which was not file-stamped, a copy of which was provided by the District Court to TOWNSEND during the pretrial conference. A0044-0054. At the May 17, 2016 pretrial conference was the first time the District Court or TOWNSEND had seen Howard's Case Conference Report, more than two months after it was due.

When TOWNSEND called KOZAK on February 16, 2016 for the telephonic case management conference, the telephone was answered by Nan Adams, a secretary at KOZAK's law firm, who asked if HUGHES or TOWNSEND had not received an opposition to HUGHES' Motion to Dismiss. TOWNSEND confirmed in no uncertain terms that no opposition had ever been received by his office and indicated his belief and understanding that the District Court had not received any opposition either. TOWNSEND was then transferred to KOZAK, who again asked if an opposition had ever been received. TOWNSEND reiterated directly to KOZAK that no opposition had ever been received. This was the first time KOZAK or anybody associated with Howard had mentioned to TOWNSEND a claim that an opposition had been filed. A0076.

Exactly three months later, on May 16, 2016, Howard filed a Motion to Set Aside Dismissal of Counterclaim, which alleged that Howard had filed an Opposition to HUGHES' Motion to Dismiss on December 30, 2016, but that it was "never filed by this Court" due to "post office mistake or being misplaced somewhere at the Court." RPI092-108. Howard also claimed in that Motion that "Mr. Hughes' counsel acknowledged to Ms. Howard's counsel that he had received the Opposition; however, he noted that it was not a file-stamped copy." RPI096. The assertion about TOWNSEND acknowledging receipt of an Opposition to the Motion to Dismiss is nothing short of a lie in violation of NRCP 11(b). At no time did TOWNSEND acknowledge to KOZAK that he had received a copy of an Opposition because no such Opposition was ever filed with the District Court or served on HUGHES. A0076. The assertions about the District Court and/or post office losing the Opposition are dubious as well.

Further, the Motion to Set Aside Dismissal was styled as a Notice of Motion, which was filed on May 16, 2016, one day before the May 17, 2016 pretrial conference. The Notice of Motion purported to give notice to HUGHES that a hearing on the Motion to Set Aside Dismissal would occur on May 17, 2016. The notice was insufficient and in violation of NRCP 6(d), which requires a minimum of 5 days' notice prior to notice of a hearing on a motion.

Howard's Motion to Set Aside Dismissal was based on a contention that an Opposition was mailed to the District Court, but that the District Court or the post office must have lost it. Evidence of the mailing was a corner of an envelope bearing a stamp. RPI108. The remainder of the envelope, which would have shown the addressee, was not provided. In the May 17, 2016 Pretrial Conference, the District Court noted the insufficiency of the evidence and, on that basis, verbally ordered supplemental information. RPI114-117; 120-121; 126-129; 137.

The District Court followed this up, on May 19, 2016, by issuing a briefing schedule with regard to Howard's Motion to Set Aside Dismissal in which Howard was ordered to supplement her Motion with additional evidence no later than July 8, 2016. RPI181-183. Instead of filing a supplement, Howard filed on or about June 20, 2016, a pleading styled as an Opposition to HUGHES' Motion to Dismiss, which was not received by TOWNSEND until June 28, 2016. RPI184-199. On the day TOWNSEND received the aforementioned Opposition, he called KOZAK to inquire as to why Howard was filing an Opposition to a Motion six months after it was due and more than five months after the Motion had already been granted. KOZAK asserted that the June 20, 2016 Opposition was filed in response to the May 19, 2016 Order. TOWNSEND noted the May 19, 2016 Order required a supplement to the May 17, 2016 Motion to Set Aside Dismissal and

KOZAK responded that the June 20, 2016 Opposition was the same thing as a supplement to the Motion to Set Aside Dismissal. A0076.

On June 29, 2016, TOWNSEND sent an email to KOZAK in which he demanded that the June 20, 2016 Opposition be withdrawn and that a filing responsive to the Court's May 19, 2016 Order be filed in its place by the deadline set therein. A0056; A0076. On or about July 7, 2016, Howard withdrew the June 20, 2016 Opposition and filed a Supplement to Motion to Set Aside Dismissal, which failed to address the District Court's concerns with the original Motion. RPI200-219.

The Court's May 19, 2016 Order provided that HUGHES had until July 27, 2016 to file an Opposition to the Motion to Set Aside Dismissal and any supplements thereto. HUGHES filed an Opposition on July 27, 2016. RPI220-258. The May 19, 2016 Order provided that Howard then had until August 5, 2016 to file a Reply. No Reply was ever filed.

As noted above, the Motion to Set Aside Dismissal was filed one day before the previously scheduled pretrial conference. At the pretrial conference, KOZAK stood before the Court and insisted that he had (a) filed an Opposition to Motion to Dismiss on December 30, 2016; (b) served HUGHES with a copy of an Opposition to Motion to Dismiss on December 30, 2016; (c) filed a case conference report with the Court; (d) served HUGHES with a copy of a case conference report; (e)

served HUGHES with the initial disclosures required by NRCP 16.1; and (f) that his office had proof of filing and/or serving each of these documents, including without limitation, having in his possession file-stamped copies of one or more of these documents. RPI268-349. The District Court briefly recessed the pretrial conference and ordered that KOZAK have his office fax or email the proof he claimed to have. He was unable to do so. RPI126-130; 134-137. Indeed, all that KOZAK's office provided to the Court during the pretrial conference was the email string and unfiled copy of Howard's individual Case Conference Report noted above. To date, KOZAK has failed to provide any evidence whatsoever of any of the actions listed above. There is no file-stamped Opposition to Motion to Dismiss or case conference report. There is no evidence that he had previously served any of the above-referenced documents on HUGHES or his counsel. The fact of the matter is that KOZAK misrepresented actions he has taken in this matter. His representations to the Court at the May 17, 2016 pretrial conference were made in bad faith in violation of 10JDCR 8(6) and for improper purposes of delay, harassment, or perhaps concealment of earlier rules violations that conceivably affected his client's case, all of which are violations of NRCP 11(b)(1). One can only guess what his motives for doing so are. Nevertheless, these actions caused delays to these proceedings and HUGHES requested sanctions, in part, to deter further actions of this type. A0001-0015. In a

September 7, 2016 Order denying Howard's Motion to Set Aside the Dismissal, the District Court specifically noted KOZAK's lack of candor to the tribunal. RPI262-264.

During the May 17, 2016 pretrial conference, KOZAK was instructed to file Howard's individual Case Conference Report and that the emailed copy received by the District Court that day was not suitable to be filed as it was not an original. RPI156. In its September 7, 2016 Order Denying Howard's Motion for Summary Judgment and Motion to Set Aside Dismissal of Counterclaim, the District Court reiterated that Howard's individual Case Conference Report was not on file. RPI263. In his August 26, 2016 Motion for Sanctions, HUGHES noted the continuing absence of Howard's individual Case Conference Report. A0008-0009. In his September 21, 2016 Reply to Howard's Opposition of the Motion for Sanctions, HUGHES reiterated that Howard's Case Conference Report was still not on file with the District Court. A0094-0095. On December 7, 2016, KOZAK took HUGHES' deposition. TOWNSEND made an objection on the record that HOWARD was not allowed to conduct any discovery because she had not yet filed her individual Case Conference Report. RPI272-273. On December 21, 2016, TOWNSEND sent a letter to KOZAK in response to written discovery requests and reiterated his objection that HOWARD was not entitled to conduct discovery because her Case Conference Report was still not on file.

RPI350-351. Despite repeated reminders over a period of several months, KOZAK did not file HOWARD's Case Conference Report until January 3, 2017, ten months after it was due and just one month before trial. RPI352-377. The report filed by KOZAK differed from the copy of an unfiled report emailed to the District Court during the May 17, 2016 Pretrial Conference.

KOZAK exacerbated his sanctionable conduct by lying to the District Court in HOWARD's September 9, 2016 Opposition to Motion for Sanctions about conversations with TOWNSEND that never occurred. A0094-0096.

To date, KOZAK has not cured any of his sanctionable conduct except to serve HOWARD's initial disclosures two months late and to file HOWARD's individual Case Conference Report ten months late and after several ignored reminders from the Court and from TOWNSEND. KOZAK has not retracted any of his lies to the Court, nor has he offered any apology therefor.

III.

SUMMARY OF ARGUMENT

A. HUGHES' Motion for Sanctions complied with the safe harbor provisions of NRCP 11.

KOZAK's Petition for a Writ improperly relies entirely on federal case law interpreting FRCP 11. Reliance on federal case law of a federal rule is improper where there is Nevada case law directly on point, which confirms that HUGHES' Motion for Sanctions complied with the safe harbor provisions of NRCP 11.

Further, there is Nevada case law standing for the proposition that a party opposing a motion for sanctions waives the right to assert the safe harbor provisions upon filing an opposition to a motion for sanctions before the safe harbor period runs.

B. Sanctions against KOZAK were within sound discretion of District Court.

KOZAK failed to meet virtually every deadline for the first several months of this lawsuit and in the case of NRCP 16.1 persisted in failing to meet deadlines until the eve of trial despite several opportunities to cure his behavior earlier, placing HUGHES at a disadvantage in preparing for trial. KOZAK lied to the District Court on multiple occasions and has not retracted any of those lies. He has not cured his sanctionable actions despite every opportunity to do so. Overturning the District Court's sanctions of KOZAK would work manifest injustice to HUGHES.

C. Attorneys' fees as sanctions were warranted under NRCP 11, 26(g), and 37.

KOZAK argues that sanctions under NRCP 11 are not appropriate for discovery failures per NRCP 11(d). However, attorneys' fees as a sanction are appropriate for discovery failures under NRCP 26(g) and 37. HUGHES' Motion to Dismiss sought sanctions under NRCP 11, 26, 37, and pertinent local district court rules.

D. The District Court analyzed the *Brunzell* factors and found that they had been met in awarding a reasonable fee to HUGHES.

KOZAK asserts that the District Court failed to fully analyze the factors applicable to determining a reasonable award of fees. KOZAK's argument relies almost entirely on decisions outside of Nevada. Moreover, the District Court's March 1, 2017 and April 24, 2017 Orders fully examined the required factors.

IV.

STANDARD OF REVIEW

The decision to award attorneys' fees as a sanction pursuant to NRCP 11 is within the District Court's sound discretion. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280 (2006). An award of attorneys' fees as a sanction will not be overturned absent manifest abuse of the broad discretion left to the District Court in this area. *Id.*

In the context of a writ of mandamus proceeding, the appellate court reviews a decision to impose NRCP 11 sanctions under a manifest abuse of discretion standard, rather than under the abuse of discretion standard. *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court ex rel. County of Washoe*, 116 Nev. 629, 5 P.3d 562 (2000); *see also Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). Manifest abuse of discretion is more than mere

error in judgment; but is a clearly erroneous interpretation or application of the law. *State v. Dist. Ct.*, 127 Nev. 927, 267 P.3d 777 (2011).

V.

ARGUMENT

A. HUGHES' Motion for Sanctions complied with the safe harbor provisions of NRCP 11.

NRCP 11 reads in pertinent part as follows:

> A motion for sanctions...shall be served as provided in NRCP 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion...the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

KOZAK's Petition is based entirely on federal case law interpreting FRCP 11, which is substantially identical to NRCP 11. His reliance on federal law is misplaced, however, particularly where pertinent local procedural rules differ substantially from federal procedure and where there is Nevada case law on point.

For instance, 10JDCR 15(15) provides that the District Court "is ordinarily unaware of the existence of any contested motion until the filing of a 'Request for Submission,'" which may not ordinarily be filed until at least ten judicial days after service of the motion if no opposition is filed and fifteen judicial days if an opposition is filed. There does not appear to be any similar submission procedure in any of the federal districts/circuits in which the cases cited by KOZAK are

applicable. Thus, where a motion is immediately presented to a federal district judge or panel upon filing, in the Tenth Judicial District of Nevada, a motion is not presented to the judge until the filing of a Request for Submission.

Indeed, in practice, a motion for sanctions filed in a Nevada jurisdiction requiring a request for submission should not be submitted until the twenty-one day safe harbor period has passed. An opposition should not be filed until the safe harbor period has passed (allowing the opposing party first an opportunity to cure his behavior). In fact, the Nevada Supreme Court has held that the filing of an opposition before the safe harbor period has lapsed operates as a waiver of the right to assert a violation of the safe harbor provision. *Garmong v. Rogney and Sons Construction*, 2016 WL 1108454, Docket No. 68255, March 18, 2016, unpublished decision (Nev. 2016) (holding that the party opposing sanctions "waived his right to rely on NRCP 11's safe harbor provision by virtue of filing his opposition to [the NRCP 11] motion before the safe-harbor period expired").

In this case, the Motion for Sanctions was served on HOWARD on August 25, 2016. A0015. Twenty-one days therefrom is September 15, 2016. HOWARD's Opposition was filed on September 9, 2016. A Reply and a Request for Submission were filed on September 19, 2016. A0098. Therefore, the Motion for Sanctions was first presented to the District Court after the twenty-one day safe harbor period had lapsed. Further, in applying the authority set forth in *Garmong*,

KOZAK waived the right to rely on the NRCP 11 safe harbor provision by (a) not curing his sanctionable behavior and (b) filing the Opposition before the safe harbor period had ended.

B. The District Court was well within its sound discretion to sanction KOZAK.

KOZAK's entire Petition is based on an argument that HUGHES failed to comply with the NRCP 11 safe harbor in which he could have cured his sanctionable behavior. Not once, however, does KOZAK assert that he has cured the behavior for which he was sanctioned. Indeed, he has not cured it.

From the outset of this case, KOZAK has failed at nearly every turn to comply with the rules. His very first action in this case was to file his client's Answer and Counterclaim four days late. From there, he failed to oppose a timely filed Motion to Dismiss and then lied to the District Court about filing one. He also lied to the District Court about a conversation he claimed to have with TOWNSEND wherein TOWNSEND allegedly affirmed receiving such an opposition when that was clearly false. He failed to timely serve his client's initial disclosures and lied to the District Court about that as well. The initial disclosures were eventually served two months late. He failed to timely file his client's individual Case Conference Report for more than ten months despite repeated reminders from the District Court and from TOWNSEND that the report was not yet on file. Not once has he acknowledged fault for any of this. Instead, he has

attempted to shift blame to his secretary or, in some cases, he has simply ignored the behavior.

His reliance on the NRCP 11 safe harbor is a farce as he has not demonstrated any intent to actually cure any of the behavior for which he was sanctioned. The reality is that HUGHES (and TOWNSEND) continue to dig a deeper financial hole with each new filing presented by KOZAK, including this Petition for Writ of Mandamus. The reality is that $16,500 is simply not enough to make HUGHES whole. Nevertheless, the sanctions imposed by the District Court were well within its sound discretion and well justified by KOZAK's multiple rules violations in this case.

C. HUGHES sought and the Court appropriately awarded sanctions pursuant to NRCP 11, 26(g) and 37.

KOZAK argues that sanctions under NRCP 11 were inappropriate to the extent they were issued for failures to follow discovery rules. NRCP 11(d) provides that sanctions under NRCP 11 "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." As a preliminary matter, the District Court sanctioned KOZAK for several reasons, including his demonstrated "lack of candor" and not only for his failures to provide required disclosures. A0103. Nevertheless, the rules governing discovery provide for sanctions as well and were cited by HUGHES in his Motion for Sanctions.

NRCP 26(g) provides that an attorney's failure to provide appropriate disclosures thereunder subjects him to sanctions, including an order to pay reasonable attorneys' fees incurred as a result thereof. NRCP 37(c) similarly provides for sanctions, including payment of attorneys' fees, for the failure to provide required disclosures.

Although the District Court did not cite NRCP 26 or 37 in its sanctions Orders, HUGHES did cite NRCP 37 and the Orders granting HUGHES' Motion for Sanctions should be read as approving the arguments and citations made in said Motion. Alternatively, this Court should uphold the District Court's sanctions Orders on the basis that it reached the right result even if it did not specifically cite all of the proper authorities. *See Wyatt v. State*, 86 Nev. 294, 468 P.2d 338 (1970).

D. The District Court analyzed the *Brunzell* factors in determining a reasonable award of attorneys' fees.

KOZAK argues that the District Court failed to analyze 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, (2) the character of the work to be done, (3) the work actually performed, and (4) the result. The District Court, in its April 24, 2017 Order noted specifically that TOWNSEND's "ability, training and education facilitated his ability to achieve a favorable result for his client." A0193-0194. It noted further that TOWNSEND "carried the unanticipated burden of having to compensate for [KOZAK's] lack of preparation and diligence on

several occasions" and that he "was diligent in preserving his client's interests." In an Affidavit filed following the granting in part of the Motion for Sanctions, TOWNSEND explained in detail the work he had performed and the District Court stated that it reviewed and considered that detail in determining a reasonable sanctions award. A0061-0073; A109-112; A0194. The District Court satisfied its obligations under *Brunzell*.

KOZAK also argues that TOWNSEND failed to prove that his hourly rate was prevailing market rate. This argument was not raised below and is therefore waived. *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012). Further, KOZAK did not dispute TOWNSEND's rate below and so, per 10JDCR 15(11), consented to approval of the rate provided by TOWNSEND.

VI.

CONCLUSION

For the reasons stated herein, HUGHES respectfully requests that the District Court's March 1, 2017 and April 24, 2017 Orders be affirmed.

DATED this 12th day of April, 2018.

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
(775) 687-0202

By: _____
JUSTIN M. TOWNSEND, NSB 12293
jtownsend@allisonmackenzie.com
Attorneys for Real Parties in Interest

CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this Answering Brief of Real Parties in Interest 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 Microsoft Office Word 2007 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 or more, and contains 5,361 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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

DATED this 12th day of April, 2018.

ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, NV 89703
(775) 687-0202

By: _____
JUSTIN M. TOWNSEND, NSB 12293
jtownsend@allisonmackenzie.com

Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

✓ First Class U.S. Mail as follows:

Charles R. Kozak, Esq.
Kozak & Associates, LLC
3100 Mill Street, Suite 115
Reno, NV 89502

Honorable Thomas L. Stockard, District Judge
c/o Sue Sevon, Court Administrator
Tenth Judicial District Court
73 North Maine Street, Suite B
Fallon, NV 89406

DATED this 12th day of April, 2018.

Nancy Fontenot

NANCY FONTENOT

4821-3666-5950, v. 3