

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES R. KOZAK, ESQ.

Petitioner,

vs.

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

Respondents,

and

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

Real Parties in Interest

Case No. 74857

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

FILED

MAY 02 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *E. Richards*  
DEPUTY CLERK

KOZAK'S REPLY TO ANSWER TO  
PETITION FOR WRIT OF MANDAMUS

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Attorney of record for Petitioner is Charles R. Kozak, Esq. of Kozak & Associates, LLC. Defendant Elizabeth Howard was represented in the underlying District Court Case #15-10DC-0876 by Charles R. Kozak, Esq. and R. Craig Lusiani, Esq. of the firm formerly known as Kozak Lusiani Law, LLC.

There exists no publicly held company nor other corporation affiliated with the current firm Kozak & Associates, LLC. or the former firm previously known as Kozak Lusiani Law, LLC.

Dated this 2nd day of May 2018.

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

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## POINTS AND AUTHORITIES

Mandamus will lie to control discretion which is manifestly abused or exercised in an arbitrary or capricious manner. Washoe County District Attorney v. Second Judicial District Court 116 Nev. 629, 636, 5 P.3d 562, 566 (2000) (granting Petition, finding District Court manifestly abused its discretion in imposing NRCP 11 sanctions against D.A. because Court based its Order of sanctions on an erroneous view of the law). An arbitrary or capricious exercise of discretion is one founded on prejudice or preference, rather than on reason, or one contrary to the evidence or established rules of law. State v. Eighth Judicial District Court 127 Nev. 927, 931-932, 267 P.3d 777, 780 (2011).

The District Court's award of \$16,500 in Rule 11 sanctions was an act of discretion manifestly abused and exercised in an arbitrary and capricious manner. A0099 & A0192@Vol.1.

NRCP 1 Scope of Rules provides: "These rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81."

NRCP 11(c)(1)(A) provides: "A motion for sanctions under the rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after

1 service of the motion (or such other period as the court may prescribe), the  
2 challenged paper, claim, defense, contention, allegation, or denial is not withdrawn  
3 or appropriately corrected.” According to the **DRAFTER’S NOTES 2004**

4  
5 **AMENDMENT:** “The rule is amended to conform to the federal rule, as amended  
6 in 1993, in its entirety.”  
7

8 “The Ninth Circuit strictly construes the safe harbor requirements of Rule  
9 11(c)(1)(A) and considers the rule’s specific requirements to be mandatory.”  
10

11 Woods v. Truckee Meadows Water Authority 2007 WL 2264509 (D.Nev. Aug. 6,

12 2007) \*3.<sup>1</sup> “Rule 11 explicitly requires that a party filing a Rule 11 motion must  
13 serve the motion on the opposing party 21 days before filing the motion with the  
14 Court.” O’Connell v. Smith 2008 WL 477875 (D.Ariz. Feb. 19, 2008) \*1 (finding  
15 Rule 11 Motion filed with Court and served on Defendants same day was  
16

17 improper). A party’s “notice of intent in the form of letters or telephone  
18 conversations, under Ninth circuit jurisprudence, does not satisfy the procedural  
19 requirements of Rule 11’s ‘safe harbor’ provisions.” Lack of “prejudice is not the  
20 correct legal test under Rule 11 – the test is simply whether the moving party has  
21 served a ‘filing ready’ motion to the opposing party 21 or more days before it is  
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23  
24

25  
26 <sup>1</sup> Federal cases interpreting Federal Rules of Civil Procedure are strong persuasive  
27 authority because the Nevada Rules of Civil Procedure are based in large part upon  
28 their federal counterparts. Executive Management, Ltd. v. Ticor Insurance  
Company 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

1 filed with the court.” Certain Underwriters at Lloyd’s London v. Rauw 2007 WL  
2 2729117 (N.D.Cal. Sept. 18, 2007) \*5. ““The requirements of the rule are  
3 straightforward: The party seeking sanctions must serve the Rule 11 motion on the  
4 opposing party at least twenty-one days before filing the motion with the district  
5 court ... It is clear from the language of the Rule that it imposes mandatory  
6 obligations upon the party seeking sanctions, so that the failure to comply with the  
7 procedural requirements precludes the imposition of the requested sanctions.... If  
8 those conditions are not satisfied, the Rule 11 motion for sanctions may not be  
9 filed with the district court. If a non-compliant motion nevertheless is filed with the  
10 court, the district court lacks authority to impose the requested sanctions.” Hohu  
11 v. Hatch 940 F.Supp.2d 1161, 1177 (N.D.Cal. 2013).

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17 On August 26, 2016, Mr. Hughes’ Motion for Sanctions was filed with the  
18 District Court. The Motion requested sanctions per NRCP 11, 10 JDCR 8(6) and  
19 10 JDCR 25. A0001 @Vol. 1. Because the sanction requested under NRCP 11 was  
20 not made “separately” from the requests made under 10 JDCR 8 and 10 JDCR 25,  
21 the Motion violated NRCP 11(c)(1)(A). The Motion further violated Rule  
22 11(c)(1)(A) as it was not first served on Howard “21 days” prior its filing with the  
23 District Court. Consequently, the Court lacked authority to impose the sanction  
24 requested.  
25  
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28

1 The District Court's reasoning in its Order that "Hughes substantially  
2 complied with the 21-day requirement under NRCP 11" and that "Howard was not  
3 prejudiced by any failure to strictly comply" are clearly erroneous applications of  
4 law.<sup>2</sup> A0101:13-15 @Vol. 1.

5  
6 According to the Hughes/Townsend Answer, counsel Kozak violated NRCP  
7 11 when he "stood before the Court" and made oral representations during the  
8 "May 17, 2016 pretrial conference".<sup>3</sup> The March 1, 2017 Order did not find any  
9 such violation of Rule. A0106:14-16@Vol.1. Nevertheless, the "rule applies only to  
10 assertions contained in papers filed with or submitted to the Court." Advisory  
11 Committee Notes 1993 Amendment of FRCP 11. Rule 11 only "authorizes  
12 sanctions against the signer of any pleading, motion or other paper." DiPaolo v.  
13 Moran 407 F.3d 140,144 (3<sup>rd</sup> 2005). See also NRCP 11(b).

14  
15 The Hughes/Townsend Answer repeatedly argues that Kozak violated  
16 NRCP 11 through various alleged acts relating to NRCP 16.1 and the Case  
17 Conference Report. Such acts, however, would be exempt from Rule 11. In this  
18 regard, NRCP 11(d) provides: "Subdivisions (a) through (c) of this rule do not  
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24 <sup>2</sup> Abuse of discretion occurs when the law is misinterpreted, overridden or  
25 misapplied. State v. Eighth Judicial District Court 127 Nev. 927, 931-932, 267  
26 P.3d 777, 780 (2011).

27 <sup>3</sup> The representations were made based on information Kozak's secretary Nan  
28 Adams had given him. When it was discovered Ms. Adams had been derelict in her  
office duties, she was fired. A0086:6-24 @Vol. 1.

1 apply to disclosures and discovery requests, responses, objections, and motions  
2 that are subject to the provisions of Rules 16.1, 16.2 and 26 through 37.”  
3

4 Alternatively, Hughes and Townsend argue that the August 26, 2016 Motion  
5 could be viewed as one requesting sanctions under NRCP 26 and NRCP 37 in  
6 addition to NRCP 11. This argument fails as NRCP 11(c)(1)(A) prohibits any other  
7 requests from being included in a Rule 11 Motion.  
8

9 Hughes and Townsend go on to argue that Kozak “waived his right to rely  
10 on NRCP 11’s safe harbor provision by virtue of filing his opposition to [the  
11 NRCP 11] motion before the safe harbor period expired.” This argument also is  
12 unavailing as Kozak and Howard were never given a “safe harbor period” to begin  
13 with.  
14

15 On August 25, 2016, Hughes’ Motion for Sanctions was served by mail to  
16 counsel for Howard. A0015@Vol.1. Immediately upon receipt, Kozak’s office  
17 called Townsend to inquire whether the Motion had already been filed with the  
18 Court. It was then confirmed that the Motion had indeed been filed on August 26,  
19 2016. A0080:19-28@Vol.1.  
20

21 On September 14, 2016, Howard’s Verified Opposition to Motion for  
22 Sanctions was filed where Kozak cited the 21-day safe harbor violation. A0079  
23 @Vol. 1. Had the September 14<sup>th</sup> filing not be made, the District Court would have  
24 granted the Motion on the basis it went unopposed. In this regard, 10 JDCR 15(11)  
25  
26  
27  
28



1 holds: "Failure of the opposing party to timely serve and file a written opposition,  
2 together with supporting points and authorities, may be construed by the Court as  
3 an admission that the motion is meritorious and a consent to granting the same."  
4

5 When a Rule 11 Motion is filed and goes unopposed, the District Court is  
6 authorized to deem the Rule 11 violation as established and the issue is then  
7 waived on Appeal. DiPaolo v. Moran 407 F.3d 140 (3<sup>rd</sup> 2005). When one fails to  
8 raise the "safe harbor provision in the district court", he has waived the argument  
9 on Appeal. Rector v. Approved Federal Savings Bank 265 F.3d 248, 253 (4<sup>th</sup>  
10 2001).  
11  
12  
13

14 Regarding the NRCP 60 argument, Howard's Motion was filed well within  
15 the "6 months" allowed under subsection (b). On January 12, 2016, Hughes filed  
16 his Notice of Entry of Order Granting Plaintiff's Motion to Dismiss Counterclaim.  
17 RP1058 @Vol. 1. On May 16, 2016, Howard moved to set aside the dismissal.  
18 RP1092 @Vol. 1.  
19  
20

21 In Socialist Republic of Romania v. Wildenstein & Company 147 F.R.D. 62  
22 (S.D.N.Y. 1993), the Romanian government filed an FRCP 60(b) Motion to relieve  
23 it from a Judgment entered 6 years earlier which dismissed the action for failure to  
24 comply with discovery. Although the Court found the Motion "untimely", it found  
25 Rule 11 sanctions were not appropriate since no demonstration was made that  
26 "after reasonable inquiry, a competent attorney could not form a reasonable belief  
27  
28

1 that the pleading is well grounded in fact and is warranted by existing law or a  
2 good faith argument for the extension, modification or reversal of existing law.””

3  
4 Id. at 66.

5 In Pease v. Pakhoed Corp. 980 F.2d 995 (5<sup>th</sup> 1993), Pease filed suit against  
6 his former employer Pakhoed, alleging wrongful discharge and age discrimination.

7 When Pakhoed moved for a more definite statement, Pease failed to respond.

8 Subsequently, the District Court entered an Order requiring Pease to submit an  
9 Amended Complaint containing a more definite statement within thirty days. When  
10

11 Pease failed to respond to the Order, Pakhoed filed a Motion to Dismiss. Following  
12

13 a hearing that Pease’s counsel failed to attend, the District Court dismissed the  
14

15 action with prejudice. Three months later, Pease hired new counsel who filed a  
16

17 Rule 60(b) Motion for Relief of Judgment. The District Court denied the Motion.

18 Two months later, Pakhoed moved for sanctions, claiming that Pease’s Rule 60  
19

20 Motion violated FRCP 11. After the District Court denied this Motion too, both  
21

22 parties appealed. In affirming the District Court’s rulings, the Fifth Circuit Opinion  
23

24 relates that Pakhoed essentially argued “Pease’s counsel failed to make sufficient  
25

26 pre-filing inquiries to support the allegations contained within Pease’s Rule 60(b)  
27

28 Motion for Relief.” According to Pakhoed, the Motion “was both factually and  
29

legally untenable and simply served to prop up a meritless claim.” Although the  
30

Fifth agreed “with the district court that Pease’s Rule 60(b) claims are unavailing”,

1 it concluded that “his contentions are not so abusive or frivolous as to violate Rule  
2 11. At the very least, Pease’s arguments fall within the protective ambit of Rule  
3 11’s ‘good faith argument’ provision...” Id. at 1001.

4  
5 The Hughes/Townsend Answer offered no rebuttal to Kozak’s argument  
6 that, even if his acts were sanctionable, the \$16,500 amount was out of proportion  
7 with other amounts imposed by the Courts. “Under Rule 11, the primary purpose  
8 of sanctions against counsel is not to compensate the prevailing party, but to ‘deter  
9 future litigation abuse.’” Hunter v. Earthgrains Company Bakery 281 F.3d  
10 144,151 (4<sup>th</sup> 2002). Only under unusual circumstances should a court direct a  
11 monetary sanction be paid to those injured by a Rule 11 violation. Myers v.  
12 Sessoms & Rogers, P.A. 781 F.Supp.2d 264,271-272 (E.D.N.Car. 2011)(attorney  
13 sanctioned \$250 amount).

14  
15 In determining reasonable attorney fees, the District Court must conduct its  
16 analysis under the factors set forth in Brunzell v. Golden Gate National Bank 85  
17 Nev. 345, 349, 455 P.2d 31, 33 (1969). The District Court must “demonstrate that  
18 it considered the required factors and the award must be supported by substantial  
19 evidence.” Logan v. Abe 350 P.3d 1139, 1143 (Nev. 2015). Citing to Logan, the  
20 Court in Songer v. Delucchi 2016 WL 3488644 (unpublished – Nevada Supreme  
21 Court June 23, 2016) opined “that the district court abused its discretion by failing  
22 to adequately address the *Brunzell* factors and by failing to provide sufficient  
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1 reasoning and findings in support of its decision to award attorney fees .... [T]he  
2 record on appeal in this case does not clearly demonstrate that the district court  
3 considered the factors or include evidence that clearly supports the amount of fees  
4 awarded.” Id. at \*1.  
5

6  
7 Although the District Court stated it “finds that Mr. Townsend’s ability,  
8 training and education facilitated his ability to achieve a favorable result for his  
9 client”, the Court failed to elaborate on these boilerplate findings or point to  
10 evidence supportive of the \$16,500 amount determined. A0192 @Vol. 1. The  
11 Affidavit of Justin Townsend certainly does not speak of this “ability, training and  
12 education”. In fact, Townsend’s Affidavit does not address the Brunzell factors at  
13 all. It simply sets forth an outrageous amount of attorney fees allegedly incurred.  
14 Townsend failed to provide any evidence that the “\$275.00 per hour” he allegedly  
15 charged as an “associate attorney” from Carson City, Nevada is in line with  
16 prevailing market rates. A0109@Vol.1.  
17  
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19  
20

## 21 CONCLUSION

22 When moving for sanctions, Hughes failed to abide by the 21 day “safe  
23 harbor” provision mandated under Rule 11. Contrary to the District Court’s ruling,  
24 one cannot “substantially” comply with the provision and lack of “prejudice” is not  
25 the test applied. Sanctions for “discovery” conduct are not allowed under Rule 11.  
26 Nor did the District Court provide sufficient reasoning and findings to support the  
27  
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1 amount awarded. Consequently, the District Court's discretion was manifestly  
2 abused and exercised in an arbitrary and capricious manner. Thus, reversal of the  
3 entire \$16,500 sanction is warranted.  
4

### 5 **CERTIFICATE OF COMPLIANCE**

6  
7 I certify that I have read this Reply and that it is not frivolous or interposed  
8 for any improper purpose, such as to harass or to cause unnecessary delay or  
9 needless increase in the cost of litigation.  
10

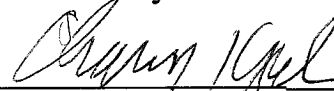
11 I certify that this Reply complies with all applicable Rules.

12 I certify that this Reply complies with the formatting requirements of  
13 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style  
14 requirements of NRAP 32(a)(6). This Reply has been prepared in a  
15 proportionally spaced typeface using Microsoft Word 2013 in 14-point Times  
16 New Roman.  
17  
18

19 Pursuant to NRS 239B.030, the undersigned certifies no Social Security  
20 numbers are contained in this document.  
21

22 Dated this 2nd day of May 2018.  
23

24 Submitted by:

25   
26 Charles R. Kozak, Esq.  
27 Petitioner appearing pro se  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2018, I mailed copies of the foregoing Reply  
to the following:

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