CASE NO. 76636

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONETTE PATUSH, Appellant

v.

LAS VEGAS BISTRO, LLC, Respondent

APPEAL FROM THE
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

APPELLANT'S REPLY BRIEF

James P. Kemp, Esq.
Nevada Bar No. 6375
KEMP & KEMP
7435 West Azure Drive, Suite110
Las Vegas, NV 89130
(702) 258-1183
Attorneys for Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellant, ANTONETTE PATUSH (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case;

2. The undersigned counsel of record for Ms. Patush is the only attorney who has appeared on his behalf in this matter in this Court. The undersigned and his associate Victoria L. Neal are the only attorneys that appeared on behalf of Ms. Patush before the District Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 27th day of March 2019.

/s/ James P. Kemp

JAMES P. KEMP, ESQUIRE
Nevada Bar No. 006375
KEMP & KEMP
7435 W. Azure Drive, Suite 110,
Las Vegas, NV 89130
(702) 258-1183
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

REPLY ARGUMENT

I. THE SUPREME COURT OF NEVADA HAS RULED THAT NRS 11.190(4)(e) ONLY APPLIES TO PERSONAL INJURY AND WRONGFUL DEATH CASES AND NOT TO ALL "WRONGFUL ACT" TORT CLAIMS GENERALLY.

Respondent's argument that NRS 11.190(4)(e) is a general "tort" statute of limitations that applies generically to all tort actions is incorrect. In considering what statute of limitations applies to claims of Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contract the Supreme Court of Nevada held as follows:

> NRS 11.190(4)(e) provides a two-year statute of limitations for "action[s] to recover damages for injuries to a person ... caused by the wrongful act or neglect of another." Although Mushkin asserts that this provision provides the statute of limitations for all wrongful act torts generally, we have previously addressed and rejected this argument

Stalk v. Mushkin, 199 P.3d 838, 841, 125 Nev. 21 (2009).[1] In *Stalk* the District Court was held to have improperly applied NRS 11.190(4)(e) to the tort claims in

[1]It cannot go unnoticed or unremarked upon that even after the *Stalk* case and the *Hanneman* case were cited in Appellant's briefing in Case No. 76062 the Respondent continues to misstate the law and press the fraudulent claim that NRS 11.190(4)(e) is a general tort statute of limitations with application beyond personal injury and wrongful death claims. At page 7 of its Answering Brief the Respondent states as follows: "Despite Appellant's professed belief, the law is clear and has been clear since at least 1984 that Appellant's claim sounded in tort and the statute of limitations set forth in NRS 11.190(4)(c)[sic] governs claims for tortious discharge. The Nevada Supreme Court made that clear in *Hansen v. Harrah's*, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984)." To be sure the undersigned went back and read *Hansen v. Harrah's* again. NOWHERE in that case does the Supreme Court of Nevada state that the NRS 11.190(4)(e) personal injury and

question. The Supreme Court held that those claims were "injury to property" claims and applied the three year limitations period under NRS 11.190(3)(c) as the Court determined that the true nature of those claims was for damage to property interests and NOT personal injuries. The *Stalk* Court in footnote 1 was very clear about the limitations of NRS 11.190(4)(e):

> In *Hanneman v. Downer,* we explained that NRS 11.190(4)(e) "applies only to personal injury and wrongful death actions" and that other tort causes of action, such as those for fraud and damage to real property, are governed by other, more specific statute of limitations provisions. 110 Nev. 167, 180 n. 8, 871 P.2d 279, 287 n. 8 (1994). Following the *Hanneman* court, ***we determine that NRS 11.190(4)(e) is limited to personal injury and wrongful death actions*** and does not apply to claims for intentional interference with prospective business advantage and contractual relations.

Stalk, 199 P.3d at 845, n.1 (emphasis added) Thus, the District Court in this case erred in applying the two year limitations period of NRS 11.190(4)(e) because that statute of limitations is limited to personal injury and wrongful death actions. *Id*. Retaliatory Discharge in Violation of Public Policy is not personal injury or wrongful death.[2]

---

wrongful death statute of limitations applies to retaliatory discharge claims. Statute of limitations was not an issue in the case, nor mentioned in the opinion at all.

[2] Personal injury in the employment context is generally defined by the workers' compensation statute NRS 616A.265 which states in relevant part as follows: "1. "Injury" or "personal injury" means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence, including injuries to prosthetic devices." Being fired illegally and the resulting economic damages for lost wages does not fit this definition. Moreover even though general tort damages are available for elements like

The Court in *Stalk* went on to explain that the way to analyze statute of limitations questions is to examine the "true nature" of the claim. *Stalk*, 199 P.3d at 841.("*See Hartford Ins. v. Statewide Appliances*, 87 Nev. 195, 197, 484 P.2d 569, 571 (1971) (explaining that the object of the action, rather than the legal theory under which recovery is sought, governs when determining the type of action for statute of limitations purposes).") Citing a number of cases from other jurisdictions the Court reasoned that interference with contract and interference with prospective economic advantage claim have to do with harm to business interests which the court determined to be "personal property" and based upon that concluded that the claims were about injuries to property that were covered by the three year period in NRS 11.190(3)(c). That was the most closely analogous statute of limitations for those claims.[3]

---

emotional distress, workers' compensation law specifically excludes mental or emotional injury "…caused by his or her layoff, the termination of his or her employment or any disciplinary action taken against him or her." NRS 616C.180(2)(c). Retaliatory Discharge in Violation of Public Policy is not a personal injury tort claim. *See also Wyeth v. Rowatt*, 244 P.3d 765, 776 (Nev. 2010) ("Section 146[of Restatement (Second) of Conflict of Laws] has defined 'personal injury' as 'either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another.'") Respondent's argument that "personal injury" in the context of NRS 11.190(4)(e) statute of limitations does not mean "physical injury" is without merit and Retaliatory Discharge claims are not personal injury or wrongful death claims.

[3] Interestingly two years later in *In re Amerco Derivative Litigation*, 252 P.3d 681, 703 (Nev.2011) the Court never addressed its earlier conclusion in *Stalk* regarding the three year statute of limitations under NRS 11.190(3)(c) for Intentional

The *Stalk* case raises a question: Should Retaliatory Discharge in Violation of Public Policy cases be treated similarly to Intentional Interference with Contract or Intentional Interference with Prospective Economic Advantage cases and subjected to the three year statute of limitations under NRS 11.190(3)(c). The answer is no based on policy and precedent. First, while an at-will employment relationship is contractual in nature, *Vancheri v. GNLV Corp*., 105 Nev. 417, 421, 777 P.2d 366, 369 (1989), the tort's elements require that the interference be done by a third-party and not an actual party to the contract. *See J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003) (citing to Restatement (Second) of Torts §§766A-766B for elements which state th at the claim is against a third-party who interferes); *See also Blanck v. Hager*, 360 F. Supp. 2d 1137, 1154-55 (D. Nev. 2005). ("In Nevada, a party cannot, as a matter of law, tortiously interfere with its own contract. *See Bartsas Realty, Inc. v. Nash,* 81 Nev. 325, 402 P.2d 650, 651 (1965)"). Thus, as the Retaliatory Discharge claim is by one party to the at-will contract against another party to the at-will contract, the Intentional Interference with Contractual Relations claim is not similar. The Retaliatory Discharge case is

---

Interference with Prospective Economic Advantage. In *Amerco* that the same type of tort claim, labeled Wrongful Interference with Prospective Economic Advantage, was held "subject to a four-year statute of limitations" under NRS 11.190(2)(c) ("An action upon a contract, obligation or liability not founded upon an instrument in writing"). The *Stalk* case clearly presents the more thorough analysis of the issue, but *Amerco* is more recent. The Court should consider taking this case as an opportunity to clear up this discrepancy.

more like an unwritten contract or obligation claim that would be a four year statute of limitations under NRS 11.190(2)(c). The same analysis would hold true for the Intentional Interference with Prospective Economic Advantage claim. The tort contemplates interference by a third-party, not one of the parties to the prospective beneficial transaction. Thus, the Retaliatory Discharge claim is not similar to the Intentional Interference with Prospective Economic Advantage claim and would not appropriately be held to the same statute of limitations as that claim.

This brings the matter full circle. The true nature of the Retaliatory Discharge claim is that of an unwritten contract or obligation. The obligation of an employer is to continue the at-will employment relationship and not sever it in retaliation for filing a workers' compensation claim. Thus, in that sense it is a contract type of claim. However, the claim has been designated as a tort claim by the Supreme Court of Nevada. The Court in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394(1984) wanted to make the full panoply of tort damages, including punitive damages available, but the claim still has to do with a contractual relationship. The central component of damages is for lost wage from the actual employer, not a third-party tortfeasor. This looks like contract damages. The at-will employment relationship is contractual, but it is NOT a personal property interest such as the claim in *Stalk*. This is why the Appellant characterizes this case as a "hybrid" type of claim that is not closely analogous to any other type of

claim for purposes of determining the correct statute of limitations to apply. It is in some senses like a contract, but it has tort damages available as remedies. It is a hybrid type claim that the Supreme Court of Nevada said in *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260, 132 Nev. Adv. Op. 75, 132 Nev. (2016) should be covered under the "catch-all" statute of limitations under NRS 11.220, which is four years. Ms. Patush's claim here was timely under that statute of limitations and the District Court's order dismissing her claim should be reversed in Case No. 76062 which is a related case to this one regarding the attorney fees award.

II. FOUR YEARS UNDER NRS 11.220 IS THE APPLICABLE STATUTE OF LIMITATIONS BECAUSE NO OTHER STATUTE CONTAINED IN NRS CHAPTER 11 OR ELSEWHERE IN THE STATUTES PROVIDES A SPECIFIC OR CLOSELY ANALAGOUS LIMITATIONS PERIOD.

The Supreme Court of Nevada's statute of limitations jurisprudence has historically looked to apply the most analogous limitations period when one is not specifically provided by statute. *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260, 132 Nev. Adv. Op. 75, 132 Nev. (2016). As argued in the Appellant's Opening Brief and in Case No. 76062, the present case is the kind of "hybrid" claim that the Court in *Perry* indicated would be appropriate to apply the "catch-all" four year limitations period set forth in NRS 11.220.

To reiterate, NRS 11.220 states as follows:

> **NRS 11.220 Action for relief not otherwise provided for.** An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

The statute is plain and unambiguous and should be applied exactly how it is written. "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *MGM Mirage v. Nev. Ins. Guar. Ass'n,* 125 Nev. 223, 228, 209 P.3d 766, 769 (2009). "[W]hen the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not" look any farther than the plain meaning of the statute. *Id.* at 228-29, 209 P.3d at 769.

The Retaliatory Discharge claim brought by Ms. Patush because her employer fired her for filing a workers' compensation claim is an "Action for relief not otherwise provided for" in NRS Chapter 11 or anywhere else in the Nevada Revised Statutes. The Legislature has written and enacted a very straight forward statute for the courts to apply. If there is no limitation expressly provided for a cause of action, then four years is the limitations period.

The District Court erred in applying NRS 11.190(4)(e) because that only applies to personal injury and wrongful death claims, as discussed above. The correct statute of limitations for Ms. Patush's case is four years under NRS 11.220 and this Court should reverse the District Court's order of dismissal and remand this case for further proceedings in Case No. 76062. That would essentially moot

this matter. Alternatively, this court should reverse in this case because the District Court erred in granting attorney fees on a case of first impression. There was no findings made by the District Court that are necessary predicates to an award of fees under NRS 18.010(2)(b), specifically that Ms. Patush filed the retaliatory discharge claim "was brought or maintained without reasonable ground or to harass the prevailing party." Neither the Order Granting Defendant's Motion to Dismiss (AA 7-8), nor the Order Granting Defendant's Motion for Attorney Fees (AA 15-16) set forth or make any findings that Ms. Patush brought her claim or maintained it without reasonable ground or to harass Larry Flynt's Hustler Club (Las Vegas Bistro, LLC). Indeed the Order Granting Defendant's Motion for Attorney Fees does not even reference or cite to NRS 18.010 at all. (Id.) Further, the Respondent has attempted to insinuate that the District Court addressed these issues at the hearing of the matter. Upon reading that fraudulent insinuation Appellant went ahead and obtained a copy of the transcript of the hearing and has included it in a Reply Appendix submitted herewith. Those issues are addressed below.

III. THE DISTRICT COURT DID NOT MAKE ANY REQUISITE FINDINGS OF FACT, HAD NO EVIDENCE UPON WHICH TO MAKE THE RULING IT DID, AND ERRED AS A MATTER OF LAW IN GRANTING ATTORNEY FEES UNDER NRS 18.010(2)(b).

At page 2 of its Answering Brief, in its statement of facts, the Respondent makes the following statement: "The District Court concluded that Respondent was entitled to its attorney fees pursuant to NRS 18.010(2)(b) and *Brunzell* because Appellant's claim was brought without reasonable grounds." The District Court's Order (AA 15-16) does not make any findings that Ms. Patush brought her claim without reasonable grounds, does not make any findings that Ms. Patush brought the claim to harass Larry Flynt's Hustler Club, does not cite to NRS 18.010(2)(b), and does not cite to or mention the *Brunzell* case or any of its factors. (See also Transcript at Reply Appx. 1-5 where in NO factual findings are made and NO legal principles are cited) The statement made by Respondent is unsupported by the record in this case. The District Court's Order is unsupported by the record in this case and should be reversed.

Where a district court applies the wrong legal standard or disregards guiding legal standards, the court has abused its discretion and its decision must be overturned. *Bergmann v. Boyce*, 856 P.2d 560, 563, 109 Nev. 670 (1993). Bergmann was an NRS 18.010(2)(b) case just like this one. NRS 18.010(2)(b), as noted in the Opening Brief, incorporates the NRCP Rule 11 standard and under Rule 11 and NRS 18.010(2)(b) a case is not groundless if it seeks to establish new law or modify existing law. *Rosenberg LT v. Macdonald Highlands*, 427 P.3d 104, 134 Nev. Adv. Op. 69 (2018). As noted in the Opening Brief this recent case from

last year establishes that the District Court failed to follow the appropriate guiding legal principles and its award of attorney fees in this case is an abuse of discretion that must be reversed.

The District Court did not make a finding in any of its orders, or state on the record, that Ms. Patush's claim was "groundless" as required by NRS 18.010(2)(b). (AA 7-8; AA 15-16; Reply Appx. 1-5) The Respondent implies that the transcript of the proceedings on the attorneys fees motion will support the District Court's decision. Respondent knew that it did not. Just like Appellant knew that it did not. So, the Court will please refer to the Reply Appendix filed concurrently herewith containing the entirety of the Tuesday, July 10, 2018 Recorder's Transcript Re: Defendant's Motion for Attorney's Fees and note that the District Court did not make any requisite findings of groundlessness or harassment, did not reference any evidence upon which it was basing its decision, did not cite Brunzell or any of its factors, or do any of the things it would be required to do to justify an award of attorney fees under NRS 18.010(2)(b). The totality of what the District Court had to say is as follows:

> Considering the ruling on the motion that I made on the motion for summary judgement [*Sic* as to spelling and because it was a motion to dismiss] I believe that that decision is sound and accurate so I'm going to grant the motion for attorney's fees. Feels will be awarded in the amount of $9500 and cost of $240.19.

The District Court's order granting the Motion to Dismiss only states that the motion was granted because it decided that the personal injury and wrongful death two year statute of limitations in NRS 11.190(4)(e) applied to retaliatory discharge employment cases. In other words, the District Court made no findings of groundlessness or harassment anywhere in the record and the order granting attorney fees is legally and factually unsupported and in violation of the "American Rule." It is error and must be reversed.

But, to take it a step further, there is no evidence anywhere in the record that would even support a District Court finding of groundlessness or harassment to support an award of attorney fees under NRS 18.010(2)(b). The sole piece of evidence of any kind would be the undersigned's April 4, 2018 letter (RA 000024-25) explaining that the undersigned had carefully studied and researched the statute of limitations issue prior to filing the case and further explaining the legal position that NRS 11.220 (4 years) was the correct statute of limitations. (Id.) The undersigned explained the rationale and noted that lack of binding case authority. (Id.) This is not evidence of knowing or negligent groundlessness. The District Court had no evidence upon which to base an award of attorney fees under NRS 18.010(2)(b). Its decision to award fees in this case was an abuse of discretion and an error of law. *See Otak Nev., LLC v. Eighth Judicial Dist. Court,* 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (An abuse of discretion occurs when the district

court's decision is not supported by substantial evidence); and *Davis v. Ewalefo,* 131 Nev. 445, 450-51, 352 P.3d 1139, 1142-43 (2015) (The District Court must apply the correct legal standard and no deference is owed to legal error)

The District Court NEVER considered the *Brunzell* factors or analyzed them as is required in an attorney fees award. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). (AA 15-16, *Brunzell* not referenced in Order; Reply Appx. 1-5 *Brunzell* and factors not referenced in transcript of hearing) Accordingly, the failure to consider the proper legal guidelines is reversible error and the attorney fees award must be reversed.

CONCLUSION

In accordance with the above and the arguments set forth in Appellant's Opening Brief, this court should REVERSE the award of attorney fees to Respondent.

RESPCTFULLY SUBMITTED this 27th day of March 2019.

/s/ James P. Kemp
JAMES P. KEMP, ESQUIRE
Nevada Bar No. 006375
Attorney for Appellant

ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF THE NEVADA RULES OF APPELLATE PROCEDURE

James P. Kemp, Attorney for Appellant, by signing below herby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14 font;

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 3,154 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 27th day of March 2019

/s/ James P. Kemp

JAMES P. KEMP, ESQ., Bar No.6375

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2019, I filed the foregoing Appellant's REPLY BRIEF through the Supreme Court of Nevada's electronic filing system along with the Appellant's Reply Appendix. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

Deanna L. Forbush, Esq.
Jeremy J. Thompson, Esq.
CLARK HIL, PLLC
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, NV 89169

DATED this 27th day of March 2019

/s/ James P. Kemp
JAMES P. KEMP, ESQ.