**IN THE SUPREME COURT FOR THE STATE OF NEVADA**

JEFFREY D. SPENCER,

Appellant,

vs.

HELMUT KLEMENTI, EGON KLEMENTI, ELFRIEDE KLEMENTI, MARY ELLEN KINION, ROWENA SHAW, and PETER SHAW,

Respondents.

Supreme Court Case No. 77086

*Consolidated with*

Supreme Court Case No. 77711



# RESPONDENTS ROWENA AND PETER SHAW'S ANSWERING BRIEF

**APPEAL FROM THE ORDER OF THE NINTH JUDICIAL DISTRCT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF DOUGLAS, GRANTING SUMMARY JUDGMENT TO RESPONDENTS ROWENA AND PETER SHAW**

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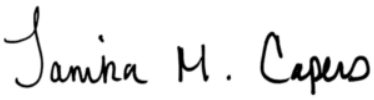
## NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) that must be disclosed. Respondents Rowena and Peter Shaw ("Shaws") are being represented in District Court and in this Court by Tanika M. Capers, Esq. of American Family Mutual Insurance Company.

Dated this 4th day of August, 2019

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY**



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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE**

**STATUTES AND RULES**



**OTHER AUTHORITIES**

## A. INTRODUCTION

Jeffrey Spencer ("Appellant") sued his neighbors, including the Shaws, after Spencer was acquitted following a criminal jury trial. The District Court granted summary judgment in favor of the Shaws, finding Spencer had not met his burden to offer any evidence in support of his claims for defamation, malicious prosecution, civil conspiracy, intentional infliction of emotional distress, or punitive damages. The District Court similarly granted summary judgment in favor of Co-Respondent Helmut Klementi as described in Respondent Helmut Klementi's Introduction to his Answering Brief (hereinafter "Helmut's Answering Brief" or "HAB"). The District Court did not err in granting summary judgment for the Shaws because Spencer failed to come forward with evidence supporting a genuine issue of material fact as to any of his claims against the Shaws.

Any statements made by the Shaws to police officers, the Kingsbury Grade General Improvement District ("KGID"), the Douglas County Planning Commission, the Douglas County District Attorney, or statements made during trial are privileged. No statements made by the Shaws were defamatory. There is no evidence of malicious prosecution on the part of the Shaws. The civil conspiracy claim was rightfully denied as there was no proof of the commission of an underlying tort by the Shaws. Likewise, there was no evidence to show the

Shaws engaged in any "extreme or outrageous" conduct nor any conduct that was intended to cause Spencer emotional distress. Lastly, punitive damages were rightfully denied as a claim for punitive damages cannot stand alone and there was no evidence of "oppression, fraud, or malice, express or implied." Hereinafter, undersigned counsel will refer to the parties by their lower court designations or simply by their name, for clarity, and in accordance with NRAP Rule 28(d).

**B. JURISDICTIONAL STATEMENT**

The Shaws join Helmut's Answering Brief and do not disagree with the jurisdictional statement by Spencer.

**C. ROUTING STATEMENT**

The Shaws join Helmut's Answering Brief in disagreeing with Spencer's Routing Statement. Spencer contends this case presents two issues of first impression: (1) the application of privilege to public comment before government entities and (2) the application of privilege to claims for malicious prosecution. *Appellant's Opening Brief* (AOB) at p. viii. As Helmut's Answering Brief points out, this is not true. In *Circus Circus Hotels*, the Court stated, "The absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions…" *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61 (Nev. 1983). In *Knox*,

the Court held, "By granting an absolute privilege to statements made before a quasi-judicial body, the right of individuals to express their views freely upon the subject under consideration is protected." *Knox v. Dick*, 99 Nev. 514, 518 (Nev. 1983). This Court clarified that application of absolute privilege is not limited to defamation claims. *See HAB*, at p. 2 (citing *Harrison v. Roitman*, 131 Nev. Adv. Op. 92, 362 P.3d 1138 (2015)). The Court followed the functional approach test to resolve the questions related to immunity; this application was never opposed by Spencer in his "response" to the Shaws Motion for Summary Judgment. 4 A. App. 779. The District Court properly analyzed the functional approach test to apply it in this case to find that absolute privilege applies. 6 A. App. 1461.

Therefore, the Shaws join Helmut's Answering Brief and believe Spencer has failed to preserve this issue for appeal and has also failed to demonstrate that this issue should even remain with this Court. Instead, this case is properly and presumptively within the jurisdiction of the Court of Appeals pursuant to NRAP 17(b)(5) (appeals from judgments of less than $250,000 in tort cases). *See HAB*, at p. 2.

**D. <u>STATEMENT OF ISSUES</u>**

The Shaws join Helmut's Answering Brief in disagreeing with Spencer's statement of issues. The only issue before this Court as it relates to the Shaw's is whether the District Court erred in granting the Shaw's Motion for Summary

Judgment when Spencer failed to come forward with any evidence to raise a genuine issue of material fact in support of his claims against the Shaws. As mentioned by Helmut, Spencer attempts to expand this singular issue into multiple ill-preserved sub-issues. Similar to Helmut, Spencer's claims against the Shaws in District Court included: (1) defamation, (2) malicious prosecution, (3) conspiracy to commit defamation, (4) conspiracy to commit malicious prosecution, (5) intentional infliction of emotional distress, and (6) punitive damages. The Shaws join Helmut's Answering Brief in not addressing additional unraised theories due to Spencer's abandonment of any claims or theories not mentioned in Spencer's Opening Brief. *HAB* at p. 3 (citing *Edwards v. Emperor's Garden Rest*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288 (2006)).

**E. <u>STATEMENT OF THE CASE</u>**

The Shaws join Helmut's Answering Brief with regard to the Statement of the Case. *See HAB,* at pp. 3–8. Helmut's statement of the case encapsulates most of the same facts and background necessary to understand the Shaws involvement in the case just as it applies to Helmut Klementi's involvement in the case. For greater clarification, counsel will highlight some of the significant case procedure pertaining to the Shaws below.

As a result of the January 30, 2017, evidentiary hearing and argument on motions, the Court granted Appellants request to amend his third party

complaint to add the Shaws to the litigation. 2 A. App 408-409. The Shaws filed a Motion for Summary Judgment on February 26, 2018 and sought summary judgment on all claims against the Shaws based upon Spencer's failure to produce any material evidence in support of his claims against the Shaws. 3 A. App. 557. The District Court scheduled a hearing on all pending motions, which occurred July 12, 2018. 3 R. App. 600–661. At the hearing, the District Court found Spencer brought no facts forward to bring any claims against the Shaws forward to a jury. 3 R. App. 657. The District Court entered its written order granting summary judgment on August 17, 2018 and the notice of entry of order was served on September 28, 2018. 7 A. App. 1457, 3 R. App. 673. This appeal followed.

**F. STATEMENT OF FACTS**

The Shaws join Helmut's Answering Brief with regard to the Statement of Facts. *See HAB*, pp. 8–14. Helmut's Answering Brief encapsulates the background facts surrounding the case at hand.

As it pertains to the Shaws, the Shaws involvement in this case stems from Spencer's third party complaint against the Shaws. The Shaws have lived in the KGID neighborhood for over thirty-seven (37) years. 3 A. App. 558. During the spring of 2012, Spencer built a six foot tall fence around his property. 3 A. App. 559. The height of the fence created a blind intersection in

front of the Shaw's residence and created a public safety risk. *Id.* Due to the risk factor, Rowena Shaw contacted KGID because she believed they were responsible for code enforcement and was eventually referred to the DA's Office and the Planning Commission. *Id.* The Shaws wrote a letter to the Planning Commission regarding the risk the fence presented and was informed the Spencers requested a variance. *Id.* Eventually, the fence was required to be removed. *Id.*

Additionally, the Shaws have approximately 6 security cameras on their property. The hard drive stores what the video records. Mrs. Shaw is not sure if the storage is 15 or 30 days. *Id.* Around December of 2012, the Shaws installed the cameras because of difficulties between the Spencers and neighbors. *Id.* In mid-December 2012, the Shaws' driveway was bermed and their flower bed was destroyed by the plow. *Id.* On December 18, 2012, the Shaws went to a KGID meeting for the first time due to concerns regarding their driveway being bermed and flowerbed being destroyed. *Id.* They spoke at the meeting during the public comment portion and also commented on the Spencer's fence. *Id.* The Board President at the KGID meeting, Dr. Norman, suggested the Shaws "keep documenting and to take pictures." *Id.*

After the KGID meeting, the Shaws went out of town and have no first-hand knowledge of the incident involving Spencer and Helmut Klementi. 3 A.

App. 560. When the Shaws returned home two days after the KGID meeting, a voicemail from Elfie Klementi informed them that Helmut had been assaulted. *Id.* Around two weeks after the incident, a police agency contacted the Shaws and asked to look at any videos from their cameras from the night of the incident. *Id.* The DA's office eventually contacted the Shaws and asked for a copy of their video. *Id.* Mrs. Shaw made a copy of the video and Officer Schultz picked it up at her home. *Id.* There is no evidence that the Shaws had any involvement in Deputy McKone's decision to arrest Spencer on December 18, 2012. *Id.* The Shaws were not involved in the criminal prosecution against Spencer until the Deputy District Attorney contacted them and requested they provide any information that they may have regarding the incident and events relevant to the neighborhood. *Id.* As part of Spencer's trial, only Mrs. Shaw was subpoenaed and required to provide testimony. Her only testimony was regarding her security cameras. *Id.* In a January 2017 hearing before the District Court, Deputy District Attorney Maria Pence testified that the Shaws had no involvement in her charging decisions regarding Spencer. *Id.*

Appellant's claims against the Shaws are for Defamation, Malicious Prosecution, Civil Conspiracy, Infliction of Emotional Distress, and Punitive Damages. 2 A. App. 437–441.

/ / /

## G. STANDARD OF REVIEW

The Shaws join and agree with Helmut's Answering Brief with regard to the standard of review. *See HAB*, p. 14. A district court's order granting summary judgment is reviewed *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). An appellate court, however, will affirm a district court's decision on any grounds supported by the record. *Rostein v. Steele*, 103 Nev. 571, 747 P.2d 230 (1987).

## H. SUMMARY OF ARGUMENT

The Shaws join and agree with Helmut's Answering Brief with regard to the summary of the argument. *See HAB*, pp. 14–15. Summary judgment is not a disfavored procedural shortcut. *Wood*, 121 Nev. at 730. Instead, as this Court recently held, summary judgment is an important procedural tool "by which 'factually insufficient claims or defenses [may] by isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.'" *Boesiger v. Desert Appraisals, LLC*, 135 Nev. Adv. Op. 25, *2m ---P.3d --- (2019) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Spencer failed to meet his burden to come forward with specific evidence for a trial on his claims against the Shaws. Even on appeal, Spencer still fails to analyze the particular claims of error as to the Shaws and

instead melds all respondents together for purposes of his argument. *See AOB*, p. 16.

Further, Spencer failed to properly preserve the issues he now asserts on appeal. Designating an issue as one of "first impression" does not mean the issue was properly preserved in the record below. Spencer waived the alleged issues of which he now complains. The District Court, however, did not err in its application of privilege to the Shaws' statements, its finding that the Shaws made no defamatory statements in the first place, or in its finding that the Shaws did not engage in malicious prosecution. 6 A. App. 1461. Nor did the District Court err in finding Spencer's claims for civil conspiracies against the Shaws must fail because he was unable to prove the commission of an underlying tort. *Id.* Lastly, the District Court did not err in finding the Shaws did not participate in any "extreme and outrageous" conduct as needed for intentional infliction of emotional distress and no finding of any evidence for a punitive damages claim. *Id.*

## I. ARGUMENT

### A. The District Court properly granted summary judgment to the Shaws.

The Shaws join Helmut's Answering Brief in its argument. *See* HAB, pp. 15–33. As this Court is well aware, the standard for Summary Judgment has

recently been changed to indicate a more stringent standard for oppositions to motions for to motions for Summary Judgment. In the case of *Wood v. Safeway, Inc*., 121 P.3d 1026 (Nev. 2005), the Nevada Supreme Court strengthened its position as to what is necessary to defeat a motion for Summary Judgment and indicated that the "slightest doubt standard" no longer exists in the State of Nevada. Therefore, Defendant, in order to prevail in this particular case and defeat this Motion for Summary Judgment, must show genuine issues of material fact.

The Nevada Supreme Court, after reviewing the standard as it had long been held in this state, indicated that in order to give Nevada Rule of Civil Procedure 56 some force and effect, and to render it not a "disfavored procedural shortcut" but instead an integral part of the Rules as a whole, realized that motions for Summary Judgment are necessary to secure the just, speedy, and expense of determination of every action. The Nevada Supreme Court cited for this position two cases; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986); and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986).

The Nevada Supreme Court reasoned by its very terms Summary Judgment provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for

summary judgment; the requirement is that there is no genuine issue of material fact. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of Summary Judgment. Factual disputes that are irrelevant or unnecessary will not be counted. The Nevada Supreme Court determined that a factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. A case cannot be built upon "gossamer threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Sav. and Loan Ass'n*, 99 Nev. 284, 662 P.2d 610 (1983).

A review of the record before the District Court reveals Spencer's allegations against the Shaws were merely that – allegations lacking evidentiary support. Spencer never identified specific statements the Shaws made that Spencer contends were defamatory and he even fails to do so now on appeal. The Shaws are presuming that the below statements are the defamatory statement that Spencer alludes too. First, Spencer alleges that the Shaws picked the side of Helmut Klementi. *See AOB* at p. x. The Shaws are unsure of what this statement means. Spencer also alleges that the Shaws were part of a "letter writing campaign to have the Spencer's fence removed and Dr. Shaw alone wrote to the Douglas County district attorney on numerous occasions, the Kingsbury General Improvement District ("KGID"), Community Development

Board Members and code enforcement in attempts to force the Spencers to dismantle the fence." *See AOB* at p. x-xi. Spencer also alleges that the Shaws reported he was "intentionally blocking their driveways with large berms of snow and ice." *See AOB* at p. xi. Spencer also claims that "[i]n a KGID meeting on December 18, 2012…" the Shaws complained to KGID "regarding a specific plow driver." *Id.* Last, he alleges that 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 A. App. 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 A. App. 800.

Spencer makes general allegations of defamatory statements but fails to provide how the statements are defamatory using the elements of the offense. The Shaws are left guessing as to how the above statements are defamatory. In addition, there is a lack of evidence as to how the Shaws have culpability for a malicious prosecution claim. It should also be noted that Spencer has provided no evidence regarding how Mr. Shaw's statements or actions support any cause of action.

In *Schuck*, this Court addressed the same situation. This Court affirmed the district court on summary judgment for the defendant where the plaintiff failed to specify the disputed issues of fact with a concise statement of material facts

claimed to be in dispute, failed to cite to any particular portions of the record, and relied on conclusory assertions. *Schuck v. Sig. Flight Support of Nev., Inc.*, 126 Nev. 434, 436-37 (Nev. 2010). The court concluded it was not the district court's obligation to hunt through the record to find some specific fact to support the nonmoving party's claim. *Id*. at 438. The *Schuck* plaintiff also opposed summary judgment by relying on the old "slightest doubt" standard just like Spencer did here. *Id.* at 439. Spencer's conduct is identical to that of *Schuck.* The gravamen of Dr. Shaw's statements seem to be the statements she made at the KGID meeting. However, there is no application of facts to the elements of a defamation claim. In Nevada, a plaintiff must prove four elements to establish a defamation claim: (1) a false and defamatory statement, (2) unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *See Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277 (2005). Spencer has not only failed to apply any analysis of a defamation claim to his alleged facts but he has failed entirely to mention the elements of a defamation claim.

Spencer has also failed to provide any evidence that the Shaws initiated, pressured, or tried to influence the criminal trial. More importantly, he failed to rebut the testimony of Ms. Pence that it was her sole decision to charge and

prosecute Spencer. 2 A. App. 300. Spencer's subjective "disagreement with the conclusions" of Pence do not defeat summary judgment. 6 A. App. 1254–55.

Spencer's own authority cited in his brief, *Catrone v. 105 Casino Corp*, 82 Nev. 166, 414 P.2d 106 (1966) actually supports the district court's decision. In *Catrone*, this Court affirmed the district court's order granting summary judgment in a malicious prosecution case. The defendants offered an affidavit from the investigating officer, who explained that he alone recommended criminal prosecution of the plaintiff based on his investigation. *Id.* at 169-170. The court agreed the plaintiff failed to meet his burden on summary judgment and held that absent competent evidence that the officer commenced criminal prosecution "because of direction, request, or pressure" from defendants, summary judgment was proper. *Id.* at 172.

In addressing his malicious prosecution against the Shaws, Spencer does as he did in addressing claims against Helmut, he presents no evidence. 4 A. App. 780–81. Ultimately, the district court concluded that probable cause existed for Spencer's arrest and prosecution, further evidenced by Spencer's bind-over from justice court for trial. 2 A. App. 321–322. Even on appeal, Spencer fails to identify what evidence supported his malicious prosecution claim against the Shaws. *AOB*, p. 16. The only evidence proffered by Dr. Shaw at the criminal trial was how her security cameras worked. 6 A. App.

1460. In addition, Mr. Shaw did not testify in the criminal trial. More importantly, Spencer has pointed to no statements made by the Shaws regarding the criminal investigation and during trial.

Instead, he sweepingly argues that alleged errors concerning respondent Mary Ellen should be applied to the Shaws. *AOB*, p. 16. Spencer's alleged points of error as to the Shaws are meritless because he has failed to identify how the district court erred as to them. See *State Indus. Ins. Sys. v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984) (conclusory arguments are not reviewable); *Thurston v. Thurston*, 87 Nev. 365, 368, 487 P.2d 342, 344 (1971) (court would not consider issues raised with little argument and no citation to legal authority); *Prins v. Prins*, 88 Nev. 261, 264, 496 P.2d 165, 166 (1972) (alleged errors were meritless absent showing of how appellant was prejudiced or aggrieved).

Spencer's assertion that the district court applied the wrong summary judgment standard is also rebuffed by the record. The district court rejected the "slightest doubt" standard offered by Spencer, recognizing it was erroneous. 7 A. App. 1466. Instead, the district court properly applied the standard articulated under *Wood v. Safeway* to find Spencer failed to meet his burden as the nonmoving party. 6 A. App. 1458–62. The district court did not err by granting summary judgment to the Shaws.

Telling also is the lack of any mention or evidence as to why his claims of intentional infliction of emotional distress, conspiracy and punitive damages should not have been dismissed. *See generally AOB.*

**B. The district court did not err by calling Ms. Pence; and Spencer waived any argument re: the propriety of her testimony.**

The Shaws join and agree with Helmut's Answering Brief with regard to the district court's decision to call Ms. Pence; additionally, Spencer waived any argument regarding the propriety of her testimony. *See HAB*, pp. 20–23. Spencer devotes a significant portion of his brief asserting the district court erred by "engaging in its own investigation" by calling Ms. Pence. *AOB*, pp. 11–16. This argument fails for two reasons: (1) NRS 50.145 permits a judge, upon his/her own motion, to call witnesses, and (2) Spencer waived – in fact he conceded to – the propriety of Ms. Pence's testimony. 1 A. App. 233.

First, NRS 50.145 expressly permits a judge to call a witness, either upon the judge's own motion or at the suggestion of a party. All parties are entitled to cross-examine the witness called. NRS 50.145(1). *Id.* The statute permits the judge to question the witnesses, and it also permits a party to object to questions asked and to evidence adduced by the witness at any time prior to submission of the issue. NRS 50.145(2); see *Smith v. United States*, 321 F.2d 427, 431 (9th Cir. 1963) (noting wide discretion of district court to call witnesses); and *Callara v.*

*Las Vegas Hilton Corp.*, 126 Nev. 697, 367 P.3d 754 (2010) (no error by trial court in questioning witness given NRS 50.145, especially where appellant failed to object).

Here, the district court sought to hear from Ms. Pence in order to determine whether Spencer's motion to amend his third party complaint should be granted in order to add the Shaws. 1 A. App. 225–26. The reason the district court stayed its ruling on Mary Ellen's summary judgment motion was for Spencer's own counsel to produce discovery from the district attorney's office and to permit the parties to supplement, if they wished. 1 A. App. 225. Spencer failed to object to the district court's motion to call Ms. Pence – in fact, Spencer suggested that the hearing be an evidentiary hearing so he could cross-examine Ms. Pence. 1 A. App. 233. Indeed, Spencer fully availed himself of that opportunity. 2 A. App. 312–62. Based on the foregoing, the district court was well within its discretion to call Ms. Pence and did not err.

Second, and relatedly, Spencer failed to preserve this argument for appeal. A party that fails to raise an issue or argument to the district court subsequently waives that issue or argument on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (refusing to consider argument on appeal where appellant neglected to raise it in district court). The exceptions to this well-established principle are matters of jurisdiction, constitutional concern, or

plain and serious error, which Spencer does not argue here. *AOB*, pp. 11-16. In fact, Spencer fails to identify how the district court's alleged error affects summary judgment in favor of the Shaws. *AOB*, p. 16. Spencer argues the district court adopted the wrong standard of review; however, the record is clear the district court rejected Spencer's "slightest doubt" standard and applied the correct standard under NRCP 56. 6 A. App. 1461, 7 A. App. 1466. At the time of the Shaw's motion, the district court properly considered whether Spencer offered any genuine evidence to rebut Ms. Pence's testimony that she alone was responsible for charging and prosecuting Spencer based on her investigation. 6 A. App. 1460.

Even *if* this Court decides the district court erred by calling Ms. Pence, Spencer's conduct in this case falls under the doctrine of invited error, whereby a "party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) citing 5 Am. Jur. 2d, *Appeal and Error*, §173 (1962). This doctrine is applicable in cases of both affirmative conduct and a failure to act. *Id.* Importantly, even the "claimed misconduct of the judge" is not subject to review upon error invited or induced by the appellant. *Id.* In *Pearson*, this Court rejected the suggestion by the appellant that the trial judge erred by entering a custody order when the

appellant's own attorney failed to object and conceded to procedure for the judge's determination of custody. *Pearson*, 110 Nev. at 297-299.

The court found appellant's failure to object and appellant's agreement with the trial court's procedure for determining custody issues fell squarely under the doctrine of invited error. *Id.* at 297. This Court reluctantly vacated the trial court's custody determination because the appellant was so inadequately represented by counsel. *Id.* at 299. Similarly, here, Spencer cannot now be heard to complain of any error by the district court calling Ms. Pence because he failed to object, consented to the procedure, and availed himself of the opportunity to cross-examine Ms. Pence.

**C. Absolute privilege clearly applies to quasi-judicial proceedings.**

The Shaws join and agree with Helmut's Answering Brief with regard to asserting that the absolute privilege clearly applies to quasi-judicial proceedings. *See HAB*, pp. 23–27. As another basis for granting summary judgment (in addition to finding that Spencer failed to meet his burden), the district court found that the Shaw's statement to the Douglas County Planning Commission (the "Commission") was absolutely privileged based on established Nevada authority. 6 A. App. 1460, 7 A. App. 1473. Spencer, however, asserts this issue is one of first impression in Nevada and the district court erred by applying the

privilege and not determining the relevance of the Shaw's statements. *AOB*, pp. iii, 17-22. All three points are wrong.

Nevada follows the long-standing common law rule that statements made in the course of judicial proceedings are absolutely privileged. *Nickovich v. Mollart*, 51 Nev. 306, 274 P. 809, 810 (1929); *Circus Circus*, 99 Nev. at 60-61, 657 P.2d at 104. This privilege clearly extends to "quasi-judicial proceedings before executive officers, boards, and commissions, including proceedings in which the administrative body is considering an employee's claim for unemployment compensation." *Circus Circus*, 99 Nev. at 60-61. The *Circus Circus* court did not "suggest" or state this proposition only in dicta, like Spencer asserts. *AOB*, pp. 17, 19.

Further, the *Circus Circus* court's holding was not limited to the unemployment statute at issue, as Spencer's reading suggests. *Id.* Rather, the court looked at the absolute privilege as a whole and found the trial court erred in interpreting the unemployment statute because it misunderstood the "very broad" test of relevancy under the privilege, which "need have only 'some relation to the proceeding,'" or "some bearing on the subject matter.'" *Id.* at 61.

In *Knox v. Dick*, this Court also held (not suggested) that "absolute privilege is applicable not only to judicial but also to quasi-judicial proceedings, and that defamatory statements made in the course of those proceedings are

privileged." 99 Nev. 514, 518, 665 P.2d 267, 270 (1983). The appellant argued the administrative board was not a quasi-judicial body. *Id.* at 518. The *Knox* court rejected this, finding that because the administrative board was governed by the Clark County Code and proceedings were governed consistent with the Code's guidelines, the administrative board was a quasi-judicial body. *Id.*

Courts apply a broad construction of whether the statement is relevant to the quasi-judicial proceeding, with any doubt resolved in favor of relevancy or pertinency. *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) citing *Circus Circus*, 99 Nev. at 61, 657 P.2d at 104; *Club Valencia Homeowners v. Valencia Assoc.,* 712 P.2d 1024, 1027 (Colo.Ct.App. 1985) ("No strained or close construction will be indulged to exempt a case form the protection of privilege").

Spencer cites no authority that the "public comment" portion of a quasi-judicial proceeding is exempt from application of the absolute privilege. *AOB*, pp. 17-22. That is because Nevada jurisprudence does not carve out such an exception. See *Circus Circus*, supra, *Knox*, supra. In fact, a California court also addressed and rejected Spencer's assertion that a statement made during public comment is not absolutely privileged. In *Whelan v. Wolford*, the court found the trial court did not err by dismissing a complaint based on application of absolute privilege for a statement made by the defendant during a city planning

commission meeting. 164 Cal. App. 2d 689, 331 P.2d 86 (Cal. 4th Dist. 1958). There, the defendant wrote a statement and testified at a planning commission hearing during public comment that the plaintiff was "running a disorderly house," characterizing plaintiff as an immoral and disreputable person. *Id.* at 88. Just like Spencer here, the plaintiff argued the defendant's comments were "not germane to the application before the commission." *Id.* The court rejected this, and instead held that because the planning commission was an official proceeding authorized by law and the publication had a "reasonable relation" to the application, the absolute privilege applied. *Id.* at 89.

Spencer's assertion that absolute privilege to quasi-judicial proceedings including public comment is wrong, because Nevada jurisprudence does not exempt public comment from the privilege. Instead, Nevada follows the policy behind the privilege, whereby the risk that occasional abuse of the privilege is outweighed by "the public interest in having people speak freely." *Circus Circus*, 99 Nev. at 61; *Knox*, 99 Nev. at 518, 665 P.2d at 270.

Spencer argues the trial court erred in applying absolute privilege; however, Spencer also urged the trial court to allow the jury to decide whether privilege would apply. 6 A. App. 1257. This would have been clear error, as "absolute privilege and relevance are questions of law for the court to decide."

*Circus Circus*, 99 Nev. at 61. The district court rejected Spencer's invitation to commit reversible error.

Finally, Spencer's argument that the district court did not determine the relevancy of Dr. Shaw's statement is belied by the record. 6 A. App. 1458–62. In its order, the trial court addressed the relevancy of the fence to the ultimate assault. *Id*. Further, Spencer's own multiple references to the court concerning the "fence issue" establish the relevancy of the fence issue to the ultimate assault. 2 A. App. 293-94, 2 A. App. 429; 6 A. App. 1251; 6 A. App. 1425-26 ("So this has been a pattern of attack all going back to a handful of neighbors [sic] didn't want them to build a fence they were building."). The district court found Dr. Shaw's statement was relevant to the subject controversy, which was the ongoing neighborhood dispute over Spencer's fence that ultimately culminated in the December 18, 2012 assault. The court correctly construed the privilege broadly, resolving any doubts in favor of privilege and finding the statement relevant. *Fink*, 118 Nev. 433.

**D. Spencer failed to meaningfully preserve his argument on absolute privilege for malicious prosecution; the court did not err in application.**

The Shaws join and agree with Helmut's Answering Brief with regard to asserting that Spencer failed to meaningfully preserve his argument on absolute privilege for malicious prosecution; the court did not err in application. *See HAB*,

pp. 27–32. In addition, Spencer failed to produce any evidence that the Shaws requested or pressured Ms. Pence to commence or continue criminal proceedings against him. He failed, however, to meaningfully preserve this argument as to the Shaws. A party fails to preserve an issue where it fails to urge that point to the district court. *Palmieri v. Clark County*, 131 Nev. Adv. Op. 102, 367 P.3d 442, 455, n. 14 (Nev. App. 2015). While a court reviews summary judgment *de novo*, this standard of review "does not trump th[at] general rule" of waiver. *Schuck*, 126 Nev. at 436, 245 P.3d at 544. Spencer's entire argument on malicious prosecution as to the Shaws fails to meaningfully argue that application of absolute privilege to malicious prosecution is not proper. 4 A. App. 780–81.

In *Roitman*, this Court recently recognized that absolute immunity protects witnesses from tort liability *in general* and did not limit the doctrine's application to only defamation claims. 131 Nev. Adv. Op. 92, 362 P.2d at 1143. The *Roitman* court followed the "functional test" set out by the Supreme Court to determine whether absolute privilege applied: (1) whether the immunity seeker performed functions sufficiently comparable to those afforded immunity at common law, (2) whether harassment or intimidation by personal liability is sufficient great to interfere with the person's performance of their duties, and (3)

whether procedural safeguards exhibit that adequately protect against illegitimate conduct. *Id.* at 1140-42.

Further, absolute privilege for malicious prosecution is not categorically rejected. For example, in *Martin v. O'Daniel*, the court held the only reason the defendants were *not* protected by absolute immunity against a malicious prosecution claim was because they engaged in "a wide range of activities to encourage and promote the prosecution" of the plaintiff, including concealing exculpatory evidence from the prosecutor. 501 S.W. 3d 1, *5 (Ky. Sept. 22, 2016).

Spencer's authorities, by contrast, do not offer any persuasive reason why the district court's application of the functional analysis test in this case was wrong to extend the absolute privilege to the Shaws. In *Jacobs v. Adelson*, for example, the court examined the specific issue of whether the defendant's statement to the media regarding ongoing civil litigation was privileged. 130 Nev. 408, 414, 325 P.3d 1282, 1286 (2014). The court held absolute privilege did not apply in this context because statements to the media did little to aid the civil case. *Id.* The *Greenberg* court adopted a legal-malpractice exception to the well-established litigation privilege in order to further and protect the attorney client relationship. *Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 631,

331 P.3d 901, 903 (2014). It did not address a crime victim's testimony during an accused's criminal action. *Id.*

Similarly, *Pope v. Motel 6* discusses qualified privilege for statements made to police and actually supports the district court's order granting summary judgment because Pope held a qualified privilege existed so crime victims could report what they perceived as a commission of a crime and not be subject to "frivolous lawsuits." *Pope*, 121 Nev. 307, 317, 114 P. 3d 277.

Finally, *Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 375, (1956) involved a civil action for malicious prosecution, which is not recognized in Nevada. See *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (the tort only involves prior criminal proceedings). Moreover, the *Albertson* court held the absolute privilege was not applicable "when the requirements of favorable termination, lack of probable cause, and malice are satisfied." *Id.* at 410. That case concerned a motion to dismiss, not summary judgment, and the court found the plaintiff had adequately stated a claim for relief such that the defense of absolute privilege should not apply. *Id.* at 410-11.

By contrast here, Spencer failed to meet his burden on summary judgment and on his appeal to come forward with any evidence that the Shaws initiated, procured, or actively participated in the continuation of the Spencer's criminal proceedings. 6 A. App. 1461; *Lester v. Buchanen*, 112 Nev. 1426, 1429, 929

P.2d 910, 912 (1996) (no evidence video store directed, requested, or pressured police officers or district attorney to prosecute plaintiff); *Boren v. Harrah's Entm't, Inc.*, 2010 WL 4934477, at *6 (D. Nev. 2010) (presence of probable cause negated malice in gambler's malicious prosecution claim against casino); *Williams v. Taylor*, 181 Cal. Rptr. 423, 428 (Ct. App. 1982) (employee's acquittal and prosecutor's dismissal of charges was not evidence of lack of probable cause in employee's malicious prosecution claim against employer).

In sum, the district court did not err by applying the "functional analysis" test under *Roitman* in this case in addition to finding that Spencer failed to meet his burden of proof on summary judgment. The judgment should be affirmed.

## J. CONCLUSION

Spencer failed to meet his burden on summary judgment to demonstrate a genuine issue of material fact for any of his claims against the Shaws. In addition, he failed to preserve issues on appeal regarding the Shaws. As such, the district court's judgment should be affirmed.

Dated this 4th day of August, 2019

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY**

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## CERTIFICATE OF COMPLIANCE

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 MS Word in 14 point Times New Roman type style.
2. I further certify that this brief complies with the type-volume limitation in NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 6,906 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 appropriate references to 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.

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Dated this 4th day of August, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of August, 2019, the foregoing **RESPONDENT SHAW'S ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court , and therefore electronic service was made in accordance with the master service list as follows:

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