Kerry S. Doyle, Esq.
Nevada Bar No. 10866
DOYLE LAW OFFICE, PLLC
4600 Kietzke Lane, Ste. I-207
Reno, NV 89502
(775) 525-0889
kerry@rdoylelaw.com

Attorneys for Appellant

IN THE SUPREME COURT FOR THE STATE OF NEVADA

JEFFREY D. SPENCER, Appellant, v. HELMUT KLEMENTI, EGON KLEMENTI, ELFRIEDE KLEMENTI, MARY ELLEN KINION, ROWENA SHAW, and PETER SHAW, Respondents.	Case No. 77086

APPELLANT'S OPENING BRIEF

Kerry S. Doyle, Esq.
Nevada Bar No. 10866
DOYLE LAW OFFICE, PLLC
4600 Kietzke Lane, Ste. I-207
Reno, NV 89502
(775) 525-0889
kerry@rdoylelaw.com

Attorneys for Appellant

IN THE SUPREME COURT FOR THE STATE OF NEVADA

JEFFREY D. SPENCER, Appellant, v. HELMUT KLEMENTI, EGON KLEMENTI, ELFRIEDE KLEMENTI, MARY ELLEN KINION, ROWENA SHAW, and PETER SHAW, Respondents.	Case No. 77086

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that following are persons and entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal. Appellant Jeffrey Spencer is an individual who was

represented in district court by David Zaniel of Ranalli, Zaniel, Fowler & Moran, LLC; William Swafford; Lynn Pierce; and William Routsis.

DATED this 3rd day of June, 2019.

DOYLE LAW OFFICE, PLLC

By: /s/ Kerry S. Doyle
Kerry S. Doyle, Esq.
Nevada Bar No. 10866
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. JURISDICTIONAL STATEMENT

This action presents two consolidated appeals and primarily challenges three orders. The court has jurisdiction over the appeal on the merits as a timely appeal from a final judgment. *See* NRAP 3A(b)(1); NRAP 4(a)(1). Jurisdiction over the order awarding attorneys' fees to Mary Ellen Kinion is appropriate as an interlocutory order for which appeal may be taken after final judgment. *See Consolidated Generator v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). The court has jurisdiction over the final order for attorneys' fees as a special order made after final judgment. NRAP 3A(b)(2).

II. ROUTING STATEMENT

As a tort case in which the judgment did exceed $250,000, this case would presumptively be assigned to the Court of Appeals. NRAP 17(b)(5). However, as the appeal presents two questions of first impression, regarding the application of privilege to public comment before government entities and to claims for malicious prosecution, this case is more appropriately retained by the Nevada Supreme Court. (*See* 3 AA 565; 4 AA 824-25; 5 AA 1109, 1111-116, 1135, 1141-43; 6 AA 1451, 1461; 7 AA 1474, 1476, 1484-86, 1493-96).

III. ISSUES ON APPEAL

1. Did the district court err as a matter of law when it granted summary judgment to Mary Ellen Kinion, and later the other respondents, after engaging in its own investigation, employing an erroneous interpretation of malicious prosecution, and making a credibility determination instead of considering whether a reasonable trier of fact could have reached a different result, ignoring the standard for granting summary judgment?
2. As a matter of first impression, does absolute testimonial privilege apply to statements made in public comment before a governing body, even if the privilege would apply in such a situation did the district court err as a matter of law when it applied absolute testimonial privilege to statements made to Spencer's employer, the Douglas County Planning Commission, and the Kingsbury Grade Improvement District, without a determination that the statements were relevant to a quasi-judicial proceeding?
3. As a matter of first impression, does absolute testimonial privilege apply to claims for malicious prosecution when it would mean that no such claim could ever be maintained?
4. Did the district court err as a matter of law by granting attorneys' fees finding a claim to have been frivolous when the claim was not dismissed but pursued to summary judgment and evidence was presented in support of the claim?

IV. STATEMENT OF RELEVANT FACTS

In 2012, the Jeff and Marilyn Spencer were having issues with some neighbors who are not parties to the action so they installed security cameras on their property. (4 AA 898, 902). Footage from those cameras showed Egon Klementi, a neighbor, walking in the Spencer's backyard and so they decided to put in a privacy fence around their property. (4 AA 903). While the fence was being built in May 2012, Jeff Spencer ("Spencer") observed Egon Klementi, a neighbor, appear to be taking pictures of the shirtless, teenage boys who were working on the fence. (5 AA 1158; 6 AA 1218). Not only did this solidify the Spencers' desire for the privacy fencing, but the Spencers angered Egon by calling the police to report Egon's activities, and that began the feud that continues to this day. (5 AA 1158; 6 AA 1217-18).

Egon, who has since passed away, lived in the neighborhood with his wife Elfriede. (4 AA 871; 6 AA 1252). His twin brother, Helmut Klementi,[1] also lived in Stateline but not in the same neighborhood. (4 AA 871). Egon's anger caused many of the neighbors to pick sides; Mary Ellen Kinion, Dr. Rowena Shaw, and Peter Shaw were among the few on the Klementis' side. (5 AA 1158-59). Together, they began a letter writing campaign to have the Spencers' fence removed. (5 AA 1159). Dr. Shaw alone wrote to the Douglas County district attorney on numerous occasions, the Kingsbury General Improvement District ("KGID"), Community Development

[1] The Klementis are referred to throughout this brief by only their first names to provide clarity.

Board Members, and code enforcement in attempts to force the Spencers to dismantle the fence. (4 AA 787-800; 4 AA 955).

As summer passed and snow started falling, the neighbors used Spencer's job as a snowplow operator contracted to KGID to provide another avenue of attack. Egon, Elfriede, Kinion, and the Shaws began reporting that Spencer was intentionally blocking their driveways with large berms of snow and ice. (1 AA 64, 87, 97, 132-33, 248; 3 AA 587-88; 4 AA 816; 5 AA 1002-1003). Although none of them could testify that they had seen Spencer berm their driveways, they made reports to his supervisors and comments at KGID public meetings hoping to get him fired. (*See id.*; 6 AA 1247 ("We want him removed from his position.")).

In a KGID meeting on December 18, 2012, Egon, Elfriede, Kinion and the Shaws complained to KGID "regarding a specific plow driver." (6 AA 1245-46). Egon alleged that Spencer had intentionally sped through the neighborhood the day before, dropping his plow blade just in time to splash snow into Egon's face. (6 AA 1246). Kinion claimed that she was outside at the time and saw Spencer with "a big grin on his face" as he turned the blade to splash Egon with snow. (*Id.*). Helmut attended the meeting, but did not make any comment. (4 AA 816-17). After the meeting, Helmut went home with Egon and Elfriede for dinner; after dinner, Helmut allegedly volunteered to go take pictures of the berm in Egon and Elfriede's driveway before he went home. (4 AA 817).

Spencer was not at the meeting. (4 AA 909-910). Spencer got home to his wife around 7:45. (4 AA 908-909). After reading in the newspaper about a rash of car break-ins, Spencer was shoveling his third floor balcony when he heard the snow crunching and could see a figure in moving in the dark near his driveway. (4 AA 908-909). Thinking that someone was trying to break into his truck, Spencer yelled several times, but got no response from the figure. (4 AA 909). He ran inside, telling his wife to call 911, and ran out his front door to the front porch. (4 AA 909). He yelled again for the person to identify himself. (4 AA 909). Still getting no answer, Spencer ran into the street in his stocking feet and collided with the person he later discovered was Helmut. (4 AA 914, 916-17; 2 AA 282[2]).

Helmut fell to the ground and started to yell in his native language. (4 AA 917). He tried to kick Spencer from where he was lying on the ground. (4 AA 917). Spencer yelled back, asking why he had not responded when Spencer yelled; "If he would have just said, it's Mr. Klementi, I'm taking pictures, then I wouldn't have came out." (4 AA 917; 5 AA 1062 (Helmut admitting that he never responded to Spencer, neither to identify himself nor to deny breaking into Spencer's truck)). Seeing that Egon had arrived to help his brother, Spencer told them that Marilyn had already called 911, and he walked back into his house. (4 AA 917).

---

[2] The district court received a video exhibit that was made a part of the record as Exhibit 12 to Spencer's Supplemental Opposition to Kinion's Motion for Summary Judgment. (2 AA 282). Spencer has made a motion contemporaneously with the filing of this brief to allow the submission of that video in the appendix.

Helmut admitted that he heard Spencer yelling something about his truck, but he was trying to take a video so he did not respond. (4 AA 882). Helmut claimed Spencer had punched him in the left side so hard that he flew through the air, hit the ground, and lost consciousness. (4 AA 883, 885). Spencer, Egon, and the sheriff who responded to Marilyn's 911 call all disagree with Helmut's claim to have lost consciousness. (3 AA 681; 4 AA 917; 5 AA 1007, 1014). Helmut even claimed to the sheriff that he had heard a gunshot from Spencer's balcony. (4 AA 886). Despite the patently obvious misstatements of fact by Helmut, the sheriff determined, without thorough investigation, that he believed Helmut's version of events and arrested Spencer. (*See* 3 AA 670; 5 AA 1010).

Spencer was initially charged with misdemeanor battery for colliding with Helmut and two gross misdemeanors based on the false statements given by Egon and Elfriede in the days following December 18, 2012. (1 AA 108; 2 AA 338-39, 357-358). Helmut repeated his version of events to Egon and Elfriede, who repeated it to their neighbors, Kinion and the Shaws. (*See* 3 AA 590-91). Egon went so far as to claim to the sheriff that he had seen Spencer hit Helmut in the same paragraph as saying that he only went outside after hearing Helmut yell and when Egon looked Helmut was already lying in the street. (5 AA 1014). They all began to incorporate these false allegations of Spencer's violence in complaints to KGID and the Douglas County Planning Commission. (*See* 4 AA 787-800; 6 AA 1248).

Kinion repeated her false allegations regarding seeing Spencer use a snowplow to throw snow at Egon to the district attorney, made other claims in ex parte communication to the judge hearing Egon and Elfriede's motion for a protective order against Spencer, and otherwise interjected herself into Spencer's criminal prosecution. (1 AA 154, 248-49, 6 AA 1245-46). Dr. Shaw reached out to the Douglas County Planning Commission in advance of a meeting to warn them about Spencer and ask for increased security. (4 AA 798). Dr. Shaw felt so strongly that she sought to correct the record to ensure that the minutes reflected Helmut had said Spencer punched him. (4 AA 800). The district attorney testified that the comments made in public meetings influenced her decision to rephrase the charges against Spencer. (2 AA 371).

Helmut, Egon, Elfriede, Kinion, and Dr. Shaw made these false and defamatory statements to get Spencer fired, to get him convicted, and to discredit him in the community. (*See* 5 AA 1027, 1033). After months of their mudslinging, Spencer was acquitted on all the criminal charges. (1 AA 115-17). Not satisfied with that result, Helmut filed a civil complaint against Spencer for the alleged battery. (1 AA 1). Spencer counterclaimed and named third party defendants only in response to Helmut's complaint, resulting in the action that is the subject of this appeal. (1 AA 5).

VI. STATEMENT OF THE CASE

Helmut began this action in December 2014 when he filed a civil complaint against Spencer alleging claims for assault and battery, elder abuse under NRS 41.1395, intentional infliction of emotional distress, and punitive damages. (1 AA 1-4). Spencer answered and made a counterclaim against Helmut and named Egon, Elfriede and Kinion as third-party defendants for malicious prosecution and conspiracy to commit malicious prosecution. (1 AA 5-15). Over the course of discovery, and after changes of counsel for both Helmut and Spencer, Helmut amended his complaint and Spencer sought leave to amend his counterclaim/third-party complaint. (1 AA 172; 2 AA 423). Before Spencer had the opportunity to file an amended pleading, Kinion moved for summary judgment. (1 AA 45).

A. Kinion's April 2016 Motion for Summary Judgment

Kinion filed her motion for summary judgment in April 2016, arguing that she could not be held liable for malicious prosecution because she had not been involved in the Douglas County Sheriff Deputy's decision to arrest Spencer and only responded to the district attorney's requests for information and testimony. (1 AA 45, 53-54). In support of her argument, she presented her own deposition testimony that she had participated in the criminal prosecution at the district attorney's request. (1 AA 50-51). In opposition, Spencer presented evidence that Kinion had made several false statements to the district attorney and other officials that lead to the amendment and increase of charges against Spencer. (1 AA 96, 97-99). In particular, Spencer

produced evidence of the criminal complaint as originally filed on January 16, 2013, and as amended on May 9, 2013, to include several additional and more serious charges. (1 AA 108-112). Spencer produced evidence that Kinion had made several statement to the district attorney suggesting that she witnessed illegal acts by Spencer that she later testified she had not witnessed. (1 AA 120, 248-49). And, perhaps most importantly, Spencer produced Kinion's testimony at trial in which she stated that the district attorney had not asked her to write a letter regarding the events she allegedly witnessed. (1 AA 151 ("Q: Did I ever ask you to write a letter? A: No.")).

Yet after hearing the argument on that motion, the district court "wanted to talk to the district attorney." (2 AA 289). The district court called the district attorney as a witness, held an evidentiary hearing, and questioned the district attorney himself. (2 AA 295-99). The district court allowed the witness to object to questions she was asked, introduce evidence that no party has sought or offered, and otherwise dictate how the hearing proceeded. (2 AA 306, 336-39, 343).

Through her testimony, the district attorney affirmed that Kinion had approached her, testifying "I remember meeting Miss Kinion at the Tahoe Township Justice Court and her expressing that she had some information. And I told her, 'You know, if there's something that you think is relevant to the case to please feel free to write something and send it to the district attorney's office.'" (2 AA 295, 307). However, the district attorney also testified that her decision to increase the charges against Spencer was based primarily on her review of Helmut's medical records. (2

AA 297). She also testified that an additional criminal complaint had been filed on January 16, 2013, alleging a felony of witness intimidation (based upon an allegation that Spencer had pushed Helmut in an attempt to intimidate him) and a gross misdemeanor of exploitation of an elderly person (which somehow had to do with a snowplow and the building of berms as a crime against Egon, Elfriede, and Helmut). (2 AA 338-39, 357-358). At the time she filed the original complaint, however, the district attorney testified that "the snowplow is not a huge issue. It's one of about six different factors. I included offensive language, violent conduct, yelling at Egon as he walked his dog, covering him with snow on the snowplow, piling berms at the end of the driveway . . . . So the snowplow itself, back in January, was one of probably eight other factors that constituted the gross misdemeanor of exploitation of an elderly person." (2 AA 365).

The district attorney emphasized that the only enhancement of any charge was the change from a misdemeanor battery against Helmut to a felony of battery causing substantial bodily harm. (2 AA 358). The district attorney testified that the January charges were based on the Douglas County Sheriff's report for Incident 12SO41608. (2 AA 361 (citing 1 AA 76-89)). The record contains a second version of a sheriff's report with the same incident number. (5 AA 1005-1018). Neither version of the sheriff's reports identifies Kinion as a witness to Spencer using a snowplow to throw

snow onto Egon. (1 AA 76-89; 5 AA 1005-1018). The district attorney testified that statements made at KGID meetings were used to support the criminal charges. (2 AA 371).

After hearing further argument, the district court granted the motion for summary judgment, stating "I believe [the district attorney]. I do not believe that the charge was enhanced by anything that Ms. Kinion did . . . ." (2 AA 407). The district court granted the motion for summary judgment based upon its own factual investigation and its own factual determination. (*See id*). Counsel for Kinion prepared the written order granting summary judgment, but nothing in that order addressed Kinion's active participation in the criminal prosecution. (3 AA 520-24). The Order relied upon a finding that "nothing Kinion did or said resulted in the charges against Spencer being enhanced." (3 AA 523). Neither Kinion's motion nor the written order contained any law supporting a requirement that her involvement "unduly influence" the prosecutor or result in the enhancement of charges. (*See* 1 AA 52-54 (Motion), 155-66 (Reply); 3 AA 520-24 (Order)).

B. Kinion's First Motion for Attorneys' Fees

In March 2017, before an order was entered granting her motion for summary judgment, Kinion moved for an award of attorneys' fees and costs, arguing that Spencer's claim for malicious prosecution against her was frivolous and an award of fees was appropriate pursuant to NRS 18.010(2). (2 AA 446-70). Specifically, Kinion alleged that Spencer and his counsel had failed to perform an adequate investigation

because the district attorney's testimony allegedly disproved his case. (2 AA 449). Because of the alleged failure to investigate, Kinion declared the claim frivolous. (*Id.*) Spencer opposed, making clear all of the facts supporting the claims against Kinion. (3 AA 501-519). Specifically, Spencer outlined his reasonable, good faith basis for making a malicious prosecution claim against Kinion. (*See* 3 AA 509). Without hearing argument, without addressing the evidence proffered by Spencer, without acknowledging that the matter had proceeded to summary judgment before resolution, the district court granted Kinion's motion for fees and costs finding that Spencer had "no basis factually or legally to bring the claim." (3 AA 547).

C. Second Round of Motions for Summary Judgment

In February 2018, after the dismissal of the complaint by Helmut against Spencer (3 AA 541), and Spencer's filing of his amended counterclaim and third-party complaint (2 AA 423), the second round of motions for summary judgment began. (*See* 3 AA 557-5 AA 1155). Helmut, the counter-defendant, and each of the third party defendants filed motions for summary judgment to resolve all of the claims remaining in the case. (*Id.*). Each of the motions made similar arguments that absolute testimonial privilege barred any tort claim based upon testimony in the criminal proceeding and any statement made before a government entity. (3 AA 565 (Shaws); 4 AA 824-25 (Helmut); 5 AA 1109, 1111-116 (Elfriede); 5 AA 1135, 1141-43 (Kinion)).

At the hearing on the motions, the district court appeared to have already made its decision. (6 AA 1400 ("We don't need a reply, unless I ask for it, because I feel that I'm ready.")). Stating that the only alleged wrongful statements were protected by "an absolute privilege to talk to the cops [or] to speak under oath at trial," the district court granted each of the motions for summary judgment in full. (6 AA 1451). The written orders, again prepared by the attorneys, relied upon the application of privilege to the statements. (*See* 6 AA 1461, 7 AA 1474, 1476, 1484-86, 1493-96).

D. Grant of Attorneys' Fees to Kinion, Elfriede, and Helmut

After hearing argument on the second round of motions for summary judgment, and before any motion for fees or costs was made, the district court stated, "I am inviting attorneys' fees," indicating that he would grant motions for fees so long as there were in the same approximate amount that he had previously granted to Kinion. (6 AA 1453). Based on the district court's directive that it would grant any motion for fees made, Spencer did not oppose the motions as such opposition would have been futile. The district court, relying again on the assertion that Spencer's claims were frivolous, awarded $42,820.30 in fees and costs to Helmut, $21,081.23 in fees and costs to Elfriede, and an additional $20,999.73 in fees and costs to Kinion. (7 AA 1701).

VII. SUMMARY OF ARGUMENT

The order granting summary judgment to Kinion, and later other respondents, should be reversed because the district court applied an incorrect standard for malicious prosecution, improperly engaged in its own investigation, and granting the motion based upon its own credibility determination, ignoring the proper standard for considering summary judgement.

Because public comment is not a quasi-judicial proceeding in which statements are subject to challenge, absolute testimonial privilege should not have been applied to those statements. Even if such a privilege could apply to public comment, absolute privilege should not have applied in this case because the comments were not relevant to any contested matters before the governing bodies and some were made outside of the public meetings entirely. Claims for malicious prosecution should be excepted from the application of absolute testimonial privilege because otherwise no such claim could be maintained. The summary judgements based upon the application of privilege should be reversed.

The district court erred in granting attorneys' fees to Helmut, Eflriede, and Kinion under NRS 18.010(2)(b) because Spencer had credible evidence to bring his claims at the time he raised them.

VIII. ARGUMENT

A. The District Court Erred in Granting Summary Judgment to Mary Ellen Kinion in Applying an Incorrect Legal Standard and Acting as a Fact-Finder

1. Standard of Review

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

2. A Claim for Malicious Prosecution Did Not Require Kinion's Participation to "Unduly Influence" the District Attorney

The district court focused on whether Kinion influenced the district attorney to initiate or enhance the charges against Spencer. (*See, e.g.*, 2 AA 296). This inquiry entirely ignored the third basis for liability in a malicious prosecution claim: active participation in the continuation of a criminal proceeding. *See LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879-80 (2002) ("A malicious prosecution claim requires that the defendant initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff."). The district court was only able to grant Kinion's motion for summary judgment by blatantly disregarding this aspect of the law.

To succeed on a claim for malicious prosecution, a plaintiff must establish "(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." *LaMantia,* 118 Nev. at 30, 38 P.3d at 879 (internal quotation omitted). Additionally, the plaintiff must link the defendant to being a proximate cause of the prosecution by proving that the defendant "initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff." *Id.* at 30, 38 P.3d at 879-80. While Nevada courts have addressed the "initiated" and "procured the institution of" manners by which a plaintiff may establish causation, they have not clearly addressed the "actively participated" method. *See, e.g.*, *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 168-72, 414 P.2d 106, 107-109 (1966) (concluding that insufficient admissible evidence had been submitted to create a genuine issue of material fact as to whether defendants had induced or procured criminal prosecution).

In articulating the three bases for proving proximate cause, the *LaMantia* court used the term "or," indicating that any of the three bases is sufficient. *See Dutchess Bus. Services, Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 718, 191 P.3d 1159, 1170 (2008) ("The word 'or' is typically used to connect phrases or clauses representing alternatives." (internal quotation omitted)). Therefore "active participation" in the context of malicious prosecution must mean something other than "initiated" or "procured the initiation of" criminal proceedings. *See id.*

Other courts have held "[c]ontinuing to prosecute a lawsuit discovered to lack probable cause . . . support[s] a claim of malicious prosecution." *Sycamore Ridge Apartments, LLC v. Naumann*, 69 Cal. Rptr. 3d 561, 572 (Cal. Ct. App. 2007). "[I]t is as much a wrong against the victim and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such proceedings in the first place." *Benjamin v. Hooper Elec. Supply Co., Inc.*, 568 So.2d 1182, 1189 n.6 (Miss. 1990). To demonstrate proximate cause, a defendant's actions need only have been a substantial factor in causing the continuation of criminal proceedings. *Id.* "Whether it was such a substantial factor is for the jury to determine unless the issue is so clear that reasonable persons could not differ." *Id.*

Spencer presented evidence in opposition to summary judgment demonstrating that Kinion (1) actively approached the district attorney to insert herself into the proceedings by telling the district attorney she witnessed events that she had not witnessed, (2) fabricated evidence regarding what she saw when Spencer allegedly threw snow onto Egon , and (3) repeated the false accusations to Spencer's employers and KGID, which statements the district attorney relied upon in crafting the criminal complaint. (1 AA 154, 248-49, 6 AA 1245-46). The district attorney admitted that at the time of her initial charge the snowplow incident "[was] not a huge issue," but after investigation, including talking to Kinion as a witness and reviewing the accusations

made by Kinion and others at KGID meetings, that charge became the only factual basis for a gross misdemeanor. (*See* 2 AA 338-39, 357-358, 365, 371).

One fact that deserves significant emphasis is that Spencer proffered evidence that the sheriff who investigated the snowplow incident in response to Egon and Kinion's calls determined that there was insufficient evidence to establish a crime had occurred. (1 AA 137; 6 JA 1327-30). In other words, there was no probable cause to make an arrest based upon the evidence apparent to the investigating officer. (*See id.*). Therefore Kinion not only repeated her story knowing that she could not possibly have seen the things she claimed to have seen, she repeated the story with an objective reason to believe there was no probable cause. Because Spencer proffered evidence that Kinion actively participated in Spencer's prosecution with knowledge that her allegations were false and that there was an absence of probable cause, the district court erred in granting summary judgment to Kinion. *See LaMantia*, 118 Nev. at 30, 38 P.3d at 879-80. Whether Kinion's participation was a substantial cause of the ongoing prosecution was a question of fact for the jury, not to be resolved as the district court did in this case by conducting its own investigation. *See Benjamin*, 568 So.2d at 1189 n.6.

3. The District Court Erred by Engaging in Fact-Finding to Grant Summary Judgment to Mary Ellen Kinion

When Mary Ellen Kinion moved for summary judgment in April 2016, she bore the burden of demonstrating that Spencer could not prove the essential elements

of his case against her. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). In support of her motion, she offered neither an affidavit nor the testimony of the district attorney who prosecuted Spencer. (*See* 1 AA at 45-92). She relied on her own testimony that she had only participated in the prosecution at the request of the district attorney. (1 AA 51). Instead of deciding the motion on the pleadings and evidence presented and without a motion or suggestion by the parties, the district court determined that it wanted to hear testimony from the district attorney. (1 AA 225-26; 2 AA 285-86, 289). After hearing the testimony, the district court ignored the standard for summary judgment and made a factual determination, holding "I believe [the district attorney]." (2 AA 407).

A district court should only grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56 (2018)[3]. To meet that burden, the moving party must identify and cite for the Court the parts of the record that indicate the absence of a genuine issue of material fact. *Cuzze*, 123

[3] As the Court is well aware, the Nevada Rules of Civil Procedure were drastically amended in March 2019. As all of the decisions at issue in this appeal were made before the amendments, the prior version of the rules of civil procedure apply. For the Court's convenience, the redlined version of Rule 56, showing the prior version and the changes made, is included here as a statutory addendum pursuant to Nevada Rule of Appellate Procedure 28(f).

Nev. at 602, 172 P.3d at 134. "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Id.* at 602-603, 172 P.3d at 134 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)). Rule 56, as it existed at the time of the motion, established that the moving party bore the burden to demonstrate its entitlement to judgement as a matter of law. If the evidence presented by the moving party was insufficient to do so, the motion for summary judgment should be denied; a district court should not schedule an evidentiary hearing to allow the addition of evidence not previously presented.

The limitation on the district court's authority to seek additional evidence is made clear by contrast to the recent amendment to Rule 56 which specifically creates additional discretion. In 2019, Rule 56 was amended to allow courts to consider facts not proffered in the pleadings and make judgments independent of the pleadings. *See* NRCP 56(e) & (f). Even in making the amendment, the Advisory Committee clarified that the new discretion was not supposed to excuse inadequate motion practice. NRCP 56 Advisory Committee Note – 2019 Amendment ("The judicial discretion afforded under new Rule 56(e) ensures fairness in the individual case; it should not excuse inadequate motion practice.").

Mary Ellen Kinion did not meet her initial burden of demonstrating that she was entitled to judgment as a matter of law. Kinion filed a motion for summary judgment, arguing that she could not be held liable for malicious prosecution because she had not been involved in the Douglas County Sheriff Deputy's decision to arrest Spencer and only responded to the district attorney's requests for information and testimony. (1 AA 45, 53-54). In support of her argument, she presented her own deposition testimony that she had participated in the criminal prosecution at the district attorney's request. (1 AA 50-51). Kinion did not offer the testimony of the district attorney, did not ask the district court to call a witness, and had apparently sought no discovery from the district attorney.

In opposition, Spencer presented evidence that Kinion had made several false statements to the district attorney and other officials that lead to the amendment of charges against Spencer, including charging him with a crime for which an investigating officer had found so little evidence he had not even created a report. (1 AA 96, 97-99, 137). In particular, Spencer produced evidence of the criminal complaint as originally filed on January 16, 2013, and as amended on May 9, 2013, to include several additional and more serious charges. (1 AA 108-112). Spencer produced evidence that Kinion had made several statements to the district attorney suggesting that she witnessed illegal acts by Jeff Spencer that she later testified she had not witnessed. (1 AA 120, 248). And, perhaps most importantly, Spencer produced Kinion's testimony at trial in which she stated that the district attorney had not asked

her to write a letter regarding the events she allegedly witnessed. (1 AA 151 ("Q: Did I ever ask you to write a letter? A: No.").

Instead of relying on the pleadings and argument, the district court set an evidentiary hearing, questioned the district attorney, allowed the district attorney to offer evidence that had not been raised by either party, and ultimately concluded that it would grant summary judgment because it believed the district attorney. (2 AA 407). The district court not only erred by using evidence that was beyond the scope of the pleadings in violation of the prior version of Nevada Rule of Civil Procedure 56, it specifically violated the standard for a grant of summary judgment by making "findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment." *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001); *see also Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

The question before the district court was if after viewing the evidence in the light most favorable to Spencer and drawing all reasonable inferences in his favor, could a reasonable juror have found that Kinion was liable for malicious prosecution. *See Borgerson*, 117 Nev. at 220, 19 P.3d at 238. Because the district court ignored this

standard and instead granted summary judgment based on a credibility determination after engaging in its own investigation, the Court should reverse the entry of summary judgment for Kinion on malicious prosecution.

The district court, having apparently made the decision before argument, repeated its failure to apply the appropriate standard in the second round of motions for summary judgment. (*See* 6 AA 1400, 1450-52). The failure to apply the appropriate standard in the second round was compounded by the legal error of applying absolute testimonial privilege as discussed below.

B. The District Court Erred in Its Application of Absolute and Qualified Privilege to Grant Summary Judgment in the Second Round

Nevada law regarding malicious prosecution and defamation has frequently dealt with the application of privilege, but in this case Helmut, Elfriede, Kinion, and the Shaws asserted a basis for privilege that has not yet been recognized in Nevada: an absolute privilege for public comment made before a governing body. The Respondents asserted this privilege in addition to other qualified privileges, capitalizing on the muddy standards to convince the district court to rule grant summary judgment in their favor. The district court erred in granting summary judgment in the second round on the basis of a privilege that has not been recognized in Nevada, and by applying that privilege to claims for malicious prosecution.

To be clear, there are two privileges at issue in this action: (1) qualified privilege for report of a crime and (2) absolute privilege for statements made in judicial or

quasi-judicial proceedings. To resolve the issues on appeal, the Court must determine whether public comment before a government body is absolutely privileged as quasi-judicial testimony and whether absolute privilege for knowingly false statements protects against a claim for malicious prosecution as well as for defamation.

1. *Public Comment Made at a Planning Commission Meeting Is Not Absolutely Privileged*

Helmut, Elfriede, Kinion, and the Shaws each argue that public comments and written statements to KGID and the Planning Commission are absolutely privileged. (3 AA 565 (Shaws); 4 AA 824-25 (Helmut); 5 AA 1109, 1111-116 (Elfriede); 5 AA 1135, 1141-43 (Kinion)). The parties give two basic legal premises for their assertion of absolute privilege NRS 41.650, Nevada's anti-SLAPP law, and the language in *Circus Circus Hotels v. Witherspoon* ("*Witherspoon*"), 99 Nev. 56, 61, 657 P.2d 101, 104 (1983), in which the court suggests that testimonial privilege applies "to quasi-judicial proceedings before executive officers, boards, and commissions . . . ." Neither of these authorities establishes immunity for statements made in public comment before a government body.

Anti-SLAPP (Strategic Lawsuit Against Public Participation) laws serve to protect people from "meritless suit[s] filed primarily to chill the defendant's exercise of First Amendment rights." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 797 (9th Cir. 2012). Nevada's Anti-SLAPP protection, NRS 41.650, creates a privilege that arguably applies to public comment, however, its language specifically creates a

qualified privilege: "A person who engages in a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is immune from any civil action for claims based upon the communication." NRS 41.650 expressly requires that the communication be in good faith to obtain the protection. At most, this creates qualified privilege not an absolute privilege asserted by the Shaws. (3 AA 565).

In contrast, the statutory language at issue in *Witherspoon*, NRS 612.265(14) provides for unequivocally absolute privilege:

> All letters, reports or communications of any kind, oral or written, from the employer or employee to each other or to the Division or any of its agents, representatives or employees are privileged and must not be the subject matter or basis for any lawsuit if the letter, report or communication is written, sent, delivered or prepared pursuant to the requirements of this chapter.

The statutory language specifically bars using written or oral communications in the course of unemployment proceedings from being used as the basis for a civil suit. *Id.* NRS 612.265 contains no requirement that the communication be in good faith, which lead the *Witherspoon* court to note that "absolute privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." *Witherspoon*, 99 Nev. at 60, 657 P.2d at 104; *compare Fitzgerald v. Mobile Billboards, LLC*, 134 Nev. ___, ___, 416 P.3d 209, 211 (2018) (concluding that NRS 616D.020 abrogated common law absolute privilege for workers' compensation hearings).

Given that the *Witherspoon* court was interpreting the application of the statutory privilege in NRS 612.265, the statement upon which the parties to this case rely is dicta. In that sentence, the *Witherspoon* court noted that "the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions . . . ." 99 Nev. at 61, 657 P.2d at 104. But whether the quasi-judicial privilege applies depends upon whether the body in question is serving a judicial function; if the body takes evidence upon oath or affirmation, calls or examines witnesses, allows the impeachment of witnesses, and offers the opportunity to rebut the evidence presented. *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983).

While Planning Commissions and other government bodies are frequently empowered to hold quasi-judicial hearings, there is no evidence that the statements in question were made during any such proceeding. (*See*, *e.g.*, 5 AA 1027, 1030, 1033). Statements made during public comment when there is no requirement for the swearing of an oath, there is no opportunity for cross-examination, and none of the other protections of a judicial or quasi-judicial proceeding, should not be granted the same privilege as statements made in proceedings for which those protections are available. Therefore, the court should reject the application of testimonial privilege to public comment at meetings of government bodies as a matter of first impression.

2. Testimonial Privilege Does Not Apply to the Statements Made in this Case

Even if this Court were to adopt a testimonial privilege for public comments before a governing body, statements are only privileged if they pertain to the issues before the body. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) (citing *Witherspoon*, 99 Nev. at 60, 657 P.2d at 104). "Whether a statement is sufficiently relevant to the judicial proceedings to fall within the absolute privilege is a question of law for the court." *Jacobs v. Adelson*, 130 Nev. 408, 412, 325 P.3d 1282, 1285 (2014). The Restatement guides courts in the determination of whether a statement is sufficiently related by allowing witnesses to answer questions posed to them, but not offer testimony that has been excluded or has no reference to the proceeding:

> If the defamatory matter is published in response to a question put to the witness by either counsel or by the judge, that fact is sufficient to bring it within the protection of the privilege, notwithstanding the fact that it is subsequently adjudged to be inadmissible. On the other hand, a witness who persists in answering a question which has no reference to the proceeding after the judge has excluded it, is not within the privilege.

Restatement (Second) of Torts § 588 (1977). Therefore, when a statement has no bearing on the issue to be decided by the judicial or quasi-judicial body, it cannot pertain to the proceedings such that it would be entitled to privilege.

The wrongful comments made in this case were made to governing bodies that were not asking questions at all and were generally made in public comment not necessarily even related to an agenda item.

In this case, Helmut's statement that Spencer "punched and assaulted" him, left him "laying on the ice," and describing the amount of pain he was in, had absolutely no bearing on the issue before the Douglas County Planning Commission: whether the Spencers should be granted a variance for their fence. (5 AA 1027, 1030, 1033). Helmut argued that it was relevant to the fence variance because the construction of the fence lead to the dispute between the neighbors (4 AA 826); however, there can be no argument that the animosity that may have escalated after the building of the fence had any bearing on the Planning Commission's decision.

Dr. Shaw specifically made comments to representatives from KGID even before the meeting began. (4 AA 798). In her comment, Dr. Shaw stated that she called for extra security the week before the meeting. (*Id*). Security was necessary, she claimed, because Spencer had punched Helmut. (*Id.*). Dr. Shaw continued to republish the false statement that Spencer had punched Helmut, ensuring that the minutes reflected the falsehood. (4 JA 798, 800). There is no agenda item or proceeding for which such comments could even arguably be relevant. (6 AA 1248-49).

Kinion's comments begin before any alleged attack on Helmut when, on December 18, 2012, she called Spencer's supervisors to report that Spencer had bermed her driveway (although she admitted under oath that she had not seen him) and used a snowplow to throw snow onto Egon in his driveway (although her later testimony made clear that she could not have witnessed the event as she claimed). (*See* 5 AA 1002; 6 AA 1311-20, 1323-24). She repeated her allegations that evening in

public comment at the KGID meeting. (6 AA 1333). Kinion cannot claim testimonial privilege for statements made to Spencer's supervisors and has offered no evidence that the KGID meeting was planned to address issues with snowplowing.

Finally Elfriede used public comment to republish Egon and Helmut's false statements regarding events she was neither a witness to: that Helmut had been pushed down and beat up by Spencer (6 AA 1248) and the Spencer had used a snowplow to throw snow onto Egon. (6 AA 1247). Elfriede specifically stated that she wanted KGID to fire Spencer. (6 AA 1247). No agenda item to which Elfriede's comments was identified.

Because the statements made by Helmut, Dr. Shaw, Kinion and Elfriede were not in response to questions or even pertaining to agenda items, the district court erred in applying absolute privilege. *Jacobs*, 130 Nev. at 412, 325 P.3d at 1285.

3. Privilege for Testimony Should Not Preclude a Claim for Malicious Prosecution

In arguing that absolute testimonial privilege applies to claims for malicious prosecution, the Respondents seem to overlook the result would be that no claim for malicious prosecution could ever be made. Because the absolute testimonial privilege applies to statements made in anticipation of litigation as well as statement made in judicial proceedings, so even patently false statements made to a prosecutor to induce a criminal charge would be protected. *Jacobs*, 130 Nev. at 413, 325 P.3d at 1285; *see Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 631, 331 P.3d 901, 904 (2014) (holding that absolute litigation privilege does not apply to attorneys statements in a

later malpractice claim because, in part, "if the privilege protected the attorney from suit by the client, no client could ever bring a malpractice suit against his or her attorney"); *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277, 283 (2005).

Other courts that have considered this issue have expressly held that absolute testimonial privilege applies to all torts except malicious prosecution. *See Silberg v. Anderson*, 786 P.2d 365, 371 (Cal. 1990). While Spencer emphasizes the practical reason to except malicious prosecution, California courts have recognized the policy reason. California courts have held that the protection for witnesses afforded by the testimonial privilege is outweighed in cases of malicious prosecution:

> [T]he fact a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.

Albertson v. Raboff, 295 P.2d 405, 410 (Cal. 1956). In *Pope*, the court reached a similar decision. 121 Nev. at 316, 114 P.3d at 283. In that case, the court concluded that "communications made to police before the initiation of criminal proceedings enjoy only qualified privilege" because "[t]he competing policies of safeguarding reputations and full disclosure are best served by a qualified privilege." *Pope*, 121 Nev. at 317, 114 P.3d at 283.

The Court should adopt the approach used by California courts and hold that only the qualified privilege adopted in *Pope* and not the absolute testimonial privilege applies to claims for malicious prosecution.

Because the district court applied absolute privilege to dismiss both the claims for defamation and malicious prosecution, the Court should reverse the order granting summary judgment as to each respondent and remand for a decision that properly applies the standard for summary judgment and privilege.

C. The District Court Erred In Awarding Attorneys' Fees Based on a Finding that Spencer's Claims Were Frivolous

The district court granted four motions for attorneys' fees in this case, each based upon a finding that Spencer's claims were frivolous under NRS 18.010(2)(b). (3 AA 544-50; 7 AA 1509-17). A decision to award attorneys' fees is reviewed for abuse of discretion. *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). The relevant question is whether Spencer "brought or maintained a claim without reasonable grounds." *Id.* at 588, 216 P.3d at 800. "[I]f an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of [attorney's] fees." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (internal quotation omitted). "For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez*, 125 Nev. at 588, 216 P.3d at 800.

The district court based its first decision on a determination that Spencer's claim for malicious prosecution against Kinion was brought without credible evidence because there was probable cause to try him in the criminal proceeding. (3 AA 545). However, Spencer proffered evidence that the sheriff who investigated the snowplow incident in response to Egon and Kinion's calls determined that there was insufficient evidence to establish a crime had occurred. (1 AA 137; 6 JA 1327-30). In other words, there was no probable cause to make an arrest based upon the evidence apparent to the investigating officer. (*See id.*). Therefore, Spencer had credible evidence that Kinion's repeated attempts to have him prosecuted for that alleged assault were brought without probable cause and the award of attorneys' fees was in error.

The second set of motions for attorneys' fees were granted before they were made when at the end of the summary judgment hearing the district court specifically indicated that it would award fees in amounts similar to the first award. (66 AA 1453). Presumably, the district court had made the same determination as to the claims made against Helmut and Elfriede. (*See id.*) As set forth above, Spencer had credible evidence to make claims against Helmut who repeatedly claimed, contrary to the video evidence, that Spencer punched him, and Elfriede who republished those claims even after she had seen the video. (*See* 2 AA 282; 5 AA 1027, 1030, 1033; 6 AA 1247-48).

The district court abused its discretion by considering it conclusions about the evidence instead of whether some credible evidence existed to make the claims and

therefore the Court should reverse the award of attorneys' fees. *See Rodriguez*, 125 Nev. at 588, 216 P.3d at 800.

IX. CONCLUSION

The district court in this case ignored the law and did its own investigation to reach a determination on the facts. (*See* 2 AA 407). Applying the proper legal standard, the Court should reverse the order granting summary judgment to Kinion on malicious prosecution, reject the application of absolute testimonial privilege to proceeding that have no judicial safeguards like public comment before a government body, reverse the order granting summary judgment in reliance on absolute privilege in this case, and hold that testimonial privilege does not apply to claims for malicious prosecution. The Court should also reverse the orders granting attorneys' fees because Spencer had credible evidence to support the claims at the time they were made.

ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Opening 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond in size 14 point font.

2. I further certify that this Opening 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 less than 8,874 words (less than the 14,000 word count available for an opening brief).

3. Finally, I certify that I have read this Opening 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 Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a

reference to the page of the record on appeal where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 3rd day of June, 2019.

DOYLE LAW OFFICE, PLLC

By: /s/ Kerry S. Doyle
Kerry S. Doyle, Esq.
Nevada Bar No. 10866
Attorneys for Appellant

STATUTORY ADDENDUM

ADKT 522 – Redline of 12/31/18 NRCP against prior NRCP

~~agency thereof unless~~its agencies only if the claimant establishes a claim or right to relief by evidence ~~satisfactory to~~that satisfies the court.

~~RULE~~

Advisory Committee Note—2019 Amendment

Rule 55 is conformed to the federal rule, but Rule 55(d) retains the cross-reference to Rule 54(c) in former state and federal versions of Rule 55.

Rule 56. ~~SUMMARY JUDGMENT~~Summary Judgment

~~(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion~~ (a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment ~~by the adverse party, move with or without supporting affidavits for a~~, identifying each claim or defense—or the part of each claim or defense—on which summary judgment ~~in the party's favor upon all or any part thereof.~~

~~**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment~~ is sought ~~may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

~~**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.~~. The ~~judgment sought shall be rendered forthwith if the~~

~~pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that~~ court shall grant summary judgment if the movant shows that there is no genuine ~~issue~~dispute as to any material fact and ~~that~~ the ~~moving party~~movant is entitled to ~~a~~ judgment as a matter of law. ~~A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. An order granting summary judgment shall set forth the undisputed material facts and legal determinations on which the court granted summary judgment.~~

~~**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~

~~**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.~~ The court ~~may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is~~

~~made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party~~should state on the record the reasons for granting or denying the motion.

~~**(f) When**~~ (b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) **Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials in the record.

(4) **Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out

facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable.** ~~Should it appear from~~ **to the** ~~affidavits of~~**Nonmovant.** If a ~~party opposing the motion~~nonmovant shows by affidavit or declaration that ~~the party cannot~~, for specified reasons ~~stated~~, it cannot present ~~by affidavit~~ facts essential to justify ~~the party's~~its opposition, the court may ~~refuse~~:

(1) defer considering the ~~application for judgment~~motion or ~~may order a continuance~~deny it;

(2) allow time to ~~permit~~obtain affidavits ~~to be obtained~~ or ~~depositions to be taken~~declarations or to take discovery ~~to be had~~; or ~~may make such~~

(3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order ~~as is just~~.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) ~~Affidavits Made~~**Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** ~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to~~ If satisfied that an affidavit or declaration under this rule ~~are presented~~is submitted in bad faith or solely for ~~the purpose of~~ delay, the court ~~shall forthwith~~ after notice and a reasonable time to respond—may order the submitting party ~~employing them~~ to pay ~~to~~ the other party ~~the amount of~~ the reasonable expenses ~~which the filing of the affidavits caused the other party to incur, including reasonable attorney's~~, including attorney fees, ~~and any~~ it incurred as a result. An offending party or attorney may also be ~~adjudged guilty of~~held in contempt or subjected to other appropriate sanctions.

~~RULE~~Advisory Committee Note—2019 Amendment

Subsection (a). Rule 56(a) retains the word "shall" consistent with the advisory committee notes to the 2010 amendments to FRCP 56 to preserve *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), and its progeny.

Subsection (d). Rule 56(d) modernizes the text of former NRCP 56(f) consistent with FRCP 56(d). The changes are stylistic and do not affect *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 265 P.3d 698 (2011), which requires an affidavit to justify a request for a continuance of the summary judgment proceeding to conduct further discovery.

Subsection (e). The judicial discretion afforded under new Rule 56(e)

ensures fairness in the individual case; it should not excuse inadequate motion practice.

Rule 57. ~~DECLARATORY JUDGMENTS~~Declaratory Judgment

~~The~~ These rules govern the procedure for obtaining a declaratory judgment ~~pursuant to statute, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in~~under NRS Chapter 30 or other state law. Rules 38 and 39~~.~~ govern a demand for a jury trial. The existence of another adequate remedy does not preclude a ~~judgment for~~ declaratory ~~relief in cases where it~~judgment that is otherwise appropriate. The court may order a speedy hearing of ~~an action for~~ a declaratory ~~-~~judgment ~~and may advance it on the calendar~~action.

~~RULE~~Rule 58. ~~ENTRY OF JUDGMENT~~Entering Judgment

(a) **Reserved.**

(b) **Entering Judgment.**~~-~~

(1) Subject to ~~the provisions of~~ Rule 54(b)~~:~~) and except as provided in Rule 55(b)(1), all judgments must be approved and signed by the court and filed with the clerk.

~~(1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court shall sign the judgment and the judgment shall be filed by the clerk;~~

(2) ~~upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form and sign the judgment, and the judgment shall be filed by the clerk.~~

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Doyle Law Office, PLLC and that on the 3rd day of June, 2019, a true and correct copy of the above APPELLANT'S OPENING BRIEF was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

Douglas R. Brown
Sarah M. Molleck
Christian L. Moore
Lemons, Grundy & Eisenberg
6005 Plumas Street, Suite 300
Reno NV 89519

Michael A Pintar
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP
241 Ridge Street, Suite 300
Reno NV 89501

Tanika M. Capers
American Family Mutual Insurance Company
6750 Via Austi Parkway, Ste. 310
Las Vegas NV 89119

DATED this 3rd day of June, 2019.

/s Kerry S. Doyle
Kerry S. Doyle