IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGEWORTH FAMILY TRUST; AND AMERICAN GRATING, LLC

Appellants/Cross-Respondents,

vs.

DANIEL S. SIMON; AND THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION,

Respondents/Cross-Appellants.

NO. 77678

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EDGEWORTH FAMILY TRUST; AND AMERICAN GRATING, LLC,

Appellants

vs.

DANIEL S. SIMON; AND THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION

Respondents.

NO. 78176

THE LAW OFFICE OF DANIEL S. SIMON,

Petitioner

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIERRA DANIELLE JONES, DISTRICT JUDGE,

Respondents,
and

NO. 79821

EDGEWORTH FAMILY TRUST; AND
AMERICAN GRATING, LLC,

Real Parties in Interest.

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JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Respondents/ Petitioners

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B. Why The Full Lien is Reasonable

The full lien does not include the following:

1. 600 plus hours by the Law Office to adjudicate the lien and defend the frivolous complaints filed against Mr. Simon.
2. The attorney's fees of Mr. Christiansen and Mr. Christensen
3. The expert fees of Mr. Kemp and Mr. Clark.
4. The damage to Mr. Simon's reputation from the wild accusations throughout this proceeding.

If the Edgeworths receive any portion of the disputed amount they will consider that a victory and likely continue with more spurious claims and unfounded actions.

IX.

CONCLUSION

The Law Office of Daniel Simon requests that the court make the specific findings as the fact finder, as follows:

1. That Mr. Simon properly perfected his lien and is entitled to a reasonable fee for the services which his office has rendered for the clients pursuant to NRS 18.015. Quantum meruit is the method used by the Court to determine the reasonable fee.

2. That Brian Edgeworth and Angela Edgeworth, both individually, and on behalf of both Plaintiffs, American Grating and Edgeworth Family Trust, intentionally provided false and misleading testimony in an attempt to persuade the Court to decide in their favor when seeking the disputed funds and to advance causes of actions against Mr. Simon personally and his practice for punitive damages.

3. That there was no credible evidence that any threats were made by Mr. Simon or the Law Office and the Court finds that no threats were made.

4. That there was no credible evidence of extortion or blackmail and the Court finds that extortion and/or blackmail by Mr. Simon or the Law Office did not occur.

5. That Mr. Simon did not state in the email that Mr. Edgeworth was a danger to children.

6. That there was no credible evidence that an express oral contract for $550 was entered into and the Court finds that there was no express or implied agreement to pay Mr. Simon $550 an hour between Mr. Simon or his Law Office and the Edgeworths.

7. That Mr. Simon was constructively discharged prior to depositing the settlement proceeds. Here was no just cause for his termination.

8. Mr. Simon did not waive the constructive termination as he was merely fulfilling his ethical duties to protect his clients' interests.

9. The bills generated by the Law Office were to establish the damages for the Lange claim only.

10. The payments made by the Edgeworths were to justify the high interest loans, and were not to be deemed as payment in full.

11. That there was no credible evidence that an implied agreement for compensation was established and the Court finds that there was not an implied contract for compensation between Mr. Simon or his Law Office and the Edgeworths.

12. That amount of the claimed lien is due the Law Office of Daniel Simon as a reasonable fee under quantum meruit.

13. That there was no credible evidence of a breach of contract.

14. That there was no credible evidence of a breach of the covenant of good faith and fair dealing.

15. That that the conversion claim was frivolous, and a legal impossibility and that the conversion cause of action was filed for an improper purpose.

16. That there was no credible evidence or basis for seeking punitive damages and the Court finds no such malice existed to support a claim for punitive damages.

17. That there was no credible evidence that there was a breach of fiduciary duty and the Court finds no such breach occurred.

18. That the Edgeworths were made "more than whole" from their portion of the Viking settlement and suffered no damages as alleged in their complaints.

19. The declaratory relief action was decided by the Court as part of the evidentiary hearing and is now moot.

The Law Office requests an opportunity to submit additional findings of fact and conclusions of law when the transcript becomes available and to address the testimony of Angela Edgeworth. The Law Office thanks the Court and its staff for its careful consideration and time devoted to this matter.

Dated this 24th day of September, 2018.

/s/ Peter S. Christiansen

Peter S. Christiansen, Esq.
Nevada Bar No. 5254
CHRISTIANSEN LAW OFFICES
810 S. Casino Center Blvd., Ste. 104
Las Vegas, NV 89101
(702)240-7979
-and-
James R. Christensen Esq.
Nevada Bar No. 3861
JAMES R. CHRISTENSEN PC
601 S. 6th Street
Las Vegas NV 89101
(702) 272-0406
Attorneys for SIMON

ROBERT D. VANNAH, ESQ.
Nevada Bar. No. 002503
JOHN B. GREENE, ESQ.
Nevada Bar No. 004279
VANNAH & VANNAH
400 South Seventh Street, 4th Floor
Las Vegas, Nevada 89101
Telephone: (702) 369-4161
Facsimile: (702) 369-0104
jgreene@vannahlaw.com

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XIV Consolidated with CASE NO.: A-16-738444-C DEPT. NO.: X **PLAINTIFFS' CLOSING ARGUMENT**

Plaintiffs EDGEWORTH FAMILY TRUST and AMERICAN GRATING, LLC (PLAINTIFFS), by and through their attorneys of record, ROBERT D. VANNAH, ESQ., and JOHN B. GREENE, ESQ., of the law firm VANNAH & VANNAH, hereby submit these closing arguments in support of their common sense arguments affirming an oral agreement between the Simon Defendants (SIMON) and PLAINTIFFS.

All of the reasons and the evidence necessary have been present all along (in Briefs, Oppositions; Exhibits; etc.) for this Court to comfortably find that an oral contract exists for the payment of attorney's fees (and costs) to SIMON in return for services rendered to PLAINTIFFS.

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Telephone (702) 369-4161 Facsimile (702) 369-0104

Likewise, everything relevant points to the fact that the agreed to hourly rate for SIMON is $550 per hour, and the rate for his two associates is $275 per hour. Too much time and effort have been spent by SIMON to attempt to obscure what is self-evident. SIMON'S efforts to obscure began on November 17, 2017, in the infamous meeting in his office, and continued unabated until the late afternoon of September 18, 2018. The time has come to put an end to his charade.

WHAT IT'S NOT ABOUT: ANY FORM OF A CONTINGENCY FEE

On that note, let's be clear on what this isn't all about—a contingency fee in any amount or form, be it at law or in equity. In speaking directly to contingency fees, the Supreme Court of Nevada adopted Nevada Rule of Professional Responsibility 1.5(c), which succinctly states:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. **A contingent fee agreement shall be in writing, signed by the client**, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement. (Emphasis added.)

"Shall" is a strong word. Because of that, everyone agrees that there isn't—and that there can't be—a contingency fee agreement here. Rule 1.5(c) requires that a contingency fee agreement be in writing, and SIMON never reduced any fee agreement to writing, even though Rule 1.5(b) alerted him that written fee agreements are preferred and that they should discuss the scope of the representation and the rate of the fee. SIMON also admitted in his letter to PLAINTIFFS dated November 27, 2017 (PLAINTIFFS Exhibit 04-0006), that: "I realize I don't have a contract in place for percentages and I am not trying to enforce one…."

Since the parties admit that this case is not about an effort to enforce a contingency fee agreement, since the Rules would prohibit SIMON from enforcing one even if he wanted to, and since SIMON admits that he's not trying to enforce something based on "percentages", there isn't a factual or legal basis to even consider bestowing a fee upon SIMON that has any nexus to a percentage. Yet that's exactly the scheme that SIMON is selling to this Court by asking for a

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percentage of the Viking settlement via quantum meruit. PLAINTIFFS strongly object to the use and application of this doctrine, as the oral agreement for fees has been in force and effect since June of 2016. Pursuant to the oral agreement for fees, SIMON'S rate is $550 per hour. And, PLAINTIFFS never terminated SIMON, regardless of the theory pitched by him. Therefore, there's no legal or factual basis to retreat to the equitable remedy of quantum meruit.

Assuming for a nanosecond that quantum meruit has a place (in the corner of a very dark and secure room in a place far, far away where the law, common sense, and decency no longer exist in any measurable quantity), it is easily and forcefully dismissed here. As this Court is well aware, quantum meruit is an equitable remedy. In order for SIMON to qualify for an equitable remedy, his hands must be clean. SIMON'S hands on this topic are completely soiled, and all by his own doing.

How can SIMON admit to his clients and this Court that he's not seeking a fee based on a percentage (as in a contingency fee based on a percentage of the Viking settlement), then turn around and assert that he should get a percentage of PLAINTIFFS recovery based on quantum meruit? And proclaim that it should be 40%? That's the amount of SIMON'S Amended Lien. (P's Exhibit 07-0001-0002.) Isn't that the poster child percentage of a contingency fee? How can SIMON admit that he never reduced any fee agreement to writing, thus precluding the recovery of any contingency fee under Rule 1.5(c), then demand one from his clients—PLAINTIFFS—in a tension-filled meeting in his office and ask for one from this Court in equity? In other words, how can SIMON get in equity what he failed by his own admission per Rule 1.5(c) to obtain at law? The legal and equitable dots do not connect.

Not only does this cast a long shadow over SIMON'S credibility, it is a classic example of the Invited Error Doctrine in action, where SIMON is brazenly seeking to profit from "errors on which he himself induced or provoked." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1993). That cannot be allowed to happen, as the law does not allow it. Since the front door to a

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contingency fee has been slammed shut by the admissions of the parties, and also locked tight by the law, there's no reasonable, evidentiary, or legal basis for this Court to entertain SIMON'S request for a backdoor/sidedoor remedy of additional fees in quantum meruit based on a percentage of anything.

WHAT IT IS ALL ABOUT: AN ORAL AGREEMENT FOR AN HOURLY FEE OF $550

While this case isn't about any argument for, or right to, a fee based on a percentage of a recovery, it is all about an oral agreement for fees. Rule 1.5(b) states:

> (b) **The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation**, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. (Emphasis added.)

There is ample evidence in this case that the parties created an oral agreement for fees, whereby SIMON agreed to receive $550 per hour for his time for services performed and PLAINTIFFS agreed to pay SIMON $550 per hour for his time and effort. Brian Edgeworth (Brian) testified that he and SIMON agreed on that rate when it became clear in early June of 2016 that SIMON would need to file a complaint to get any relief for PLAINTIFFS. Brian also testified that SIMON explained at that time that this rate was reasonable because judges in other proceedings had approved that amount.

Angela Edgeworth (Angela) and Brian also testified that despite some initial hesitancy in keeping SIMON as their attorney (with his relatively high hourly rate and relative inexperience), they decided it was in their best interest to do so. Oddly and/or conveniently, SIMON testified that there was never a discussion about his fee and that he and PLAINTIFFS would agree on what a reasonable fee would be at the end of the case.

SIMON presented himself and testified that he is a very successful and ostensibly ethical lawyer. Yet, to believe SIMON'S testimony on this one point is to believe that he knowingly and

willingly violated Rule 1.5(b). Fortunately, there isn't a need to believe SIMON'S testimony on this one point or others), as there is a clear and bright conflict between what SIMON said on the stand versus what SIMON did from Day One. While SIMON'S words on the stand may (now) say "no" to an oral contract for fees, his prior words and deeds proclaim "yes!"

The evidence presented by the parties since this all began (in the late spring of 2016) shows that SIMON and PLAINTIFFS followed with exactness the terms of their oral contract for fees from June of 2016 until November 17, 2017…when SIMON decided he wouldn't. Compelling evidence in favor of SIMON'S deeds that support the clear existence of the oral contract for fees is first found in the four invoices (P's Exhibit 02-0001 through 0031) sent by SIMON to, and paid in full by, PLAINTIFFS. It's also found in the super bill (P's Exhibit 05-0001 through 0183) SIMON attached to his Motion to Adjudicate.

This evidence shows that from SIMON'S first (undated) billing entry for 1.75 hours entitled "Initial Meeting with Client" through SIMON'S last dated billing entry of January 8, 2018, for 2.5 hours entitled "Travel to Bank of Nevada 2x re Trust deposit," SIMON billed every task for every entry on every page on each invoice at $550 per hour. Simple math shows that over 225 entries on his first four invoices and more than 1,815 entries on his super bill are all billed at $550 per hour. SIMON never deviated from billing that rate, not once, not even after he claimed to PLAINTIFFS on November 17, 2017, that he was worth far more than he was getting paid, that he deserved a percentage of the recovery, and that he expected something else.

A second example where SIMON'S deeds and lack of words articulate his understanding of the contractual nature of things (more clearly than does his tongue on the stand) comes from the events in and after San Diego in August of 2017. Brian testified that he and SIMON discussed modifying the agreement for fees while sitting in a bar waiting for a flight back home. He also testified that options were discussed, such as a hybrid contingency agreement, a straight contingency

VANNAH & VANNAH
400 South Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

VANNAH & VANNAH
400 South Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

agreement, or to continue on an hourly basis. Brian testified that he asked for a proposal from SIMON on how to modify the existing oral agreement for fees, but that SIMON didn't offer one.

Then, on August 22, 2017, the evidence shows that Brian again reached out to SIMON, this time via email, to get a proposal from him on perhaps changing the oral agreement for fees. (P's Exhibit 03-0001.) By that time, SIMON had sent, and PLAINTIFFS had paid in full, three invoices for fees and costs totaling $231,266.84, all billed at $550 for SIMON (and $275 for his associates). In that email entitled "Contingency," and as corroborated through Brian's testimony, Brian reminded SIMON that they "never really had a structured discussion about how this might be done." The "this" in that unstructured discussion, per Brian's testimony and the evidence, is changing how SIMON would be paid, from hourly to a contingency, or to something else. We know that's the case from what is clearly reflected in the next sentence from Brian, where he writes: "I am more than happy to keep paying hourly…." (Ex. 03-0001.)

After receiving this email from Brian and mulling over his options, what were SIMON'S words and deeds in response? For one, failing to reply to the email, sending the message loud and clear that he didn't favor changing the deal on the payment of his fees by the hour at the agreed to rate. For another, and most telling, SIMON then sent PLAINTIFFS the fourth invoice for $255,186.25, which included $183,631.25 in fees, all billed at $550 per hour. For all factual intents and legal purposes, SIMON rejected the option to change what was agreed to and instead continued on the path where PLAINTIFFS would "keep paying hourly."

A third example where SIMON made his intentions well known on the nature of his fee agreement with PLAINTIFFS, as well as how much was paid, is found in email correspondence prior to, and during the course of, Brian's deposition. In an email from SIMON to all counsel for the Viking and Lange Defendants dated January 4, 2017 (SIMONEH0004402), SIMON stated that: "My clients damages are increasing every day due to loans and attorney's fees and costs that he is

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paying out of pocket." Can SIMON'S intent and understanding be expressed more clearly than that? On this point, SIMON was right—PLAINTIFFS damages were increasing everyday, namely from the $550 per hour that SIMON was charging, and PLAINTIFFS were "paying out of pocket" in full, for SIMON'S services.

On September 29, 2017, Brian sat for his deposition. As the evidence clearly shows, lawyers for Viking and Lange were present. (P's Exhibit 06-0001 through 0003.) On pages 190-191 of that deposition, Brian was asked by Ms. Dalacas: "Is it your testimony that you've actually paid that full amount, $518,396.99, to Mr. Simon's law office?" To that question, Brian responded: "If your math is correct, I paid that amount. If you math is wrong, then I haven't. I've paid every bill under "Legal" on this sheet…." The follow up question of Ms. Dalacas was as follows: "So there's no place that you could look for that information and tell me a number of attorneys fees that American Grating LLC has actually incurred prior to May of 2017?" At that juncture, SIMON had sat silent long enough and, as an officer of the court, had to make the truth known to all.

At page 271, lines 18-19, SIMON says: "They've all been disclosed to you." SIMON goes on to admit at lines 23-24: "The attorneys' fees and cost for both of these plaintiffs as a result of this claim have been disclosed to you long ago." SIMON puts a finer and final point on the topic of PLAINTIFFS hourly fees paid to him by declaring at page 272, lines 2-3: "And they've been updated as of last week." All of the attorney's fees referenced by SIMON to counsel for defendants in Brian's deposition were billed by SIMON at $550 per hour.

At **no** point did SIMON ever say to counsel for the Defendants any words to the effect that: We've only disclosed a portion of both plaintiffs' fees and costs to you. Or, that more invoices for additional fees and costs will be disclosed by him soon. Or that he was going to be sifting through PLAINTIFFS invoices and our files and add time and fees that we haven't added or disclosed yet. Or that SIMON'S fees were being billed on a contingency basis, as opposed to hourly. Or anything

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else for that matter to give notice or even an indication that every fee and cost incurred by SIMON to date hadn't been produced to Defendants.

A fourth example where SIMON also made his intentions well known on the nature of his fee agreement with PLAINTIFFS, as well as how much was paid, is found in the NRCP 16.1 disclosures and calculations of damages that SIMON produced to Defendants. Just like we see with SIMON'S admissions in Brian's deposition, all of PLAINTIFFS damages were required by rule to be produced to Defendants. Testimony confirmed that PLAINTIFFS damages included a claim for attorney's fees paid to SIMON, and each of the calculations of damages produced by SIMON to Defendants for fees billed and paid to SIMON by PLAINTIFFS was based on SIMON'S four invoices where his hourly rate is $550 per hour for every entry.

With these three admissions alone from January of 2017, through September of 2017, how can SIMON in good conscience tell this Court now that any lawyer for Viking (or Lange) based any settlement offer on the notion that a contingency fee was in play here and needed to be factored in? There's no evidence that ANYONE from Viking thought that PLAINTIFFS owed a contingency fee to SIMON. Was it perhaps a mere memory lapse on SIMON'S part to now assert that? Confusion on his part? Or a flat-out fabrication from him to get a larger fee? None of those options speak well for SIMON.

A fifth example of the oral contract for fees is found in the email string between Angela and SIMON that began on November 27, 2017. (80SIMONEH1169, 1667, 1668, 1664, 1665, & 44SIMONEH00421). After SIMON admits to finally sending the Viking settlement agreement to PLAINTIFFS that morning—containing the terms that PLAINTIFFS had agreed to on November 15, 2017—Angela replies: "I do have questions about the process, and am quite confused. I had no idea we were in anything but an hourly contract with you until our last meeting." Thus far, the evidence states that Brian and Angela believed—rightfully—that an hourly contract for fees was in

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place and in play since June of 2016. What's holding SIMON back now from admitting the obvious to this Court?

His Retainer Agreement doesn't hold back. (P's Ex. 04-0008.) In paragraph 1 where he wants $1,500,000 (BTW: why is it now $1,977,843.80 as set forth in SIMON'S Amended Lien, or the $692,120 that he billed PLAINTIFFS in the super bill??) in total from the Viking settlement, SIMON says: "…This sum includes all past billing statements, the substantial time that is not included in past billing statements, the current outstanding billing statements and any further billing statements that may accrue to finalized and secure the settlement with Viking Entities only." Setting aside for a moment the bonus he wants, SIMON uses the word "billing" four times in that sentence. Can SIMON really say that the nature and terms of the oral fee agreement with PLAINTIFFS wasn't crystal clear to him?

But there's more. In SIMON'S letter dated December 7, 2017 (04-0001 through 0002), to Robert Vannah and John Greene, he states that the worked performed by him from the outset that had not been billed "may well exceed $1.5M." He goes on further by saying: "Simon Law is reviewing the case file and work performed from the outset that has not been billed (including such things as obtaining the forensic copy of case related e-mails and phone records) to provide a comprehensive hourly bill." He also adds: "It is reasonably expected at this time that the hourly bill may well exceed a total of $1.5M…." In that one paragraph, SIMON used the word "hourly" twice and "bill" or "billing" four times. "Billing," according to the evidence, means the hourly work at $550 per hour that SIMON had charged since May 27, 2016, through the date of that Retainer Agreement…and beyond to January 8, 2018.

While SIMON has been reluctant to admit to this Court that an oral agreement for fees is clearly in effect, his words and actions have spoken volumes and in loud decibels. Yet, while he admits, for all intents and purposes, to willfully violating Rule 1.5(b) by not discussing either the

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scope of the representation or the rate of the fee to PLAINTIFFS, SIMON wants this Court to bail him out of his willful acts and throw him a lifeline in equity by crafting a made up deal using quantum meruit. The better way is to embrace the overwhelming evidence that supports the existence of an oral contract for fees at the hourly rate of $550 for SIMON and $275 for his associates.

THERE'S NO DISCHARGE, CONSTRUCTIVE OR OTHERWISE

In yet another departure from reality and the evidence, SIMON raised the unfounded assertion that he was constructively discharged when PLAINTIFFS stopped following SIMON'S advice when they had the temerity to actually follow his advice to seek the counsel of another attorney! Of importance, no one has alleged or testified that anyone fired anybody, or that anyone withdrew from anything. Both Brian and Angela testified that during the meeting with SIMON in his office on November 17, 2017, SIMON encouraged them to speak with attorneys about what SIMON was now proposing.

Additionally, in his letter of November 27, 2017, SIMON acknowledges that: "I know you both have…likely consulted with other lawyers…." (P's Ex. 04-0007.) In an email to Angela later that day, SIMON writes: "**I am also happy to speak to your attorney as well**." (80SIMONEH1664.)(Emphasis added.) SIMON is rightfully fixated on the need for PLAINTIFFS to consult another lawyer, as he admitted on cross-examination that he meant it when he wrote it in his letter of November 27, 2017, that "he can't keep working on PLAINTIFFS case unless they worked something out because he was losing money." This message, sent loud and clear by SIMON, was received by PLAINTIFFS. So, what did PLAINTIFFS reasonably do when SIMON said he'd stop working on their case if PLAINTIFFS didn't, in essence, pay him a bonus, and that they should consult with an attorney?

Brian testified that two days later when he returned from China, he followed SIMON'S

advice and spoke with an attorney, Robert D. Vannah, Esq. The evidence also shows that the very next day, Mr. Vannah reached out to SIMON and spoke with him on the phone. Was SIMON happy to speak with Mr. Vannah, as his email promised? And what basis does he have to object? How can SIMON testify that he felt he was "terminated" when his clients chose to follow his advice to speak with another lawyer? That position defies any measure of factual, legal, or common sense.

It is also disingenuous. SIMON testified that he also went out and consulted with his own lawyer, as he testified that he "didn't know what my options were at the time." SIMON is uncertain about the point in time that he spoke with his attorney and testified all over the charts on that matter. At one point he said he sought counsel when he "didn't hear from them verbally since November 25, 2017." At yet another point, he testified that he consulted with James R. Christensen, Esq., "sometime" around the time SIMON sent the letter of November 27, 2017.

Yet again, he testified that he met with Mr. Christensen around November 30, 2017. In but another iteration, SIMON testified that: "…it would have been around that time or a few days or more before…." Why not a straight answer from a bright, ethical lawyer whose life, he testified to, had been consumed by this case? Why would SIMON promote a flagrant double standard where he can seek guidance to protect his alleged rights, but where PLAINTIFFS cannot?

Regardless, the evidence is undisputed that SIMON was instructed by PLAINTIFFS, through Mr. Vannah, to continue working to complete the settlements with the Viking and Lange entities. This included settling with Lange for the $25,000 offer on the table and to finalize the settlement with Viking for the terms that were acceptable to PLAINTIFFS and communicated to SIMON back on November 11, 2017 (SIMONEH1754.), and again on November 16, 2017 (SIMONEH1709). Regarding the Viking settlement agreement, the evidence shows that the original version that SIMON sent to PLAINTIFFS was without paragraph E. This was the version that Mr. Vannah instructed SIMON to have finalized "as is", per the clients instructions.

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400 South Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

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Then, merely hours later, without consulting PLAINTIFFS, SIMON caused to be added (and billed PLAINTIFFS for) language in the agreement that Vannah & Vannah would be consulting PLAINTIFFS on the merits of the settlement agreement. At no point was any evidence presented by SIMON to suggest or to prove that Mr. Vannah or the Vannah firm had anything to do with any revisions to the Viking agreement, as inferred by SIMON'S counsel during the proceedings. Despite SIMON'S revisions, the evidence proves that PLAINTIFFS signed the Viking agreement the next day and that it was promptly delivered to SIMON'S office. On December 1, 2017, the matter with Lange resolved, as well.

In a summary of the timeline, here's what the evidence shows as to how this all went down: Brian, on behalf of PLAINTIFFS, agreed to the amount of the settlement with Viking no later than November 11, 2017, and that SIMON was aware of PLAINTIFFS consent; SIMON met with PLAINTIFFS in his office on November 17, 2017, where SIMON demanded more money in fees and encouraged PLAINTIFFS to consult with attorneys on the merits of SIMON'S demands; on November 27, 2017, SIMON said he'd be "happy to speak" with PLAINTIFFS attorneys; in the meantime, SIMON had spoken with his own attorney; on November 29, 2017, PLAINTIFFS, through Brian, consulted with and retained Mr. Vannah; on November 30, 2017, SIMON sent a draft of the Viking agreement to PLAINTIFFS; later that morning, Mr. Vannah spoke with SIMON and instructed him to keep working on the Viking and Lange matters and to finalize the Viking agreement "as is"; and, by December 1, 2017, the Viking and the Lange matters were resolved, thus concluding the primary scope of SIMON'S responsibilities.

SIMON can't credibly claim now that PLAINTIFFS constructively discharged him when they followed his advice and counsel by meeting with and speaking with other attorneys! That defies logic and common sense. SIMON also can't credibly claim that PLAINTIFFS constructively discharged him when they chose to resolve a very lengthy and contentious chunk of litigation with

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Lange, especially since it would likely cost PLAINTIFFS, by SIMON'S own admission, significantly more in fees and expenses.

If it wasn't bad enough for SIMON to assert that he was constructively discharged by his clients for following his advice to consult with an attorney who he said he'd be "happy to speak with"; or for SIMON to cry foul that he got his alleged pink slip (denied by PLAINTIFFS and the evidence) after the Viking and the Lange matters resolved by December 1, 2017; or for SIMON to say that he was constructively discharged, then continue to bill PLAINTIFFS for his time at $550 per hour; or for SIMON to play the victim; then, the most shameful thing of all is that he wants what appears to be an extra fee by abusing the equitable remedy of quantum meruit.

The cases cited by SIMON on constructive discharge are not helpful to him. Missing is any mention or cite of any authority, controlling or otherwise, that holds that a contingency fee can rise like a phoenix in equity in quantum meruit from the ashes of an attorney's failure at law to reduce a contingency fee agreement to writing. If that abuse of an equitable principle were ever found to be okay, SIMON would have cited that case till the end of days. It isn't and he didn't.

To reiterate, SIMON cannot get in equity what he failed by his own admission to obtain at law. To allow him a windfall in the form of a contingency fee in quantum meruit would lay to waste what the Supreme Court of Nevada has adopted in Rule 1.5(c) what a lawyer MUST do in order to receive one, which is to put all of the relevant and specified terms IN WRITING. SIMON the lawyer did not do that here. He's admitted as much on several occasions. Therefore, he's precluded from sneaking in the back-, side-, or any-door with the key of quantum meruit, as that key does not fit here.

What does fit here and does make sense is the rate of the fee of $550 per hour that SIMON and PLAINTIFFS agreed to from the beginning. PLAINTIFFS agree that SIMON is entitled to a measure of additional fees billed at $550 per hour for the work he performed from the date of the

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last billing entry of the fourth invoice—September 19, 2017—to a reasonable time after December 1, 2017, the date when both the Viking and Lange matters had resolved. Similarly, the reasonable time for SIMON'S associates would be billed at $275.

SPAM FOLDER

Since the meeting with PLAINTIFFS in his office on November 17, 2017, SIMON has presented one notion after another that are all belied by the evidence, common sense, and/or the law. Therefore, they are destined for the proverbial Spam Folder. Here are a few of the more bizarre, sad, untruthful, and objectionable examples.

*SIMON'S testimony under oath that the payment of his fees by PLAINTIFFS was optional on their part**.** This one might go down as one of the most bizarre things testified to under oath by a coherent and intelligent witness. No one should believe this nonsense. Of course SIMON expected to be paid what he'd billed, as he made a huge deal in these proceedings on how he was losing money on this case. SIMON also admitted that he never told PLAINTIFFS that paying his fees was optional. To the contrary, when Brian emailed SIMON on December 15, 2016, and asked him if he should send the check for SIMON'S (first) invoice to his house or office (SIMONH3109), SIMON replied that "Anything regarding case should be sent to 810 s casino center Blv LV 89101." (SIMONH3102) Wouldn't that have been the prime time for SIMON to let his clients know that they didn't need to pay his fees? OR SEND THE CHECK/CHECKS BACK TO PLAINTIFFS/SIMON'S CLIENTS WITHOUT DEPOSITING THEM?!? Spam.

*SIMON'S testimony and arguments throughout that PLAINTIFFS don't pay their bills, including SIMON'S fees. In light of the content of the prior Spam Folder item where SIMON says that PLAINTIFFS paid over $370,000 in fees to him that were optional for them to pay, which should be enough to swat this odd assertion to the Spam Folder. But, SIMON stayed on this point like a terrier on a pant leg. In other examples, Mr. Christiansen trotted out an email where Brian was

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contesting paying a bill to show PLAINTIFFS as financial slackers. Yet, Brian and Angela explained that this bill was related to United Restorations, a remediation company that failed to provide a mold certificate at the conclusion of their work, thus preventing occupancy. Once the certificate was provided, Brian testified that the bill was paid in full.

Mr. Christiansen also mentioned a time or two that PLAINTIFFS didn't pay their lawyer. He really said that—even though SIMON remarkably said that the payment of his fees was optional. The evidence also showed that on the morning of November 15, 2017, Brian sent an email to SIMON asking him to send an invoice for any outstanding fees and costs. SIMON never bothered to reply to that email, or send the invoice for fees and costs that Brian requested.

The final example was brought to light when Mr. Christiansen boldly asserted/asked Angela on cross in condescending words (to the effect that): "You want us to believe that you paid your lenders in full the day after you received your settlement check?" When Angela answered "yes," Mr. Christiansen scoffed…until he couldn't when copies of the checks were immediately produced showing exactly what Angela had testified to moments earlier. PLAINTIFFS don't pay their bills, including their legal fees? Spam.

*SIMON'S testimony that PLAINTIFFS wanted the fourth invoice to pay in full before Brian's deposition. Did SIMON ever show anyone an email, letter, or text message to support that wild and wacky assertion? Of course not, because it's untrue and unsupportable. Brian adamantly refuted any morsel of truth to this story. Common sense dictates that no one who had to take out high interest loans to pay SIMON'S fees and costs for damages that they never wanted in the first place is ever going to beg for a bill in the amount of $255,186.25 to pay. Spam.

*SIMON'S testimony that PLAINTIFFS earned interest and benefited from the high interest that was accruing on the loans taken to pay SIMON'S fees. Even a political science major with a history minor knows that when one is paying interest on a loan, the borrower isn't either benefiting

from or earning interest on what they are paying. George H.W. Bush might have called SIMON'S testimony voodoo economics, or the like. In any event, SIMON'S testimony makes no sense and was only offered to slime PLAINTIFFS. Spam.

*SIMON'S argument that the Viking settlement was made with the understanding that PLAINTIFFS likely owed SIMON a contingency fee. As discussed above, NO ONE in the Viking and Lange litigation—neither SIMON nor PLAINTIFFS nor counsel for Viking and/or Lange—was operating under any notion that a contingency fee was in play here. SIMON and PLAINTIFFS have testified that there wasn't any agreement for a contingency fee. As mentioned above, in an email to Defense counsel on January 4, 2017 (SIMONEH0004402), SIMON stated that: "My clients damages are increasing every day due to loans and attorney's fees and costs that he is paying out of pocket." That reality was reinforced by SIMON to the attorneys for Defendants at Brian's deposition and in 16.1 disclosures. For SIMON or his attorneys to assert to this Court anything to the contrary is not in harmony with the evidence. Spam.

*SIMON'S incessant assertion that he's lost money on this case. How can SIMON admittedly fail to bill (at $550 per hour!) for all of the time he allegedly spent working on this case, then claim that he's the victim who's lost money? He's not a victim under any definition. He had no risk, unlike PLAINTIFFS, as he was paid all along. It boggles the mind and does violence to the equity that SIMON sorely seeks. If one is willing to believe him for a moment, had SIMON contemporaneously kept track of the time that he reasonably spent, it is possible that he would have made more money as the case slogged along.

And, contrary to what SIMON would have one believe, keeping track of one's time is no more difficult than taking notes. Yet, SIMON makes this simple task out to be second only to solving world hunger. This is yet another example of SIMON'S invited error being used by him to fashion an equitable remedy that he doesn't deserve. Equity requires clean hands, and SIMON has

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willfully soiled his. Spam.

*Mr. Christiansen's position that since PLAINTIFFS are wealthy and live in a big house that they own free and clear, they should share some of the Viking settlement with SIMON. If the relative wealth of the parties were relevant, the fortunate circumstances of the SIMONS' would certainly be added to the conversation. (Perhaps that of Mr. Christiansen, too.) But, the wealth of the parties is neither relevant nor a crime. Why would a wealthy person disparage the wealth of another wealthy person when none of the above is remotely relevant to the proceedings? Spam.

*SIMON'S testimony that he's not trying to seek a contingency fee in addition to the hourly fees he's billed and paid for. SIMON said on the stand that he wouldn't and doesn't do that. Yet, as Brian and Angela testified, that's exactly what he demanded of them in the November 17, 2017, meeting. SIMON doubled down on his demand on page one of his proposed Retainer Agreement where he wanted $1,500,000 from PLAINTIFFS pertaining to the Viking matter. That's 25% of the settlement. And he's already billed and received from PLAINTIFFS $560,000 in fees and costs. Spam.

*SIMON'S testimony that he was constructively discharged "…when he's meeting with other lawyers...etc." SIMON admits that he encouraged Brian and Angela to seek out the advice of other counsel, so that can't be a decent reason for this odd argument. It's also undisputed from the entries in SIMON'S super bill that he alone continued to bill PLAINTIFFS $550 per hour in 74 additional entries and 43.3 additional hours, not including the whopping 135.8 hours in the block billing entry to review emails. That amounts to $23,815 in SIMON'S fees alone from the mid-morning of November 30, 2017, through January 8, 2018! Is that the conduct of one who reasonably believes he was discharged at any time after he spoke with Mr. Vannah on the mid-morning of November 30, 2017? Spam.

*SIMON'S testimony that the hourly value of his work is now worth more than the $550 per

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hour that he was paid throughout this case. There's no documentary evidence that SIMON ever expressed any displeasure to PLAINTIFFS for either the hourly rate that SIMON was charging and cashing large checks for…until November 17, 2017, after PLAINTIFFS agreed to the number to settle the Viking matter on November 11, 2017. If SIMON truly believed he was losing money on this case all along, and/or that he was entitled to a percentage of any eventual settlement with Viking, he would have spent the 15 minutes max it would have taken to either reply to Brian's email of August 22, 2017, where he was encouraged to provide alternatives, or submit a written proposal for fees many months earlier. SIMON didn't do either, though he did present another large hourly invoice, all billed at $550 per hour.

SIMON'S sudden buyer's remorse doesn't sell well, either to the facts of this case or to cases at large. By analogy, SIMON'S sudden remorse is akin to the chipmaker(s) for iPhones suing Apple for more than the original contract price, or a portion of Apple's profits, simply because they helped Apple's premier product rise to the lofty status that it enjoys. Or, closer to home, if Mr. Nunez decided that the hourly rate paid by his insurance carrier clients has been beneath his value all along, and exercised his wrath by suing them for his perceived rate on past cases. Two things would surely happen then: One, his insurance clients would pull all of his files by 5:00 p.m. Two, the Nevada Supreme Court would either dismiss his appeal or simply uphold the Motion for Summary Judgment that the District Court would have granted in favor of his clients. SIMON doesn't really believe that his services here are worth more per hour than the $550 per hour he agreed to be paid. Spam.

*Will Kemp's testimony that Rule 1.5(c) is Dan Polsenberg's rule. That's either a bad stab at humor or a very clueless statement from one who should (and really does) know better. Up front and center to these Rules is language that tells us lawyers that they are "adopted by the Supreme Court of Nevada." There are numerous cases published by them that show how much they are paying attention to whether or not their Rules are being followed by those of us to whom they

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apply—lawyers such as SIMON. Do the Justices not give a darn whether a contingency fee agreement is in writing? Hardly! Have they EVER upheld the award of a contingency fee to a lawyer who didn't have a written contingency fee agreement with all of the whistles and bells per Rule 1.5(c)? If they had, SIMON would have cited it in bold and all caps.

The Nevada Supreme Court cares very much how lawyers interact with their clients. And they care even more deeply to preserve the integrity of the practice of law. They rightfully keep a tight leash on how we do things, as one can plainly see near the end of each edition of the Nevada Lawyer magazine. The Rules of Professional Conduct are cited again and again. Dan Polsenberg's Rules to which the Nevada Supreme Court would choose to dismiss? Spam.

MAKING IT REAL

In reality, none of this was necessary but for SIMON. Had he truly believed that he needed a different fee structure to make this case more profitable for him and his firm, he would have prepared and provided the proposal to Brian that the undisputed evidence proves that Brian asked for. Instead, SIMON did nothing. If SIMON really thought that he was losing money on this case, he also would have provided the additional invoice for fees and costs that the undisputed evidence shows that Brian asked for via email during the morning hours of November 15, 2017. Instead, SIMON, again, did nothing.

Despite himself, SIMON is entitled to additional fees for work he performed from September 19, 2017, the date of the last entry of the fourth invoice, through the wrap-up of the Viking and Lange settlements. By his own admission, SIMON billed nearly $400,000 in fees for his time at $550 per hour on his super bill for that period of time. PLAINTIFFS presented evidence that this portion of the super bill contains block billings, double billings, and that offensive and wild entry of 135.8 hours for reviewing emails. That totals $74,690 in fees alone!

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But it gets worse—what SIMON is attempting to sell this Court as reasonable fees in his super bill from September 20, 2017, to the settlements of the Viking and Lange matters amounts to an average of $6,500 billed each day, seven days a week! That's the epitome of unreasonable. While PLAINTIFFS don't agree that the amount in SIMON'S super bill is reasonable, they assert that between $180,000 and $300,000 is the most that could possibly be justified in reasonable additional hourly fees for SIMON to compensate him from the date of his last billing entry on the fourth invoice to the bitter end.

What is neither real nor fair is to award and reward SIMON for his do-overs. These are the entries in his super bill where SIMON and his staff went back and added time and entries for the time frame between May 27, 2016 and September 19, 2017. PLAINTIFFS already paid him handsomely for that timeframe. More telling, the evidence shows that SIMON admitted to defense counsel as an officer of the court that all of "the fees and costs for both of these plaintiffs as a result of this claim have been disclosed to you." He can't have it both ways, especially as he seeks equity from this Court when he's willfully soiled his own hands.

ALTERED REALITY

SIMON'S version of the evidence, including the remedy he longs to receive, is altered reality. There is simply no factual or legal basis for SIMON'S conduct or the amount of his Amended Attorneys' Lien, which is a thinly veiled scheme to compel a contingency fee. There are no practical reasons, either. To the contrary—to entertain SIMON'S position in this matter sends a very troubling message to the community looking to lawyers for help. It also undermines the fiduciary duty that lawyers, such as SIMON, owe to clients, such as PLAINTIFFS. PLAINTIFFS refer to this as The SIMON Rule.

If The SIMON Rule is adopted, attorneys will be emboldened by the following in the handling of their client's interests: 1.) Agree to represent a client for an hourly fee of $550, but fail

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to represent their best interests by reducing the fee agreement to writing; 2.) Bill the client $550 per hour for an extended period of time and collect thousands or hundreds of thousands of dollars from the client, who pays on time when the invoices are presented; 3.) Express a desire to change the terms of the fee agreement when it becomes clear that a much higher fee, or bonus, can be had if the client will agree to do so; 4.) When the client won't agree to pay more than the agreed to fee of $550 per hour, lien the file for the additional proceeds, or bonus, that you had your eyes on late in the game; and, 5.) Use your failure to reduce your fee agreement in writing as a basis to get more money on the back of a "charging lien" and a Motion to Adjudicate with its accelerated timelines and no discovery.

What are the optics of The SIMON Rule if it were widely known that this is the way that we attorneys can operate? Not good. Thankfully, neither the facts, nor the law, nor practical nor common sense supports The SIMON Rule. And neither should this court.

THE END

It is so simple to connect the evidentiary dots to find that an oral contract for fees was created by the parties in June of 2016 and performed with exactness. The agreed-to rate is and always has been $550 per hour for SIMON (and then $275 for his associates). It is equally simple to recognize that there is nothing in the evidence or the law to find that SIMON was ever discharged by anyone for anything. To the contrary—PLAINTIFFS followed SIMON'S advice and counsel by speaking with an attorney on November 29, 2017, and PLAINTIFFS directed SIMON on November 30, 2017, through counsel, to complete all of the tasks necessary to finalize the Viking and Lange settlements. All of that was completed by December 1, 2017. That is what the evidence says and that is what this Court should find.

While it's possible to support an additional fee to SIMON in a range between $180,000 and $300,000, it is reasonable to award him less. We would not be here had it not been for SIMON'S

numerous errors in judgment and procedure, and his own invited errors cannot be used as a tool to extract an unreasonable remedy in equity.

DATED this 24th day of September, 2018.

VANNAH & VANNAH

/s/ Robert D. Vannah

ROBERT D. VANNAH, ESQ.

VANNAH & VANNAH
400 South Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

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CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

Case Number: A-16-738444-C

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

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18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was $692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Law Office Appropriately Asserted A Charging Lien Which Must Be Adjudicated By The Court

An attorney may obtain payment for work on a case by use of an attorney lien. Here, the Law Office of Daniel Simon may use a charging lien to obtain payment for work on case A-16-738444-C under NRS 18.015.

NRS 18.015(1)(a) states:

> 1. An attorney at law shall have a lien:
> (a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

Nev. Rev. Stat. 18.015.

The Court finds that the lien filed by the Law Office of Daniel Simon, in case A-16-738444-C, complies with NRS 18.015(1)(a). The Law Office perfected the charging lien pursuant to NRS 18.015(3), by serving the Edgeworths as set forth in the statute. The Law Office charging lien was perfected before settlement funds generated from A-16-738444-C of $6,100,000.00 were deposited, thus the charging lien attached to the settlement funds. Nev. Rev. Stat. 18.015(4)(a); Golightly & Vannah, PLLC v. TJ Allen LLC, 373 P.3d 103, at 105 (Nev. 2016). The Law Office's charging lien

is enforceable in form.

The Court has personal jurisdiction over the Law Office and the Plaintiffs in A-16-738444-C. Argentina Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish, 216 P.3d 779 at 782-83 (Nev. 2009). The Court has subject matter jurisdiction over adjudication of the Law Office's charging lien. Argentina, 216 P.3d at 783. The Law Office filed a motion requesting adjudication under NRS 18.015, thus the Court must adjudicate the lien.

Fee Agreement

It is undisputed that no express written fee agreement was formed. The Court finds that there was no express oral fee agreement formed between the parties. An express oral agreement is formed when all important terms are agreed upon. *See,* Loma Linda University v. Eckenweiler, 469 P.2d 54 (Nev. 1970) (*no oral contract was formed, despite negotiation, when important terms were not agreed upon and when the parties contemplated a written agreement*). The Court finds that the payment terms are essential to the formation of an express oral contract to provide legal services on an hourly basis.

Here, the testimony from the evidentiary hearing does not indicate, with any degree of certainty, that there was an express oral fee agreement formed on or about June of 2016. Despite Brian Edgeworth's affidavits and testimony; the emails between himself and Danny Simon, regarding punitive damages and a possible contingency fee, indicate that no express oral fee agreement was formed at the meeting on June 10, 2016. Specifically in Brian Edgeworth's August 22, 2017 email, titled "Contingency," he writes:

> "We never really had a structured discussion about how this might be done. I am more than happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these

> scumbags will file etc. Obviously that could not have been done earlier snce who would have thought this case would meet the hurdle of punitives at the start. I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell. I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?"

(Def. Exhibit 27).

It is undisputed that when the flood issue arose, all parties were under the impression that Simon would be helping out the Edgeworths, as a favor.

The Court finds that an implied fee agreement was formed between the parties on December 2, 2016, when Simon sent the first invoice to the Edgeworths, billing his services at $550 per hour, and the Edgeworths paid the invoice. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for Simon's associates. Simon testified that he never told the Edgeworths not to pay the bills, though he testified that from the outset he only wanted to "trigger coverage". When Simon repeatedly billed the Edgeworths at $550 per hour for his services, and $275 an hour for the services of his associates; and the Edgeworths paid those invoices, an implied fee agreement was formed between the parties. The implied fee agreement was for $550 per hour for the services of Daniel Simon Esq. and $275 per hour for the services of his associates.

Constructive Discharge

Constructive discharge of an attorney may occur under several circumstances, such as:

- Refusal to communicate with an attorney creates constructive discharge. Rosenberg v. Calderon Automation, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986).
- Refusal to pay an attorney creates constructive discharge. *See e.g.*, Christian v. All Persons Claiming Any Right, 962 F. Supp. 676 (U.S. Dist. V.I. 1997).

- Suing an attorney creates constructive discharge. See Tao v. Probate Court for the Northeast Dist. #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). *See also* Maples v. Thomas, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and Guerrero v. State, 2017 Nev. Unpubl. LEXIS 472.

- Taking actions that preventing effective representation creates constructive discharge. McNair v. Commonwealth, 37 Va. App. 687, 697-98 (Va. 2002).

Here, the Court finds that the Edgeworths constructively discharged Simon as their lawyer on November 29, 2017. The Edgeworths assert that because Simon has not been expressly terminated, has not withdrawn, and is still technically their attorney of record; there cannot be a termination. The Court disagrees.

On November 29, 2017, the Edgeworths met with the Law Firm of Vannah and Vannah and signed a retainer agreement. The retainer agreement was for representation on the Viking settlement agreement and the Lange claims. (Def. Exhibit 90). This is the exact litigation that Simon was representing the Edgeworths on. This fee agreement also allowed Vannah and Vannah to do all things without a compromise. Id. The retainer agreement specifically states:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
>
> a) …
> b) …
> c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

Id.

This agreement was in place at the time of the settlement of the Viking and Lange claims. Mr. Simon had already begun negotiating the terms of the settlement agreement with Viking during the

week of November 27, 2017 prior to Mr. Vannah's involvement. These negotiated terms were put into a final release signed by the Edgeworths and Mr. Vannah's office on December 1, 2017. (Def. Exhibit 5). Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly identified as the firm that solely advised the clients about the settlement. The actual language in the settlement agreement, for the Viking claims, states:

> PLAINTIFFS represent that their independent counsel, Robert Vannah, Esq. and John Greene, Esq., of the law firm Vannah & Vannah has explained the effect of this AGREEMENT and their release of any and all claims, known or unknown and, based upon that explanation and their independent judgment by the reading of this Agreement, PLAINTIFFS understand and acknowledge the legal significance and the consequences of the claims being released by this Agreement. PLAINTIFFS further represent that they understand and acknowledge the legal significance and consequences of a release of unknown claims against the SETTLING PARTIES set forth in, or arising from, the INCIDENT and hereby assume full responsibility for any injuries, damages, losses or liabilities that hereafter may occur with respect to the matters released by this Agreement.

Id.

Also, Simon was not present for the signing of these settlement documents and never explained any of the terms to the Edgeworths. He sent the settlement documents to the Law Office of Vannah and Vannah and received them back with the signatures of the Edgeworths.

Further, the Edgeworths did not personally speak with Simon after November 25, 2017. Though there were email communications between the Edgeworths and Simon, they did not verbally speak to him and were not seeking legal advice from him. In an email dated December 5, 2017, Simon is requesting Brian Edgeworth return a call to him about the case, and Brian Edgeworth responds to the email saying, "please give John Greene at Vannah and Vannah a call if you need anything done on the case. I am sure they can handle it." (Def. Exhibit 80). At this time, the claim against Lange Plumbing had not been settled. The evidence indicates that Simon was actively

working on this claim, but he had no communication with the Edgeworths and was not advising them on the claim against Lange Plumbing. Specifically, Brian Edgeworth testified that Robert Vannah Esq. told them what Simon said about the Lange claims and it was established that the Law Firm of Vannah and Vannah provided advice to the Edgeworths regarding the Lange claim. Simon and the Law Firm of Vannah and Vannah gave different advice on the Lange claim, and the Edgeworths followed the advice of the Law Firm of Vannah and Vannah to settle the Lange claim. The Law Firm of Vannah and Vannah drafted the consent to settle for the claims against Lange Plumbing (Def. Exhibit 47). This consent to settle was inconsistent with the advice of Simon. Mr. Simon never signed off on any of the releases for the Lange settlement.

Further demonstrating a constructive discharge of Simon is the email from Robert Vannah Esq. to James Christensen Esq. dated December 26, 2017, which states: "They have lost all faith and trust in Mr. Simon. Therefore, they will not sign the checks to be deposited into his trust account. Quite frankly, they are fearful that he will steal the money." (Def. Exhibit 48). Then on January 4, 2018, the Edgeworth's filed a lawsuit against Simon in Edgeworth Family Trust; American Grating, LLC vs. Daniel S. Simon; the Law Office of Daniel S. Simon, a Professional Corporation d/b/a Simon Law, case number A-18-767242-C. Then, on January 9, 2018, Robert Vannah Esq. sent an email to James Christensen Esq. stating, "I guess he could move to withdraw. However, that doesn't seem in his best interests." (Def. Exhibit 53).

The Court recognizes that Simon still has not withdrawn as counsel of record on A-16-738444-C, the Law Firm of Vannah and Vannah has never substituted in as counsel of record, the Edgeworths have never explicitly told Simon that he was fired, Simon sent the November 27, 2018 letter indicating that the Edgeworth's could consult with other attorneys on the fee agreement (that was attached to the letter), and that Simon continued to work on the case after the November 29,

2017 date. The court further recognizes that it is always a client's decision of whether or not to accept a settlement offer. However the issue is constructive discharge and nothing about the fact that Mr. Simon has never officially withdrawn from the case indicates that he was not constructively discharged. His November 27, 2017 letter invited the Edgeworth's to consult with other attorneys on the fee agreement, not the claims against Viking or Lange. His clients were not communicating with him, making it impossible to advise them on pending legal issues, such as the settlements with Lange and Viking. It is clear that there was a breakdown in attorney-client relationship preventing Simon from effectively representing the clients. The Court finds that Danny Simon was constructively discharged by the Edgeworths on November 29, 2017.

Adjudication of the Lien and Determination of the Law Office Fee

NRS 18.015 states:

1. An attorney at law shall have a lien:

(a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

(b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.

2. A lien pursuant to subsection 1 is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.

3. An attorney perfects a lien described in subsection 1 by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

4. A lien pursuant to:

(a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action; and

(b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including, without limitation, copies of the attorney's file if the original documents

> received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6, from the time of service of the notices required by this section.
>
> 5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.
>
> 6. On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.
>
> 7. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

Nev. Rev. Stat. 18.015.

NRS 18.015(2) matches Nevada contract law. If there is an express contract, then the contract terms are applied. Here, there was no express contract for the fee amount, however there was an implied contract when Simon began to bill the Edgeworths for fees in the amount of $550 per hour for his services, and $275 per hour for the services of his associates. This contract was in effect until November 29, 2017, when he was constructively discharged from representing the Edgeworths. After he was constructively discharged, under NRS 18.015(2) and Nevada contract law, Simon is due a reasonable fee- that is, quantum meruit.

Implied Contract

On December 2, 2016, an implied contract for fees was created. The implied fee was $550 an hour for the services of Mr. Simon. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for the services of Simon's associates. This implied contract was created when invoices were sent to the Edgeworths, and they paid the invoices.

The invoices that were sent to the Edgeworths indicate that they were for costs and attorney's fees, and these invoices were paid by the Edgeworths. Though the invoice says that the fees were

reduced, there is no evidence that establishes that there was any discussion with the Edgeworths as to how much of a reduction was being taken, and that the invoices did not need to be paid. There is no indication that the Edgeworths knew about the amount of the reduction and acknowledged that the full amount would be due at a later date. Simon testified that Brian Edgeworth chose to pay the bills to give credibility to his actual damages, above his property damage loss. However, as the lawyer/counselor, Simon did not prevent Brian Edgeworth from paying the bill or in any way refund the money, or memorialize this or any understanding in writing.

Simon produced evidence of the claims for damages for his fees and costs pursuant to NRCP 16.1 disclosures and computation of damages; and these amounts include the four invoices that were paid in full and there was never any indication given that anything less than all the fees had been produced. During the deposition of Brian Edgeworth it was suggested, by Simon, that all of the fees had been disclosed. Further, Simon argues that the delay in the billing coincides with the timing of the NRCP 16.1 disclosures, however the billing does not distinguish or in any way indicate that the sole purpose was for the Lange Plumbing LLC claim. Since there is no contract, the Court must look to the actions of the parties to demonstrate the parties' understanding. Here, the actions of the parties are that Simon sent invoices to the Edgeworths, they paid the invoices, and Simon Law Office retained the payments, indicating an implied contract was formed between the parties. The Court find that the Law Office of Daniel Simon should be paid under the implied contract until the date they were constructively discharged, November 29, 2017.

Amount of Fees Owed Under Implied Contract

The Edgeworths were billed, and paid for services through September 19, 2017. There is some testimony that an invoice was requested for services after that date, but there is no evidence

that any invoice was paid by the Edgeworths. Since the Court has found that an implied contract for fees was formed, the Court must now determine what amount of fees and costs are owed from September 19, 2017 to the constructive discharge date of November 29, 2017. In doing so, the Court must consider the testimony from the witnesses at the evidentiary hearing, the submitted billings, the attached lien, and all other evidence provided regarding the services provided during this time.

At the evidentiary hearing, Ashley Ferrel Esq. testified that some of the items in the billing that was prepared with the lien "super bill," are not necessarily accurate as the Law Office went back and attempted to create a bill for work that had been done over a year before. She testified that they added in .3 hours for each Wiznet filing that was reviewed and emailed and .15 hours for every email that was read and responded to. She testified that the dates were not exact, they just used the dates for which the documents were filed, and not necessarily the dates in which the work was performed. Further, there are billed items included in the "super bill" that was not previously billed to the Edgeworths, though the items are alleged to have occurred prior to or during the invoice billing period previously submitted to the Edgeworths. The testimony at the evidentiary hearing indicated that there were no phone calls included in the billings that were submitted to the Edgeworths.

This attempt to recreate billing and supplement/increase previously billed work makes it unclear to the Court as to the accuracy of this "recreated" billing, since so much time had elapsed between the actual work and the billing. The court reviewed the billings of the "super bill" in comparison to the previous bills and determined that it was necessary to discount the items that had not been previously billed for; such as text messages, reviews with the court reporter, and reviewing, downloading, and saving documents because the Court is uncertain of the accuracy of the "super

bill."

Simon argues that he has no billing software in his office and that he has never billed a client on an hourly basis, but his actions in this case are contrary. Also, Simon argues that the Edgeworths, in this case, were billed hourly because the Lange contract had a provision for attorney's fees; however, as the Court previously found, when the Edgeworths paid the invoices it was not made clear to them that the billings were only for the Lange contract and that they did not need to be paid. Also, there was no indication on the invoices that the work was only for the Lange claims, and not the Viking claims. Ms. Ferrel testified that the billings were only for substantial items, without emails or calls, understanding that those items may be billed separately; but again the evidence does not demonstrate that this information was relayed to the Edgeworths as the bills were being paid. This argument does not persuade the court of the accuracy of the "super bill".

The amount of attorney's fees and costs for the period beginning in June of 2016 to December 2, 2016 is $42,564.95. This amount is based upon the invoice from December 2, 2016 which appears to indicate that it began with the initial meeting with the client, leading the court to determine that this is the beginning of the relationship. This invoice also states it is for attorney's fees and costs through November 11, 2016, but the last hourly charge is December 2, 2016. This amount has already been paid by the Edgeworths on December 16, 2016.[2]

The amount of the attorney's fees and costs for the period beginning on December 5, 2016 to April 4, 2017 is $46,620.69. This amount is based upon the invoice from April 7, 2017. This amount has already been paid by the Edgeworths on May 3, 2017.

The amount of attorney's fees for the period of April 5, 2017 to July 28, 2017, for the services of Daniel Simon Esq. is $72,077.50. The amount of attorney's fees for this period for

[2]There are no billing amounts from December 2 to December 4, 2016.

Ashley Ferrel Esq. is $38,060.00. The amount of costs outstanding for this period is $31,943.70. This amount totals $142,081.20 and is based upon the invoice from July 28, 2017. This amount has been paid by the Edgeworths on August 16, 2017.[3]

The amount of attorney's fees for the period of July 31, 2017 to September 19, 2017, for the services of Daniel Simon Esq. is $119,762.50. The amount of attorney's fees for this period for Ashley Ferrel Esq. is $60,981.25. The amount of attorney's fees for this period for Benjamin Miller Esq. is $2,887.50. The amount of costs outstanding for this period is $71,555.00. This amount totals $255,186.25 and is based upon the invoice from September 19, 2017. This amount has been paid by the Edgeworths on September 25, 2017.

From September 29, 2017 to November 29, 2017, the Court must determine the amount of attorney fees owed to the Law Office of Daniel Simon.[4] For the services of Daniel Simon Esq., the total amount of hours billed are 340.05. At a rate of $550 per hour, the total attorney's fees owed to the Law Office for the work of Daniel Simon Esq. is $187,027.50. For the services of Ashley Ferrel Esq., the total amount of hours billed are 337.15. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Ashley Ferrel Esq. from September 19, 2017 to November 29, 2017 is $92,716.25.[5] For the services of Benjamin Miller Esq., the total amount of hours billed are 19.05. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Benjamin Miller Esq. from September 19, 2017 to November 29, 2017 is $5,238.75.[6]

The Court notes that though there was never a fee agreement made with Ashley Ferrel Esq. or Benjamin Miller Esq., however, their fees were included on the last two invoices that were paid

[3] There are no billings from July 28 to July 30, 2017.
[4] There are no billings for October 8th, October 28-29, and November 5th.
[5] There is no billing for the October 7-8, October 22, October 28-29, November 4, November 11-12, November 18-19, November 21, and November 23-26.
[6] There is no billing from September 19, 2017 to November 5, 2017.

by the Edgeworths, so the implied fee agreement applies to their work as well.

The Court finds that the total amount owed to the Law Office of Daniel Simon for the period of September 19, 2018 to November 29, 2017 is $284,982.50.

Costs Owed

The Court finds that the Law Office of Daniel Simon is owed for outstanding costs of the litigation in Edgeworth Family Trust; and American Grating, LLC vs. Lange Plumbing, LLC; The Viking Corporation; Supply Network, Inc. dba Viking Supplynet in case number A-16-738444-C. Pursuant to the Memorandum of Costs and Disbursements filed on January 17, 2018, the Law Firm submits that it is owed $71,594.93 in costs. These costs include $3,122.97 in Clerk's Fees; $9,575.90 in Video and Court Recorder's Fees; $57,646.06 in Expert Witness Fees; and $1,250.00 in Copy Fees. The Court finds that the Law Office of Daniel Simon is owed these costs in the amount of $71,594.93.

Quantum Meruit

When a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract, but is paid based on quantum meruit. *See e.g.* Golightly v. Gassner, 281 P.3d 1176 (Nev. 2009) (*unreported*) (*discharged contingency attorney paid by quantum meruit rather than by contingency fee pursuant to agreement with client*); *citing,* Gordon v. Stewart, 324 P.3d 234 (1958) (*attorney paid in quantum meruit after client breach of agreement*); and, Cooke v. Gove, 114 P.2d 87 (Nev. 1941) (*fees awarded in quantum meruit when there was no contingency agreement*). Here, Simon was constructively discharged by the Edgeworths on November 29, 2017. The constructive discharge terminated the implied contract for fees. William

Kemp Esq. testified as an expert witness and stated that if there is no contract, then the proper award is quantum meruit. The Court finds that the Law Office of Daniel Simon is owed attorney's fees under quantum meruit from November 29, 2017, after the constructive discharge, to the conclusion of the Law Office's work on this case.

In determining the amount of fees to be awarded under quantum meruit, the Court has wide discretion on the method of calculation of attorney fee, to be "tempered only by reason and fairness". Albios v. Horizon Communities, Inc., 132 P.3d 1022 (Nev. 2006). The law only requires that the court calculate a reasonable fee. Shuette v. Beazer Homes Holding Corp., 124 P.3d 530 (Nev. 2005). Whatever method of calculation is used by the Court, the amount of the attorney fee must be reasonable under the Brunzell factors. Id. The Court should enter written findings of the reasonableness of the fee under the Brunzell factors. Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury Standish, 216 P.3d 779, at fn2 (Nev. 2009). Brunzell provides that "[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant. Brunzell v. Golden Gate National Bank, 455 P.2d 31 (Nev. 1969).

The Brunzell factors are: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed; and (4) the result obtained. Id. However, in this case the Court notes that the majority of the work in this case was complete before the date of the constructive discharge, and the Court is applying the Brunzell factors for the period commencing after the constructive discharge.

In considering the Brunzell factors, the Court looks at all of the evidence presented in the case, the testimony at the evidentiary hearing, and the litigation involved in the case.

1. *Quality of the Advocate*

Brunzell expands on the "qualities of the advocate" factor and mentions such items as

training, skill and education of the advocate. Mr. Simon has been an active Nevada trial attorney for over two decades. He has several 7-figure trial verdicts and settlements to his credit. Craig Drummond Esq. testified that he considers Mr. Simon a top 1% trial lawyer and he associates Mr. Simon in on cases that are complex and of significant value. Michael Nunez Esq. testified that Mr. Simon's work on this case was extremely impressive. William Kemp Esq. testified that Mr. Simon's work product and results are exceptional.

2. *The Character of the Work to be Done*

The character of the work done in this case is complex. There were multiple parties, multiple claims, and many interrelated issues. Affirmative claims by the Edgeworths covered the gamut from product liability to negligence. The many issues involved manufacturing, engineering, fraud, and a full understanding of how to work up and present the liability and damages. Mr. Kemp testified that the quality and quantity of the work was exceptional for a products liability case against a world-wide manufacturer that is experienced in litigating case. Mr. Kemp further testified that the Law Office of Danny Simon retained multiple experts to secure the necessary opinions to prove the case. The continued aggressive representation, of Mr. Simon, in prosecuting the case that was a substantial factor in achieving the exceptional results.

3. *The Work Actually Performed*

Mr. Simon was aggressive in litigating this case. In addition to filing several motions, numerous court appearances, and deposition; his office uncovered several other activations, that caused possible other floods. While the Court finds that Mr. Edgeworth was extensively involved and helpful in this aspect of the case, the Court disagrees that it was his work alone that led to the other activations being uncovered and the result that was achieved in this case. Since Mr. Edgeworth is not a lawyer, it is impossible that it was his work alone that led to the filing of motions

and the litigation that allowed this case to develop into a $6 million settlement. All of the work by the Law Office of Daniel Simon led to the ultimate result in this case.

4. The Result Obtained

The result was impressive. This began as a $500,000 insurance claim and ended up settling for over $6,000,000. Mr. Simon was also able to recover an additional $100,000 from Lange Plumbing LLC. Mr. Vannah indicated to Simon that the Edgeworths were ready so sign and settle the Lange Claim for $25,000 but Simon kept working on the case and making changes to the settlement agreement. This ultimately led to a larger settlement for the Edgeworths. Recognition is due to Mr. Simon for placing the Edgeworths in a great position to recover a greater amount from Lange. Mr. Kemp testified that this was the most important factor and that the result was incredible. Mr. Kemp also testified that he has never heard of a $6 million settlement with a $500,000 damage case. Further, in the Consent to Settle, on the Lange claims, the Edgeworth's acknowledge that they were made more than whole with the settlement with the Viking entities.

In determining the amount of attorney's fees owed to the Law Firm of Daniel Simon, the Court also considers the factors set forth in Nevada Rules of Professional Conduct – Rule 1.5(a) which states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

NRCP 1.5. However, the Court must also consider the remainder of Rule 1.5 which goes on to state:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

(1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

(2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

(3) Whether the client is liable for expenses regardless of outcome;

(4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and

(5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

NRCP 1.5.

The Court finds that under the Brunzell factors, Mr. Simon was an exceptional advocate for the Edgeworths, the character of the work was complex, the work actually performed was extremely significant, and the work yielded a phenomenal result for the Edgeworths. All of the Brunzell factors justify a reasonable fee under NRPC 1.5. However, the Court must also consider the fact

that the evidence suggests that the basis or rate of the fee and expenses for which the client will be responsible were never communicated to the client, within a reasonable time after commencing the representation. Further, this is not a contingent fee case, and the Court is not awarding a contingency fee. Instead, the Court must determine the amount of a reasonable fee. The Court has considered the services of the Law Office of Daniel Simon, under the Brunzell factors, and the Court finds that the Law Office of Daniel Simon is entitled to a reasonable fee in the amount of $200,000, from November 30, 2017 to the conclusion of this case.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court must adjudicate the lien. The Court further finds that there was an implied agreement for a fee of $550 per hour between Mr. Simon and the Edgeworths once Simon started billing Edgeworth for this amount, and the bills were paid. The Court further finds that on November 29, 2017, the Edgeworth's constructively discharged Mr. Simon as their attorney, when they ceased following his advice and refused to communicate with him about their litigation. The Court further finds that Mr. Simon was compensated at the implied agreement rate of $550 per hour for his services, and $275 per hour for his associates; up and until the last billing of September 19, 2017. For the period from September 19, 2017 to November 29, 2017, the Court finds that Mr. Simon is entitled to his implied agreement fee of $550 an hour, and $275 an hour for his associates, for a total amount of $284,982.50. For the period after November 29, 2017, the Court finds that the Law Office of Daniel Simon properly perfected their lien and is entitled to a reasonable fee for the services the office rendered for the Edgeworths, after being

constructively discharged, under quantum meruit, in an amount of $200,000. The Court further finds that the Law Office of Daniel Simon is entitled to costs in the amount of $71,594.93.

ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Adjudicate the Attorneys Lien of the Law Office of Daniel S. Simon is hereby granted and that the reasonable fee due to the Law Office of Daniel Simon is $556,577.43, which includes outstanding costs.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

Electronically Filed
10/11/2018 11:14 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

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6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

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> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

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This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

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11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

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16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing

> you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was

$692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

Breach of Contract

The First Claim for Relief of the Amended Complaint alleges breach of an express oral contract to pay the law office $550 an hour for the work of Mr. Simon. The Amended Complaint alleges an oral contract was formed on or about May 1, 2016. After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied oral contract. As such, a claim for breach of contract does not exist and must be dismissed as a matter of law.

Declaratory Relief

The Plaintiff's Second Claim for Relief is Declaratory Relief to determine whether a contract existed, that there was a breach of contract, and that the Plaintiffs are entitled to the full amount of the settlement proceeds. The Court finds that there was no express agreement for compensation, so there cannot be a breach of the agreement. The Plaintiffs are not entitled to the full amount of the settlement proceeds as the Court has adjudicated the lien and ordered the appropriate distribution of the settlement proceeds, in the Decision and Order on Motion to Adjudicate Lien. As such, a claim for declaratory relief must be dismissed as a matter of law.

Conversion

The Third Claim for Relief is for conversion based on the fact that the. Edgeworths believed that the settlement proceeds were solely their and Simon asserting an attorney's lien constitutes a claim for conversion. In the Amended Complaint, Plaintiffs allege "The settlement proceeds from the litigation are the sole property of the Plaintiffs." Amended Complaint, P. 9, Para. 41.

Mr. Simon followed the law and was required to deposit the disputed money in a trust account. This is confirmed by David Clark, Esq. in his declaration, which remains undisputed. Mr. Simon never exercised exclusive control over the proceeds and never used the money for his personal use. The money was placed in a separate account controlled equally by the Edgeworth's own counsel, Mr. Vannah. This account was set up at the request of Mr. Vannah.

When the Complaint was filed on January 4, 2018, Mr. Simon was not in possession of the settlement proceeds as the checks were not endorsed or deposited in the trust account. They were finally deposited on January 8, 2018 and cleared a week later. Since the Court adjudicated the lien and found that the Law Office of Daniel Simon is entitled to a portion of the settlement proceeds, this claim must be dismissed as a matter of law.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The Fourth Claim for Relief alleges a Breach of the Implied Covenant of Good Faith and Fair Dealing based on the time sheets submitted by Mr. Simon on January 24, 2018. Since no express contract existed for compensation and there was not a breach of a contract for compensation, the cause of action for the breach of the covenant of good faith and fair dealing also fails as a matter of law and must be dismissed.

Breach of Fiduciary Duty

The allegations in the Complaint assert a breach of fiduciary duty for not releasing all the funds to the Edgeworths. The Court finds that Mr. Simon followed the law when filing the attorney's lien. Mr. Simon also fulfilled all his obligations and placed the clients' interests above his when completing the settlement and securing better terms for the clients even after his discharge. Mr.

Simon timely released the undisputed portion of the settlement proceeds as soon as they cleared the account. The Court finds that the Law Office of Daniel Simon is owed a sum of money based on the adjudication of the lien, and therefore, there is no basis in law or fact for the cause of action for breach of fiduciary duty and this claim must be dismissed.

Punitive Damages

Plaintiffs' Amended Complaint alleges that Mr. Simon acted with oppression, fraud, or malice for denying Plaintiffs of their property. The Court finds that the disputed proceeds are not solely those of the Edgeworths and the Complaint fails to state any legal basis upon which claims may give rise to punitive damages. The evidence indicates that Mr. Simon, along with Mr. Vannah deposited the disputed settlement proceeds into an interest bearing trust account, where they remain. Therefore, Plaintiffs' prayer for punitive damages in their Complaint fails as a matter of a law and must be dismissed.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court adjudicated the lien. The Court further finds that the claims for Breach of Contract, Declaratory Relief, Conversion, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of the Fiduciary Duty, and Punitive Damages must be dismissed as a matter of law.

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ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Dismiss NRCP 12(b)(5) is GRANTED.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
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Tess Driver
Judicial Executive Assistant
Department 10

Electronically Filed
10/11/2018 11:16 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

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Defendants.

DECISION AND ORDER ON SPECIAL MOTION TO DISMISS ANTI-SLAPP

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person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

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$692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Court has adjudicated all remaining issues in the Decision and Order on Motion to Dismiss NRCP 12(b)(5), and the Decision and Order on Motion to Adjudicate Lien; leaving no remaining issues.

CONCLUSION

The Court finds that the Special Motion to Dismiss Anti-Slapp is MOOT as all remaining issues have already been resolved with the Decision and Order on Motion to Dismiss NRCP 12(b) and Decision and Order on Motion to Adjudicate Lien.

ORDER

It is hereby ordered, adjudged, and decreed, that the Special Motion to Dismiss Anti-Slapp is MOOT.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

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Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel S. Simon

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST, and AMERICAN GRATING, LLC Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5 and ROE entities 6 through 10; Defendants.	Case No.: A-16-738444-C Dept. No.: 10 **MOTION TO AMEND FINDINGS UNDER NRCP 52; and/or FOR RECONSIDERATION** Date of Hearing: Time of Hearing:
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC Plaintiffs, vs. DANIEL S. SIMON d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	CONSOLIDATED WITH Case No.: A-18-767242-C Dept. No.: 10

The Law Office of Daniel Simon, Daniel Simon individually, and Simon Law, (Simon) requests amendment of the findings recently issued by the Court pursuant to NRCP 52, and/or, reconsideration of the findings and orders recently issued pursuant to EDCR 2.20.

This motion is made and based upon the papers and pleadings on file herein, exhibits attached, the points and authorities set forth herein, all other evidence that the Court deems just and proper, as well as the arguments of counsel at the time of the hearing hereon.

Dated this 29th day of October, 2018.

/s/ *James R. Christensen*
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel S. Simon

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

You, and each of you, will please take notice that the undersigned will bring on for hearing the Motion for Reconsideration, Clarification of Decision and Order, and Amendment of the Findings of Fact and Conclusions of Law before the above- entitled Court located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155 on the **29th** day of **November**, 2018, at **In Chambers** ~~a.m./p.m~~. in Department X, Courtroom 14B.

DATED this 29th day of October, 2018.

/s/ *James R. Christensen*
JAMES R. CHRISTENSEN, ESQ.
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(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel S. Simon

MEMORANDUM OF POINTS & AUTHORITIES

I. Introduction

On October 11, 2018, this Court made three decisions:

- Decision and Order on Motion to Dismiss NRCP 12(b)(5). ("MTDO") Attached hereto as Exhibit 1.
- Decision and Order on Motion to Adjudicate Lien. ("Lien D&O") Attached hereto as Exhibit 2.
- Decision and Order on Special Motion to Dismiss Anti-SLAPP. ("ASO") Attached hereto as Exhibit 3.

Upon review, Simon believes there are matters that require correction, clarification and/or merit reconsideration by the court. Accordingly, Simon respectfully requests the Court amend its findings pursuant to NRCP 52 and/or reconsider its rulings pursuant to EDCR 2.20 on the following issues:

A. The implied oral contract finding in the MTDO appears to be a typo.

B. The cost award in the Lien D&O needs clarification.

C. The Viking claim settled on or after December 1, 2017, not November 15, 2017.

D. Because Simon was constructively discharged, the Simon fee is determined by quantum meruit.

E. Simon must be paid for all work on the file.

Simon asks the Court to revisit its findings, conclusions and orders on these topics as argued below.

II. Statement Of Relevant Facts

Simon represented Plaintiffs in a complex and hotly contested products liability and contractual dispute stemming from a premature fire sprinkler activation in April of 2016 which flooded Plaintiffs speculation home during its construction causing $500,000.00 in property damage. Lien D&O, pp. 2-7.

In May/June of 2016, Simon helped Plaintiffs on the flood claim as a favor, with the goal of ending the dispute by triggering insurance to adjust the property damage loss. Simon and Plaintiffs never had an express written or oral attorney fee agreement.

In June of 2016, a complaint was filed. In November of 2016, a joint case conference was held.

In August/September of 2017, Simon and clients agree that the flood case dramatically changed. The case had become extremely demanding and was dominating the time of the law office. Simon and the clients made efforts to reach an express attorney fee agreement. In August of 2017, Daniel Simon and Brian Edgeworth agreed that the nature of the case had changed and had discussions about an express fee agreement based on a hybrid of hourly and contingency fees. However, an express agreement could not be reached due to the unique nature of

the property damage claim and the amount of work and costs necessary to achieve a great result. Simon and the clients agree that the attorney fee was in flux during this period.

Although efforts to reach an express fee agreement failed, Simon continued to forcefully litigate Plaintiffs' claims by serving and assertively pursuing discovery and dynamic motion practice, including the filing of a motion to strike Vikings' answer.

In mid-November of 2017, an offer was made by Viking. The first Viking offer was made in the context of mediation, as a counter offer to a mediator's proposal. The first Viking offer was made as several dispositive motions and an evidentiary hearing on the request to strike Vikings answer were pending. The first Viking offer contained contingencies and provisions which had not been previously agreed to.

Following the Viking offer in mid-November, Simon continued to vigorously pursue the litigation against Viking pending resolution of the details of settlement, and against the co-defendant, Lange Plumbing. Simon also again raised the desire for an express attorney fee agreement with the clients.

On November 29, 2017, the Edgeworths constructively fired Simon by retaining new counsel, Vannah and Vannah, and ceased all direct communications with Simon.

On November 30, 2017, Vannah and Vannah provided Simon notice of retention.

On November 30, 2017, Simon served an attorney lien pursuant to NRS 18.015. However, Simon continued to protect his former clients' interests in the complex flood litigation, to the extent possible under the unusual circumstances.

On December 1, 2017, the Edgeworths entered into an agreement to settle with Viking and release Viking from all claims in exchange for a promise by Viking to pay six million dollars ($6,000,000.00 USD).

On January 2, 2018, Simon served an amended attorney lien.

On January 4, 2018, Plaintiffs sued Simon, alleging Conversion and various other causes of actions based on the assertion of false allegations.

Simon responded with two motions to dismiss, which detailed the facts and explained the law on why the complaint was frivolous. Rather than conceding the lack of merit as to even a portion of the complaint, Plaintiffs filed an Amended Complaint to include new causes of action for the Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Fiduciary Duty and reaffirmed all the false facts in support of the claims. The false facts asserted alleged extortion, blackmail, stealing, by Simon and sought punitive damages.

The facts elicited at the five-day evidentiary hearing confirmed that the allegations in the complaints were false and that the complaints were filed for an

improper purpose as a collateral attack on the lien adjudication proceeding; which forced Simon to retain counsel and experts to defend the suit.

The Court found that Simon was discharged as of November 29, 2017. The Court also found an implied contract existed based solely on the bills sent and paid.

III. Argument

A court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate an order previously made and entered on motion in the progress of the cause or proceeding. *See, e.g.*, *Trail v. Faretto,* 91 Nev. 401 (1975).

NRCP 52(b) allows a party to request amendment of findings of fact and conclusions of law, and the court to do so, as long as the request is timely made:

> **b) Amendment.** Upon a party's motion filed not later than 10 days after service of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may later be questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Notice of entry of order for the MTDO and ASO just occurred and a notice has not yet been filed for the Lien D&O, therefore, this motion is timely.

A party may also move to reconsider an order. A motion to reconsider must set forth the following: (1) some valid reason why the court should revisit its prior order; and (2) facts or law of a "strongly convincing nature" in support of reversing the prior decision. *Keating v. Gibbons*, 2009 U.S. Dist. LEXIS 22842 (citing

Frasure v. U.S., 256 F. Supp.2d 1180, 1183 (D. Nev. 2003)). Reconsideration may be appropriate if (1) the court is presented with newly considered evidence; (2) has committed clear error; or (3) there has been an intervening change in controlling law. *Id*. (citing *Kona Enterprises, Inc. v. Estate of Bishop,* 229 F.3d 877, 890 (9th Cir. 2000).

EDCR 2.24 sets forth the way parties are permitted to seek reconsideration of a prior court ruling. EDCR 2.24(b) provides:

> A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion.

Notice of entry of order for the MTDO and ASO just occurred and a notice has not yet been filed for the Lien D&O, therefore, this motion is timely.

As detailed below there are grounds to amend, alter and/or reconsider the D&O under NRCP 52(b) and/or EDCR 2.24.

A. The implied oral contract finding in the MTDO appears to be a typo.

The order granting the motion to dismiss pursuant to NRCP 12(b)(5) references an implied oral contract, "After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied oral contract." MTDO at 7:8-9.

It appears that the reference to an implied oral contract in the MTDO is likely a typo. For example, the Lien D&O at page 9 describes the basis for finding an implied contract and does not mention an implied oral contract. Further, the Court found an implied contract was based on the past performance only, that is- the bills generated and paid. This is an implied contract based on past performance only and was not based on an express oral agreement. Accordingly, Simon requests that the order be amended to reference an implied contract only.

B. The cost award in the Lien D&O needs clarification.

The Lien D&O can be read to award outstanding costs to Simon.

The Simon attorney liens sought reimbursement for advanced costs. The amount of advanced costs originally sought was $71,594.93. The amount sought for advanced costs was later changed to $68,844.93.

In March of 2018, the Edgeworths finally paid the outstanding advanced costs. As of the evidentiary hearing, no advanced costs were sought by Simon and no advanced costs were outstanding.

It is proper and necessary for the Court to find that Simon acted appropriately in securing repayment of advanced costs through use of an attorney lien, in accord with statute and case law. However, Simon is uncertain how the Court addressed the costs in relation to what is currently owed Simon.

The Edgeworths have also indicated uncertainty concerning the findings in the Lien D&O regarding the need to currently pay costs.

Simon respectfully requests clarification on the cost issue and whether costs are to be added, deducted or are considered separate from the amount currently owed to Simon, and reconciliation of the amount of the fee owed.

C. The Viking claim settled on or after December 1, 2017, not November 15, 2017.

Finding of fact #13 in the MTDO, the ASO, and the Lien D&O states:

> 13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

An express settlement agreement with Viking was not formed in November of 2017. An express settlement agreement with Viking was formed after Brian Edgeworth returned from China, and after Mr. Vannah was hired-on or after December 1, 2017.

It is undisputed that on November 15, 2017, Viking made its first settlement *offer*, with conditions. The conditions were contrary to the mediator's proposal; therefore, the first Viking offer was not an acceptance of the mediator's proposal, but a counter offer. The three main new Viking conditions were:

(1) Confidentiality;

(2) A court order granting of good faith settlement status; and,

(3) Plaintiffs dismissal of the case against Lange.

On November 17, 2017, Simon met the Edgeworths and provided a litigation and settlement update and again raised the issue of an express written fee agreement.

Following November 17, Simon continued to negotiate with Viking and Lange, despite being hobbled by the clients' unusual silence.

On November 29, Vannah was hired.

On November 30, Simon was informed of Vannah's retention.

On December 1, 2017, the express written settlement agreement with Viking was signed by the Edgeworths. The express written agreement was later signed by Viking.

A settlement agreement is formed only when all essential terms are agreed upon. *See, May v. Anderson*, 119 P.3d 1254 (Nev. 2005). The express written settlement agreement signed by the Edgeworths on December 1, 2017, *did not* contain a confidentiality provision or a term requiring dismissal of the case against Lange-a million dollar plus claim, which was later settled by Plaintiffs for an additional $100,000.00. Both are essential terms which were not expressly reached until on or after December 1, 2017.

In addition, advice by Vannah to the Edgeworths on the written Viking settlement agreement presumably did not occur until December 1, according to the express terms of the settlement agreement. And, good faith settlement status,

granted later by the Court, was an agreed upon pre-condition to enforceability of the agreement.

The forgoing all mean that settlement with Viking did not occur on November 15, 2017, as a matter of law. The earliest possible date for a finding of an express settlement agreement with Viking is December 1, 2017. Accordingly, Simon requests that finding #13 in all orders be so amended.

D. Because Simon was constructively discharged, the Simon fee is determined by quantum meruit.

In the Lien D&O, the Court concluded that an implied contract existed between Simon and clients until November 29, 2017, the date of Simon's discharge; and, that Simon must be compensated prior to November 29, 2017, under the hourly payment terms of the implied contract as found by the Court. Lien D&O at pages 15-19. Simon requests the Court alter and/or reconsider this conclusion of law.

As a matter of law, the Edgeworths cannot use the implied contract as a shield from the Simon lien claim for reasonable value, because by discharging Simon, the Edgeworths disavowed the implied contract:

> A client who voids the contract as stated here cannot then enforce its favorable terms against the lawyer, and the client is liable to the lawyer for the fair value of the lawyer's services (see § 39).

Third Restatement, *The Law Governing Lawyers*, §18, at comment e.[1]

The Court agreed that when a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract but is paid based on *quantum merit*. *See, Golightly v. Gassner*, 281 P.3d 1176 (Nev. 2009) (unreported) (discharged contingency attorney paid by *quantum merit* rather than by contingency); *citing*, *Gordon v. Stewart*, 324 P.3d 234 (1958) (attorney paid in *quantum merit* after client breach of agreement); and, *Cooke v. Gove*, 114 P.2d 87 (Nev. 1941)(fees awarded in *quantum merit* when there was no agreement). D&O at 19:18-25.

The law cited by the Court prevents the client from enforcing the terms of a contract, which the client has disavowed. This means that quantum meruit is used to determine the amount of fee owed for the period before as well as after the discharge.

In this case, the Edgeworths disavowed the implied contract with Simon, and the implied hourly rate, when they fired Simon and hired Vannah. Accordingly, the Court erred when it analyzed a portion of the lien claim as if the implied

[1] The Nevada Supreme Court frequently relies upon the Third Restatement. *E.g., NC-DSH, Inc., v. Gardner*, 218 P.3d 853, 861 (Nev. 2009); *Waid v. Eighth Jud. Dist. Ct.*, 119 P.3d 1219 (Nev. 2005); *Leibowitz v. Eighth Jud. Dist. Ct*., 78 P.3d 515, 520 n. 19, 521 n. 23 (Nev. 2003); *Palmer v. Pioneer Inn Assocs., Ltd*., 59 P.3d 1237, 1247 (Nev. 2002).

contract hourly rate was enforceable. The law calls for the entirety of Simon's services to be analyzed by the Court under quantum meruit-that is, a reasonable fee pursuant to the *Brunzell* factors.

The Court cited *Rosenberg* in support of the constructive discharge and the payment method to the discharged attorney. *Rosenberg v. Calderon Automation, Inc.*, 1986 Ohio App. LEXIS 5460 (1986). In *Rosenberg*, client Calderon hired attorney Brenner for a patent infringement case. Brenner recently graduated from law school and did not have much patent infringement experience, so he hired attorney Rosenberg, which was authorized by Calderon. Rosenberg believed he was hired and to be paid based on the 1/3 contingency fee agreement between Calderon and Brenner.

After a trial on special interrogatories, Rosenberg recommended settlement negotiations between Calderon and General Motors. Calderon refused and had no further communications with Rosenberg. The refusal to communicate was held to be a constructive discharge. Rosenberg then filed suit against Calderon in order to recover his attorney fees.

The *Rosenberg* court noted that an attorney that is discharged without just cause is entitled to compensation based upon a stated agreement or upon the theory of quantum meruit. *Id.* at *15. The Court found that Rosenberg was constructively discharged when Calderon ceased all communications with Rosenberg. On the

question of how Rosenberg should be compensated – either by a percentage of the contingency fee per the agreement or by the basis of quantum meruit. The *Rosenberg* court indicated that termination of a contract by a party after part performance of the other party, entitles the performing party to recover the value of the labor performed *irrespective of the contract price. Although the Court acknowledged that Rosenberg could have elected to be compensated pursuant to the agreement, the court adopted Rosenberg's election to be compensated via quantum meruit:*

> Consequently, the reasonable value of Rosenberg's services must be based either on a percentage of the contingency fee or on the basis of quantum meruit. Rosenberg has elected, by his testimony and by his letters to Calderon, to be paid based upon the theory of quantum meruit." *Id.* at *19.

The *Rosenberg* Court applied a basic legal principle. Following a discharge, a performing party may elect to be paid the contract price or quantum meruit, at the election of the performing party.

Notably, Rosenberg did not keep time records, but Rosenberg attempted to estimate the total number of hours on the case that was outstanding at the time of the constructive discharge. The *Rosenberg* court found that Rosenberg's testimony on the work he performed was corroborated by Calderon and Brenner and, therefore, upheld the lower court's award to Rosenberg:

> "Upon a review of the record, we find that the trial court exercised its discretion in arriving at a fair and equitable determination of fees for

> services rendered by Rosenberg. The trial court's award, in our opinion, accomplishes the same and we accordingly affirm." *Id.* at *20.

In Rosenberg, when the discharge occurred, the Court confirmed that the method of payment for outstanding services was elected at the choice of the discharged attorney. The discharged lawyer was given the option by the court to elect to enforce the terms of the contract or have the court determine the outstanding fee based on quantum meruit. The discharged lawyer elected quantum meruit. The Court then determined the reasonable value of his services based on the quantum meruit and not the contract. This result was upheld by the reviewing court on appeal.

Our case is directly on point to the facts and law in *Rosenberg*, and the Ohio Court of Appeals decision is still good law. Like Calderon, Brian Edgeworth fired Simon on the eve of a fantastic result but prior to case conclusion. At the time of termination there were substantial attorney's fees and costs owed to Simon. Edgeworth does not get the benefit of the repudiated implied contract because Simon elected to be compensated by quantum meruit.

The period of quantum meruit could be from the beginning of the case, but certainly for the period after September 19, 2017, which is the period when outstanding services were rendered. The value of quantum meruit for this period is 1.9 million based on the undisputed testimony of expert Will Kemp, and is corroborated by the size of the file, the work performed and the amazing result.

The Court is asked to make a new finding based on this period of time, or at a minimum, to make an alternative finding for this period of time, which can be used if the Supreme Court determines that quantum meruit is the correct measure of fees for this period of time.

The law is clear that if there is no express contract, or if Simon is fired, then the fee is set by reasonable value-that is quantum meruit. The Edgeworths know this is the law, which is why the Edgeworths would not admit they had fired Simon even when they filed a complaint alleging Simon was a thief. No matter, because by ceasing communication, hiring Vannah, and suing Simon for conversion, the Edgeworths constructively fired Simon, and Simon is due the reasonable value of his services. *Rosenberg,* 1986 Ohio App. LEXIS 5460.

E. Simon must be paid for all work on the file.

In the alternative to a reasonable fee under quantum meruit, Simon requests amendment and reconsideration of the conclusion that every single entry of additional time in the super bill for a previously billed period was speculative.

The Court found that an implied contact existed based solely on the past performance of the bills sent and paid up until September 2017. The Court then described general concerns over the accuracy of the superbill entries for work down prior to September 2017, without identifying any specific inaccuracies. In

addition, neither the Court nor the Edgeworths identified a meaningful contract law defense for payment of the past work.

The undisputed evidence at the hearing was that the time entries in the super bill was for work that was done-even if a date was a day or two off. The entries in the superbill were based on tangible work product and/or events in the file, not speculative guess work. Mr. Simon and Ms. Ferrel both testified in detail about the foundation for the superbill and that *every entry was based upon a tangible event*.

In fact, the use of a landmark tangible event meant that many hundreds of hours of work were not included, because those hours could not be tied to a tangible event. The use of only confirmable tangible events by Simon creates a time sheet which can be objectively confirmed, is not speculative, and is considerably lower than a typical hourly bill.

The Edgeworths attempts at establishing double billing and other billing inaccuracies fell flat, and were exposed, by the Court and Simon counsel, as groundless. As such, the Edgeworths failed attempts helped to establish that the foundation for all Simon billing was rock solid. Accordingly, Simon requests an amended finding/conclusion granting a fee for all the documented work performed for the Edgeworths.

1. The superbill was supported by substantial evidence.

There is no requirement for an attorney to keep a contemporaneous time record. *See, e.g., Mardirossian & Associates v. Ersoff*, 153 Cal. App. 4th 257 (2007). In *Mardirossian*, attorney Mardirossian was fired on the eve of a $3.7 million-dollar settlement. Mardirossian then sued former client Ersoff for a reasonable fee. Mardirossian did not keep contemporaneous time records. At trial Mardirossian and other firm lawyers gave *estimates* of the time spent on the file. The estimates were not grounded on tangible work product or events. Rather, they were given on an average hour per week basis. *Ibid*.

The jury awarded Mardirossian a considerable fee based, in part, on the time estimates. The foundation for the time estimates was repeatedly challenged by Ersoff at the trial court and on appeal. And, Ersoff lost at every turn because the testimony of a witness with knowledge, Mardirossian and the firm lawyers, constitutes substantial evidence.

At attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. *Id*., at 269; *quoting, Steiny & Co., v. California Electric Supply*, 79 Cal. App. 4th 285, 293 (2000).

The law is the same in Nevada. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion**."** *Bongiovi v.*

Sullivan, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006). The witnesses' testimonies alone can constitute substantial evidence supporting a finding by a Court. Coru*Summit Vill., Inc., v. Hilltop Duplexes Homeowners Ass'n*, 2011 Nev. Unpub. LEXIS 873, *10-11 (Nev. April 27, 2011).

The evidence of time spent provided by Simon was magnitudes stronger than that provided by Mardirossian. Simon provided time sheets, Mardirossian did not. Every entry on the Simon time sheets is founded on tangible work product or a tangible confirmable event, such as the court file or a disclosed e-mail or phone record. Mardirossian did not. The Court's current finding creates a burden for proof of damages which is well beyond anything found in the law. The Court is asked to re-visit its decision and grant Simon fees for the all the work performed.

2. Minimum billing entries are the norm.

The Edgeworths are seemingly criticized the use of minimum billing entries by Simon. However, the use of a minimum billing entry by Simon is entirely appropriate and the use of minimum billing entries is commonplace.

Minimum billing amounts are the norm, are accepted and are enforceable. *Manigault v. Daly & Sorenson*, 413 P.3d 1114 (Wyo. 2018) (the court found that minimum billing units benefit "both attorneys and clients" and are reasonable). To the extent that the Court discounted work billed under a minimum entry, the Court is asked to revisit the decision.

3. The Edgeworths will be unjustly enriched if the full amount of the time entries is not awarded to Simon for the work performed.

The Court did not grant Simon fees for a lot of documented time spent on the Edgeworths' case. The Court discounted all entries for past billing periods in the superbill. There is no doubt that enormous time was spent, and work was done, the boxes of emails are objective proof of that fact. Therefore, by holding that Simon not get paid for work done and time spent, the Edgeworths have been given a windfall.

Lien adjudication is a proceeding in equity to determine the fair value of an attorney's services, and the lawyer should be compensated for the work performed. In *Leventhal v. Black & LoBello*, 129 Nev. 472, 475, 305 P.3d 907, 909 (2013), the Supreme Court of the state of Nevada stated:

> "A charging lien "is not dependent on possession, as in the case of the general or retaining lien. It is based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it." 23 *Williston on Contracts* § 62:11 (4th ed. 2002)."

There is no rule or authority that supports a finding that work not billed during a case cannot be recovered later. Excepting, of course, the statute of limitations, which is four years or six years, depending on the contract. NRS 11.190 (1)(a) & 2(c).

The Edgeworths were aware of the phone calls and the 2,000+ emails not included in the bills. The Edgeworths received or sent a huge number of the emails and Brian initiated many of the phone calls. A finding that does not award the Law Office the actual time spent unjustly enriches the Edgeworth's for the work performed, which is contrary to the purpose and intent of lien adjudication and certainly the principles of fundamental fairness.

There is no evidence in the record that the billing entries in the super bill were speculative or that the work was not actually performed. The Edgeworths did not have a basis to dispute any of the entries, and the Edgeworths admitted they had no basis to challenge the time entries during the hearing. If the Court is going to determine the fee based on the hourly rate of the implied contact found for all work done through November 29, 2017, then the actual time of the Law Office should be reimbursed.

The Edgeworths admit they have been more than fully compensated. The Edgeworths admitted at hearing that their claimed liquidity problems were caused by their own decisions, like when they used cash on hand to refurbish their 12,000 square foot paid for home instead of for the litigation. There is no basis to grant the Edgeworths another windfall. There is no doubt that the Edgeworths dominated the time of the Law Office, one look at the boxes of e-mails confirms the magnitude of the time spent. The Court is asked to revisit its decision to

prevent a further windfall for the Edgeworths, and to grant fees to Simon for all the work performed.

IV. Conclusion

Simon respectfully requests that the findings and conclusions be clarified, reconsidered and/or amended as stated.

Dated this 29th day of October 2018.

/s/ *James R. Christensen*
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel Simon

CERTIFICATE OF SERVICE

I CERTIFY SERVICE of the foregoing Motion for Reconsideration, Clarification of Decision and Order, And Amendment of Findings of Fact and Conclusion of Law was made by electronic service (via Odyssey) this 29th day of October 2018, to all parties currently shown on the Court's E-Service List.

/s/ *Dawn Christensen*
an employee of
JAMES R. CHRISTENSEN, ESQ.

Exhibit 1

Electronically Filed
10/11/2018 11:14 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

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11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

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costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

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15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing

> you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was

$692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

Breach of Contract

The First Claim for Relief of the Amended Complaint alleges breach of an express oral contract to pay the law office $550 an hour for the work of Mr. Simon. The Amended Complaint alleges an oral contract was formed on or about May 1, 2016. After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied oral contract. As such, a claim for breach of contract does not exist and must be dismissed as a matter of law.

Declaratory Relief

The Plaintiff's Second Claim for Relief is Declaratory Relief to determine whether a contract existed, that there was a breach of contract, and that the Plaintiffs are entitled to the full amount of the settlement proceeds. The Court finds that there was no express agreement for compensation, so there cannot be a breach of the agreement. The Plaintiffs are not entitled to the full amount of the settlement proceeds as the Court has adjudicated the lien and ordered the appropriate distribution of the settlement proceeds, in the Decision and Order on Motion to Adjudicate Lien. As such, a claim for declaratory relief must be dismissed as a matter of law.

Conversion

The Third Claim for Relief is for conversion based on the fact that the. Edgeworths believed that the settlement proceeds were solely their and Simon asserting an attorney's lien constitutes a claim for conversion. In the Amended Complaint, Plaintiffs allege "The settlement proceeds from the litigation are the sole property of the Plaintiffs." Amended Complaint, P. 9, Para. 41.

Mr. Simon followed the law and was required to deposit the disputed money in a trust account. This is confirmed by David Clark, Esq. in his declaration, which remains undisputed. Mr. Simon never exercised exclusive control over the proceeds and never used the money for his personal use. The money was placed in a separate account controlled equally by the Edgeworth's own counsel, Mr. Vannah. This account was set up at the request of Mr. Vannah.

When the Complaint was filed on January 4, 2018, Mr. Simon was not in possession of the settlement proceeds as the checks were not endorsed or deposited in the trust account. They were finally deposited on January 8, 2018 and cleared a week later. Since the Court adjudicated the lien and found that the Law Office of Daniel Simon is entitled to a portion of the settlement proceeds, this claim must be dismissed as a matter of law.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The Fourth Claim for Relief alleges a Breach of the Implied Covenant of Good Faith and Fair Dealing based on the time sheets submitted by Mr. Simon on January 24, 2018. Since no express contract existed for compensation and there was not a breach of a contract for compensation, the cause of action for the breach of the covenant of good faith and fair dealing also fails as a matter of law and must be dismissed.

Breach of Fiduciary Duty

The allegations in the Complaint assert a breach of fiduciary duty for not releasing all the funds to the Edgeworths. The Court finds that Mr. Simon followed the law when filing the attorney's lien. Mr. Simon also fulfilled all his obligations and placed the clients' interests above his when completing the settlement and securing better terms for the clients even after his discharge. Mr.

Simon timely released the undisputed portion of the settlement proceeds as soon as they cleared the account. The Court finds that the Law Office of Daniel Simon is owed a sum of money based on the adjudication of the lien, and therefore, there is no basis in law or fact for the cause of action for breach of fiduciary duty and this claim must be dismissed.

Punitive Damages

Plaintiffs' Amended Complaint alleges that Mr. Simon acted with oppression, fraud, or malice for denying Plaintiffs of their property. The Court finds that the disputed proceeds are not solely those of the Edgeworths and the Complaint fails to state any legal basis upon which claims may give rise to punitive damages. The evidence indicates that Mr. Simon, along with Mr. Vannah deposited the disputed settlement proceeds into an interest bearing trust account, where they remain. Therefore, Plaintiffs' prayer for punitive damages in their Complaint fails as a matter of a law and must be dismissed.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court adjudicated the lien. The Court further finds that the claims for Breach of Contract, Declaratory Relief, Conversion, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of the Fiduciary Duty, and Punitive Damages must be dismissed as a matter of law.

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ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Dismiss NRCP 12(b)(5) is GRANTED.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

Exhibit 2

Electronically Filed
10/11/2018 11:09 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10; Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XXVI **Consolidated with** CASE NO.: A-16-738444-C DEPT NO.: X
EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	**DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN**

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
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> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

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20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

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CONCLUSION OF LAW

The Law Office Appropriately Asserted A Charging Lien Which Must Be Adjudicated By The Court

An attorney may obtain payment for work on a case by use of an attorney lien. Here, the Law Office of Daniel Simon may use a charging lien to obtain payment for work on case A-16-738444-C under NRS 18.015.

NRS 18.015(1)(a) states:

> 1. An attorney at law shall have a lien:
> (a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

Nev. Rev. Stat. 18.015.

The Court finds that the lien filed by the Law Office of Daniel Simon, in case A-16-738444-C, complies with NRS 18.015(1)(a). The Law Office perfected the charging lien pursuant to NRS 18.015(3), by serving the Edgeworths as set forth in the statute. The Law Office charging lien was perfected before settlement funds generated from A-16-738444-C of $6,100,000.00 were deposited, thus the charging lien attached to the settlement funds. Nev. Rev. Stat. 18.015(4)(a); Golightly & Vannah, PLLC v. TJ Allen LLC, 373 P.3d 103, at 105 (Nev. 2016). The Law Office's charging lien

is enforceable in form.

The Court has personal jurisdiction over the Law Office and the Plaintiffs in A-16-738444-C. Argentina Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish, 216 P.3d 779 at 782-83 (Nev. 2009). The Court has subject matter jurisdiction over adjudication of the Law Office's charging lien. Argentina, 216 P.3d at 783. The Law Office filed a motion requesting adjudication under NRS 18.015, thus the Court must adjudicate the lien.

Fee Agreement

It is undisputed that no express written fee agreement was formed. The Court finds that there was no express oral fee agreement formed between the parties. An express oral agreement is formed when all important terms are agreed upon. *See,* Loma Linda University v. Eckenweiler, 469 P.2d 54 (Nev. 1970) (*no oral contract was formed, despite negotiation, when important terms were not agreed upon and when the parties contemplated a written agreement*). The Court finds that the payment terms are essential to the formation of an express oral contract to provide legal services on an hourly basis.

Here, the testimony from the evidentiary hearing does not indicate, with any degree of certainty, that there was an express oral fee agreement formed on or about June of 2016. Despite Brian Edgeworth's affidavits and testimony; the emails between himself and Danny Simon, regarding punitive damages and a possible contingency fee, indicate that no express oral fee agreement was formed at the meeting on June 10, 2016. Specifically in Brian Edgeworth's August 22, 2017 email, titled "Contingency," he writes:

> "We never really had a structured discussion about how this might be done. I am more than happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these

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(Def. Exhibit 27).

It is undisputed that when the flood issue arose, all parties were under the impression that Simon would be helping out the Edgeworths, as a favor.

The Court finds that an implied fee agreement was formed between the parties on December 2, 2016, when Simon sent the first invoice to the Edgeworths, billing his services at $550 per hour, and the Edgeworths paid the invoice. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for Simon's associates. Simon testified that he never told the Edgeworths not to pay the bills, though he testified that from the outset he only wanted to "trigger coverage". When Simon repeatedly billed the Edgeworths at $550 per hour for his services, and $275 an hour for the services of his associates; and the Edgeworths paid those invoices, an implied fee agreement was formed between the parties. The implied fee agreement was for $550 per hour for the services of Daniel Simon Esq. and $275 per hour for the services of his associates.

Constructive Discharge

Constructive discharge of an attorney may occur under several circumstances, such as:

- Refusal to communicate with an attorney creates constructive discharge. Rosenberg v. Calderon Automation, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986).
- Refusal to pay an attorney creates constructive discharge. *See e.g.*, Christian v. All Persons Claiming Any Right, 962 F. Supp. 676 (U.S. Dist. V.I. 1997).

- Suing an attorney creates constructive discharge. See Tao v. Probate Court for the Northeast Dist. #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). *See also* Maples v. Thomas, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and Guerrero v. State, 2017 Nev. Unpubl. LEXIS 472.

- Taking actions that preventing effective representation creates constructive discharge. McNair v. Commonwealth, 37 Va. App. 687, 697-98 (Va. 2002).

Here, the Court finds that the Edgeworths constructively discharged Simon as their lawyer on November 29, 2017. The Edgeworths assert that because Simon has not been expressly terminated, has not withdrawn, and is still technically their attorney of record; there cannot be a termination. The Court disagrees.

On November 29, 2017, the Edgeworths met with the Law Firm of Vannah and Vannah and signed a retainer agreement. The retainer agreement was for representation on the Viking settlement agreement and the Lange claims. (Def. Exhibit 90). This is the exact litigation that Simon was representing the Edgeworths on. This fee agreement also allowed Vannah and Vannah to do all things without a compromise. Id. The retainer agreement specifically states:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
>
> a) …
> b) …
> c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

Id.

This agreement was in place at the time of the settlement of the Viking and Lange claims. Mr. Simon had already begun negotiating the terms of the settlement agreement with Viking during the

week of November 27, 2017 prior to Mr. Vannah's involvement. These negotiated terms were put into a final release signed by the Edgeworths and Mr. Vannah's office on December 1, 2017. (Def. Exhibit 5). Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly identified as the firm that solely advised the clients about the settlement. The actual language in the settlement agreement, for the Viking claims, states:

> PLAINTIFFS represent that their independent counsel, Robert Vannah, Esq. and John Greene, Esq., of the law firm Vannah & Vannah has explained the effect of this AGREEMENT and their release of any and all claims, known or unknown and, based upon that explanation and their independent judgment by the reading of this Agreement, PLAINTIFFS understand and acknowledge the legal significance and the consequences of the claims being released by this Agreement. PLAINTIFFS further represent that they understand and acknowledge the legal significance and consequences of a release of unknown claims against the SETTLING PARTIES set forth in, or arising from, the INCIDENT and hereby assume full responsibility for any injuries, damages, losses or liabilities that hereafter may occur with respect to the matters released by this Agreement.

Id.

Also, Simon was not present for the signing of these settlement documents and never explained any of the terms to the Edgeworths. He sent the settlement documents to the Law Office of Vannah and Vannah and received them back with the signatures of the Edgeworths.

Further, the Edgeworths did not personally speak with Simon after November 25, 2017. Though there were email communications between the Edgeworths and Simon, they did not verbally speak to him and were not seeking legal advice from him. In an email dated December 5, 2017, Simon is requesting Brian Edgeworth return a call to him about the case, and Brian Edgeworth responds to the email saying, "please give John Greene at Vannah and Vannah a call if you need anything done on the case. I am sure they can handle it." (Def. Exhibit 80). At this time, the claim against Lange Plumbing had not been settled. The evidence indicates that Simon was actively

working on this claim, but he had no communication with the Edgeworths and was not advising them on the claim against Lange Plumbing. Specifically, Brian Edgeworth testified that Robert Vannah Esq. told them what Simon said about the Lange claims and it was established that the Law Firm of Vannah and Vannah provided advice to the Edgeworths regarding the Lange claim. Simon and the Law Firm of Vannah and Vannah gave different advice on the Lange claim, and the Edgeworths followed the advice of the Law Firm of Vannah and Vannah to settle the Lange claim. The Law Firm of Vannah and Vannah drafted the consent to settle for the claims against Lange Plumbing (Def. Exhibit 47). This consent to settle was inconsistent with the advice of Simon. Mr. Simon never signed off on any of the releases for the Lange settlement.

Further demonstrating a constructive discharge of Simon is the email from Robert Vannah Esq. to James Christensen Esq. dated December 26, 2017, which states: "They have lost all faith and trust in Mr. Simon. Therefore, they will not sign the checks to be deposited into his trust account. Quite frankly, they are fearful that he will steal the money." (Def. Exhibit 48). Then on January 4, 2018, the Edgeworth's filed a lawsuit against Simon in Edgeworth Family Trust; American Grating, LLC vs. Daniel S. Simon; the Law Office of Daniel S. Simon, a Professional Corporation d/b/a Simon Law, case number A-18-767242-C. Then, on January 9, 2018, Robert Vannah Esq. sent an email to James Christensen Esq. stating, "I guess he could move to withdraw. However, that doesn't seem in his best interests." (Def. Exhibit 53).

The Court recognizes that Simon still has not withdrawn as counsel of record on A-16-738444-C, the Law Firm of Vannah and Vannah has never substituted in as counsel of record, the Edgeworths have never explicitly told Simon that he was fired, Simon sent the November 27, 2018 letter indicating that the Edgeworth's could consult with other attorneys on the fee agreement (that was attached to the letter), and that Simon continued to work on the case after the November 29,

2017 date. The court further recognizes that it is always a client's decision of whether or not to accept a settlement offer. However the issue is constructive discharge and nothing about the fact that Mr. Simon has never officially withdrawn from the case indicates that he was not constructively discharged. His November 27, 2017 letter invited the Edgeworth's to consult with other attorneys on the fee agreement, not the claims against Viking or Lange. His clients were not communicating with him, making it impossible to advise them on pending legal issues, such as the settlements with Lange and Viking. It is clear that there was a breakdown in attorney-client relationship preventing Simon from effectively representing the clients. The Court finds that Danny Simon was constructively discharged by the Edgeworths on November 29, 2017.

Adjudication of the Lien and Determination of the Law Office Fee

NRS 18.015 states:

1. An attorney at law shall have a lien:

(a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

(b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.

2. A lien pursuant to subsection 1 is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.

3. An attorney perfects a lien described in subsection 1 by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

4. A lien pursuant to:

(a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action; and

(b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including, without limitation, copies of the attorney's file if the original documents

> received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6, from the time of service of the notices required by this section.
>
> 5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.
>
> 6. On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.
>
> 7. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

Nev. Rev. Stat. 18.015.

NRS 18.015(2) matches Nevada contract law. If there is an express contract, then the contract terms are applied. Here, there was no express contract for the fee amount, however there was an implied contract when Simon began to bill the Edgeworths for fees in the amount of $550 per hour for his services, and $275 per hour for the services of his associates. This contract was in effect until November 29, 2017, when he was constructively discharged from representing the Edgeworths. After he was constructively discharged, under NRS 18.015(2) and Nevada contract law, Simon is due a reasonable fee- that is, quantum meruit.

Implied Contract

On December 2, 2016, an implied contract for fees was created. The implied fee was $550 an hour for the services of Mr. Simon. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for the services of Simon's associates. This implied contract was created when invoices were sent to the Edgeworths, and they paid the invoices.

The invoices that were sent to the Edgeworths indicate that they were for costs and attorney's fees, and these invoices were paid by the Edgeworths. Though the invoice says that the fees were

reduced, there is no evidence that establishes that there was any discussion with the Edgeworths as to how much of a reduction was being taken, and that the invoices did not need to be paid. There is no indication that the Edgeworths knew about the amount of the reduction and acknowledged that the full amount would be due at a later date. Simon testified that Brian Edgeworth chose to pay the bills to give credibility to his actual damages, above his property damage loss. However, as the lawyer/counselor, Simon did not prevent Brian Edgeworth from paying the bill or in any way refund the money, or memorialize this or any understanding in writing.

Simon produced evidence of the claims for damages for his fees and costs pursuant to NRCP 16.1 disclosures and computation of damages; and these amounts include the four invoices that were paid in full and there was never any indication given that anything less than all the fees had been produced. During the deposition of Brian Edgeworth it was suggested, by Simon, that all of the fees had been disclosed. Further, Simon argues that the delay in the billing coincides with the timing of the NRCP 16.1 disclosures, however the billing does not distinguish or in any way indicate that the sole purpose was for the Lange Plumbing LLC claim. Since there is no contract, the Court must look to the actions of the parties to demonstrate the parties' understanding. Here, the actions of the parties are that Simon sent invoices to the Edgeworths, they paid the invoices, and Simon Law Office retained the payments, indicating an implied contract was formed between the parties. The Court find that the Law Office of Daniel Simon should be paid under the implied contract until the date they were constructively discharged, November 29, 2017.

Amount of Fees Owed Under Implied Contract

The Edgeworths were billed, and paid for services through September 19, 2017. There is some testimony that an invoice was requested for services after that date, but there is no evidence

that any invoice was paid by the Edgeworths. Since the Court has found that an implied contract for fees was formed, the Court must now determine what amount of fees and costs are owed from September 19, 2017 to the constructive discharge date of November 29, 2017. In doing so, the Court must consider the testimony from the witnesses at the evidentiary hearing, the submitted billings, the attached lien, and all other evidence provided regarding the services provided during this time.

At the evidentiary hearing, Ashley Ferrel Esq. testified that some of the items in the billing that was prepared with the lien "super bill," are not necessarily accurate as the Law Office went back and attempted to create a bill for work that had been done over a year before. She testified that they added in .3 hours for each Wiznet filing that was reviewed and emailed and .15 hours for every email that was read and responded to. She testified that the dates were not exact, they just used the dates for which the documents were filed, and not necessarily the dates in which the work was performed. Further, there are billed items included in the "super bill" that was not previously billed to the Edgeworths, though the items are alleged to have occurred prior to or during the invoice billing period previously submitted to the Edgeworths. The testimony at the evidentiary hearing indicated that there were no phone calls included in the billings that were submitted to the Edgeworths.

This attempt to recreate billing and supplement/increase previously billed work makes it unclear to the Court as to the accuracy of this "recreated" billing, since so much time had elapsed between the actual work and the billing. The court reviewed the billings of the "super bill" in comparison to the previous bills and determined that it was necessary to discount the items that had not been previously billed for; such as text messages, reviews with the court reporter, and reviewing, downloading, and saving documents because the Court is uncertain of the accuracy of the "super

bill."

Simon argues that he has no billing software in his office and that he has never billed a client on an hourly basis, but his actions in this case are contrary. Also, Simon argues that the Edgeworths, in this case, were billed hourly because the Lange contract had a provision for attorney's fees; however, as the Court previously found, when the Edgeworths paid the invoices it was not made clear to them that the billings were only for the Lange contract and that they did not need to be paid. Also, there was no indication on the invoices that the work was only for the Lange claims, and not the Viking claims. Ms. Ferrel testified that the billings were only for substantial items, without emails or calls, understanding that those items may be billed separately; but again the evidence does not demonstrate that this information was relayed to the Edgeworths as the bills were being paid. This argument does not persuade the court of the accuracy of the "super bill".

The amount of attorney's fees and costs for the period beginning in June of 2016 to December 2, 2016 is $42,564.95. This amount is based upon the invoice from December 2, 2016 which appears to indicate that it began with the initial meeting with the client, leading the court to determine that this is the beginning of the relationship. This invoice also states it is for attorney's fees and costs through November 11, 2016, but the last hourly charge is December 2, 2016. This amount has already been paid by the Edgeworths on December 16, 2016.[2]

The amount of the attorney's fees and costs for the period beginning on December 5, 2016 to April 4, 2017 is $46,620.69. This amount is based upon the invoice from April 7, 2017. This amount has already been paid by the Edgeworths on May 3, 2017.

The amount of attorney's fees for the period of April 5, 2017 to July 28, 2017, for the services of Daniel Simon Esq. is $72,077.50. The amount of attorney's fees for this period for

[2]There are no billing amounts from December 2 to December 4, 2016.

Ashley Ferrel Esq. is $38,060.00. The amount of costs outstanding for this period is $31,943.70. This amount totals $142,081.20 and is based upon the invoice from July 28, 2017. This amount has been paid by the Edgeworths on August 16, 2017.[3]

The amount of attorney's fees for the period of July 31, 2017 to September 19, 2017, for the services of Daniel Simon Esq. is $119,762.50. The amount of attorney's fees for this period for Ashley Ferrel Esq. is $60,981.25. The amount of attorney's fees for this period for Benjamin Miller Esq. is $2,887.50. The amount of costs outstanding for this period is $71,555.00. This amount totals $255,186.25 and is based upon the invoice from September 19, 2017. This amount has been paid by the Edgeworths on September 25, 2017.

From September 29, 2017 to November 29, 2017, the Court must determine the amount of attorney fees owed to the Law Office of Daniel Simon.[4] For the services of Daniel Simon Esq., the total amount of hours billed are 340.05. At a rate of $550 per hour, the total attorney's fees owed to the Law Office for the work of Daniel Simon Esq. is $187,027.50. For the services of Ashley Ferrel Esq., the total amount of hours billed are 337.15. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Ashley Ferrel Esq. from September 19, 2017 to November 29, 2017 is $92,716.25.[5] For the services of Benjamin Miller Esq., the total amount of hours billed are 19.05. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Benjamin Miller Esq. from September 19, 2017 to November 29, 2017 is $5,238.75.[6]

The Court notes that though there was never a fee agreement made with Ashley Ferrel Esq. or Benjamin Miller Esq., however, their fees were included on the last two invoices that were paid

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[3] There are no billings from July 28 to July 30, 2017.
[4] There are no billings for October 8th, October 28-29, and November 5th.
[5] There is no billing for the October 7-8, October 22, October 28-29, November 4, November 11-12, November 18-19, November 21, and November 23-26.
[6] There is no billing from September 19, 2017 to November 5, 2017.

by the Edgeworths, so the implied fee agreement applies to their work as well.

The Court finds that the total amount owed to the Law Office of Daniel Simon for the period of September 19, 2018 to November 29, 2017 is $284,982.50.

Costs Owed

The Court finds that the Law Office of Daniel Simon is owed for outstanding costs of the litigation in Edgeworth Family Trust; and American Grating, LLC vs. Lange Plumbing, LLC; The Viking Corporation; Supply Network, Inc. dba Viking Supplynet in case number A-16-738444-C. Pursuant to the Memorandum of Costs and Disbursements filed on January 17, 2018, the Law Firm submits that it is owed $71,594.93 in costs. These costs include $3,122.97 in Clerk's Fees; $9,575.90 in Video and Court Recorder's Fees; $57,646.06 in Expert Witness Fees; and $1,250.00 in Copy Fees. The Court finds that the Law Office of Daniel Simon is owed these costs in the amount of $71,594.93.

Quantum Meruit

When a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract, but is paid based on quantum meruit. *See e.g.* Golightly v. Gassner, 281 P.3d 1176 (Nev. 2009) (*unreported*) (*discharged contingency attorney paid by quantum meruit rather than by contingency fee pursuant to agreement with client*); *citing,* Gordon v. Stewart, 324 P.3d 234 (1958) (*attorney paid in quantum meruit after client breach of agreement*); and, Cooke v. Gove, 114 P.2d 87 (Nev. 1941) (*fees awarded in quantum meruit when there was no contingency agreement*). Here, Simon was constructively discharged by the Edgeworths on November 29, 2017. The constructive discharge terminated the implied contract for fees. William

Kemp Esq. testified as an expert witness and stated that if there is no contract, then the proper award is quantum meruit. The Court finds that the Law Office of Daniel Simon is owed attorney's fees under quantum meruit from November 29, 2017, after the constructive discharge, to the conclusion of the Law Office's work on this case.

In determining the amount of fees to be awarded under quantum meruit, the Court has wide discretion on the method of calculation of attorney fee, to be "tempered only by reason and fairness". Albios v. Horizon Communities, Inc., 132 P.3d 1022 (Nev. 2006). The law only requires that the court calculate a reasonable fee. Shuette v. Beazer Homes Holding Corp., 124 P.3d 530 (Nev. 2005). Whatever method of calculation is used by the Court, the amount of the attorney fee must be reasonable under the Brunzell factors. Id. The Court should enter written findings of the reasonableness of the fee under the Brunzell factors. Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury Standish, 216 P.3d 779, at fn2 (Nev. 2009). Brunzell provides that "[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant. Brunzell v. Golden Gate National Bank, 455 P.2d 31 (Nev. 1969).

The Brunzell factors are: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed; and (4) the result obtained. Id. However, in this case the Court notes that the majority of the work in this case was complete before the date of the constructive discharge, and the Court is applying the Brunzell factors for the period commencing after the constructive discharge.

In considering the Brunzell factors, the Court looks at all of the evidence presented in the case, the testimony at the evidentiary hearing, and the litigation involved in the case.

1. *Quality of the Advocate*

Brunzell expands on the "qualities of the advocate" factor and mentions such items as

training, skill and education of the advocate. Mr. Simon has been an active Nevada trial attorney for over two decades. He has several 7-figure trial verdicts and settlements to his credit. Craig Drummond Esq. testified that he considers Mr. Simon a top 1% trial lawyer and he associates Mr. Simon in on cases that are complex and of significant value. Michael Nunez Esq. testified that Mr. Simon's work on this case was extremely impressive. William Kemp Esq. testified that Mr. Simon's work product and results are exceptional.

2. *The Character of the Work to be Done*

The character of the work done in this case is complex. There were multiple parties, multiple claims, and many interrelated issues. Affirmative claims by the Edgeworths covered the gamut from product liability to negligence. The many issues involved manufacturing, engineering, fraud, and a full understanding of how to work up and present the liability and damages. Mr. Kemp testified that the quality and quantity of the work was exceptional for a products liability case against a world-wide manufacturer that is experienced in litigating case. Mr. Kemp further testified that the Law Office of Danny Simon retained multiple experts to secure the necessary opinions to prove the case. The continued aggressive representation, of Mr. Simon, in prosecuting the case that was a substantial factor in achieving the exceptional results.

3. *The Work Actually Performed*

Mr. Simon was aggressive in litigating this case. In addition to filing several motions, numerous court appearances, and deposition; his office uncovered several other activations, that caused possible other floods. While the Court finds that Mr. Edgeworth was extensively involved and helpful in this aspect of the case, the Court disagrees that it was his work alone that led to the other activations being uncovered and the result that was achieved in this case. Since Mr. Edgeworth is not a lawyer, it is impossible that it was his work alone that led to the filing of motions

and the litigation that allowed this case to develop into a $6 million settlement. All of the work by the Law Office of Daniel Simon led to the ultimate result in this case.

4. The Result Obtained

The result was impressive. This began as a $500,000 insurance claim and ended up settling for over $6,000,000. Mr. Simon was also able to recover an additional $100,000 from Lange Plumbing LLC. Mr. Vannah indicated to Simon that the Edgeworths were ready so sign and settle the Lange Claim for $25,000 but Simon kept working on the case and making changes to the settlement agreement. This ultimately led to a larger settlement for the Edgeworths. Recognition is due to Mr. Simon for placing the Edgeworths in a great position to recover a greater amount from Lange. Mr. Kemp testified that this was the most important factor and that the result was incredible. Mr. Kemp also testified that he has never heard of a $6 million settlement with a $500,000 damage case. Further, in the Consent to Settle, on the Lange claims, the Edgeworth's acknowledge that they were made more than whole with the settlement with the Viking entities.

In determining the amount of attorney's fees owed to the Law Firm of Daniel Simon, the Court also considers the factors set forth in Nevada Rules of Professional Conduct – Rule 1.5(a) which states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

NRCP 1.5. However, the Court must also consider the remainder of Rule 1.5 which goes on to state:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

(1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

(2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

(3) Whether the client is liable for expenses regardless of outcome;

(4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and

(5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

NRCP 1.5.

The Court finds that under the Brunzell factors, Mr. Simon was an exceptional advocate for the Edgeworths, the character of the work was complex, the work actually performed was extremely significant, and the work yielded a phenomenal result for the Edgeworths. All of the Brunzell factors justify a reasonable fee under NRPC 1.5. However, the Court must also consider the fact

that the evidence suggests that the basis or rate of the fee and expenses for which the client will be responsible were never communicated to the client, within a reasonable time after commencing the representation. Further, this is not a contingent fee case, and the Court is not awarding a contingency fee. Instead, the Court must determine the amount of a reasonable fee. The Court has considered the services of the Law Office of Daniel Simon, under the Brunzell factors, and the Court finds that the Law Office of Daniel Simon is entitled to a reasonable fee in the amount of $200,000, from November 30, 2017 to the conclusion of this case.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court must adjudicate the lien. The Court further finds that there was an implied agreement for a fee of $550 per hour between Mr. Simon and the Edgeworths once Simon started billing Edgeworth for this amount, and the bills were paid. The Court further finds that on November 29, 2017, the Edgeworth's constructively discharged Mr. Simon as their attorney, when they ceased following his advice and refused to communicate with him about their litigation. The Court further finds that Mr. Simon was compensated at the implied agreement rate of $550 per hour for his services, and $275 per hour for his associates; up and until the last billing of September 19, 2017. For the period from September 19, 2017 to November 29, 2017, the Court finds that Mr. Simon is entitled to his implied agreement fee of $550 an hour, and $275 an hour for his associates, for a total amount of $284,982.50. For the period after November 29, 2017, the Court finds that the Law Office of Daniel Simon properly perfected their lien and is entitled to a reasonable fee for the services the office rendered for the Edgeworths, after being

constructively discharged, under quantum meruit, in an amount of $200,000. The Court further finds that the Law Office of Daniel Simon is entitled to costs in the amount of $71,594.93.

ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Adjudicate the Attorneys Lien of the Law Office of Daniel S. Simon is hereby granted and that the reasonable fee due to the Law Office of Daniel Simon is $556,577.43, which includes outstanding costs.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

Exhibit 3

Electronically Filed
10/11/2018 11:16 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON SPECIAL MOTION TO DISMISS ANTI-SLAPP

DECISION AND ORDER ON SPECIAL MOTION TO DISMISS ANTI-SLAPP

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing

> you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was

$692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Court has adjudicated all remaining issues in the Decision and Order on Motion to Dismiss NRCP 12(b)(5), and the Decision and Order on Motion to Adjudicate Lien; leaving no remaining issues.

CONCLUSION

The Court finds that the Special Motion to Dismiss Anti-Slapp is MOOT as all remaining issues have already been resolved with the Decision and Order on Motion to Dismiss NRCP 12(b) and Decision and Order on Motion to Adjudicate Lien.

ORDER

It is hereby ordered, adjudged, and decreed, that the Special Motion to Dismiss Anti-Slapp is MOOT.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

JOHN B. GREENE, ESQ.
Nevada Bar No. 004279
ROBERT D. VANNAH, ESQ.
Nevada Bar No. 002503
VANNAH & VANNAH
400 S. Seventh Street, 4th Floor
Las Vegas, Nevada 89101
jgreene@vannahlaw.com
Telephone: (702) 369-4161
Facsimile: (702) 369-0104
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA
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EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan corporation; and DOES I through V and ROE CORPORATIONS VI through X, inclusive, Defendants.	CASE NO.: A-16-738444-C DEPT. NO.: X **PLAINTIFFS' OPPOSITION TO SIMON'S MOTION TO AMEND FINDINGS UNDER NRCP 52; and/or, FOR RECONSIDERATION**
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-18-767242-C DEPT. NO.: XXIX

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

Plaintiffs EDGEWORTH FAMILY TRUST and AMERICAN GRATING, LLC (PLAINTIFFS), by and through their attorneys of record, ROBERT D. VANNAH, ESQ., and JOHN B. GREENE, ESQ., of the law firm VANNAH & VANNAH, hereby file their Opposition to the Motion of DANIEL S. SIMON and THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION (SIMON) to Amend Findings Under NRCP 52, and/or For Reconsideration pursuant to EDCR 2.24 (the Motion).

This Opposition is based upon the attached Memorandum of Points and Authorities; the pleadings and papers on file herein; the Findings of Fact and Orders entered by this Court; NRCP 52, EDCR 2.24(c); NRAP 36(c)(2); NRPC 1.5; and, any oral argument this Court may wish to entertain.

DATED this 8 day of November, 2018.

VANNAH & VANNAH

ROBERT D. VANNAH, ESQ.

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

I.

SUMMARY

The facts of this matter are well known to this Court. The path to this intricate knowledge was gained by, but not limited to, having listened to five days of comprehensive testimony; by having reviewed the totality of the evidence presented; by having read hundreds of pages of pre and post hearing briefing, exhibits, notes, and arguments; and, by having carefully crafted factual findings and orders. Therefore, PLAINTIFFS will spare this Court yet another recitation of the facts.

Suffice it to say that, other than the agreed-to removal of the award of costs to SIMON, there isn't anything in SIMON'S Motion that possesses a morsel of merit—nothing new factually that wasn't litigated and argued ad nauseum throughout the proceedings; nothing in the law that suddenly changed that SIMON didn't have the fair opportunity to assert and argue from Day One; no reasonable basis for SIMON to portray himself as a victim of some fictional manifest injustice here when he's set to earn over $1,000,000 in fees and costs (past payments made by PLAINTIFFS together with those recently Ordered by this Court) for less than nineteen (19) months of time and work; and, no evidence presented of clear error by this Court.

As mentioned, PLAINTIFFS and SIMON do agree that the award of costs to SIMON in the amount of $71,594.93 should be removed from the Lien Decision and Order (LDO), as everyone agrees that PLAINTIFFS paid SIMON in full for all outstanding costs once SIMON provided PLAINTIFFS with the correct amount, together with supporting documentation. (As things have gone in this attorney client relationship, SIMON also billed PLAINTIFFS $1,700 in expert costs that were clearly related to another client file. Despite providing evidence of this erroneous invoice and payment to SIMON, he refuses to reimburse PLAINTIFFS for his error.) Plus, SIMON admits in his Motion that he was not and is not seeking the payment of costs in this matter. (See Motion at 11:26-28.)

PLAINTIFFS respectfully request that this Court refuse SIMON'S invitation to reconsider—in other words re-litigate—what he was given a full and fair opportunity to present to this Court in months of briefing and five (5) days of an evidentiary hearing.

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VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

II.

ARGUMENTS

A. THE FINDING OF AN IMPLIED CONTRACT VERSUS AND IMPLIED ORAL CONTRACT IS A DISCRETIONARY DISTINCTION WITHOUT A DIFFERENCE.

Whether or not the Court found that the contract between PLAINTIFFS and SIMON was an implied oral contract versus an implied contract is irrelevant in the context of the Decision and Order on Motion to Dismiss NRCP 12(b)(5)(DOMD). This Court has the discretion to find the existence of either form of contract. *Certified Fire, Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 283 P.3d 250 (2012). It is a discretionary distinction without a difference, as either form of contract is a **contract**, whether it was entered into after oral discussions or through repeated performance. (*Id.*)

There was testimonial evidence presented by Brian Edgeworth that as early as June of 2016, he and SIMON spoke about SIMON'S hourly fee for this matter being $550. There was also substantial evidence presented by all parties that PLAINTIFFS paid every dime of hourly fees that SIMON billed and submitted to PLAINTIFFS for payment in the four original invoices. (LDO at p. 9:10-20.) Regardless, substantial evidence presented at the hearing (and in the months leading to the hearing) supports the finding of this Court that a contract was created between the parties. (LDO 14; 24.) However, if the Court wishes to clarify in the DOMD whether the contract was an implied oral contract or an implied contract, PLAINTIFFS defer to the discretion of the Court.

B. SIMON AGREES THAT ALL COSTS HAVE BEEN PAID IN FULL.

SIMON admits at page 11:26-28 of his Motion that PLAINTIFFS do not owe any additional costs. (In fact, they're owed a reimbursement in the amount of $1,700 that SIMON refuses to pay.) SIMON'S attorney, Peter S. Christiansen, Esq., also acknowledged as much in a reply email to this Court on October 9, 2018, at 8:28 a.m., where he stated: "The check is

question was received by Mr. Simon as a reimbursement of costs and is not included in the asserted attorneys lien." (Please see email string attached as Exhibit 1.) Since the evidentiary hearing was premised on a Motion to Adjudicate Attorney's Lien, and since SIMON was not seeking costs in the Amended Lien that was adjudicated, the award of costs in the LDO in the amount of $71,594.93 should be removed.

Strangely, SIMON seeks "clarification" in his Motion at page 12, lines 9-12, whether "costs are to be added, deducted or are considered separate from the amount currently owed to Simon, and reconciliation of the fee owed." (Emphasis added.) SIMON clearly knows that there aren't any costs owed to him. (See SIMON'S Motion at p. 11:26-28.) He also admits he was not seeking costs at the time of the evidentiary hearing. (Id.) Plus, SIMON knows that he didn't present any evidence at the hearing that he was owed any costs.

Certainly by this point in time, SIMON must be well enough acquainted with the Nevada Rules of Professional Conduct, namely 1.5, as these Rules came up again and again at the evidentiary hearing due to what SIMON did and didn't do here. A recitation of Rule 1.5 appears again at page 22 of the LDO. Of importance to this issue here, NRPC 1.5(a) states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." (Emphasis added.) If charging an unreasonable amount for an expense (as in a "cost") is prohibited, then seeking to charge and/or charging PLAINTIFFS for a nonexistent cost must be deemed much, much worse.

SIMON'S suggestion that he's somehow entitled to money for costs he didn't incur and isn't owed is yet another self-inflicted transgression and unnecessary violation of the Nevada Rules of Professional Conduct. Why can't SIMON just represent to this Court in his Motion that he agrees that costs awarded in the amount of $71,594.93 should be removed from the LDO, as they're not owed to him? That would be—and is—the simple truth, as well as the right thing to do. It's also the request of PLAINTIFFS.

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400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

C. EDCR 2.24(c) DOES NOT ALLOW FOR THE REMEDY THAT SIMON SEEKS.

In support of his Motion at page 10, SIMON'S cite of EDCR 2.24 was a little light on content. In only referencing (b), he left out the most important and relevant part found in (c). In doing so, SIMON leads this Court to believe that his Motion should be heard and reargued just because it was filed. Yet, it is no secret that a motion for reconsideration is an extraordinary remedy that is disfavored and should only be used sparingly. *Peterson v. Miranda*, 57 F.Supp 3d 1271 (D. Nev. 2014). In short, they're generally nothing more than a thinly veiled request for a do-over of what's already been done by a trier-of-fact who's vested with the authority and the discretion to decide what's already been decided. It is also tantamount to an insult to the acumen of the trier-of-fact.

Furthermore, in filing a Motion to clarify an irrelevant fact (implied oral contract versus implied contract) and regarding costs he knows he isn't owed under any circumstances, SIMON seems to want to avoid the impactful language and effect of section (c). There we read:

> **If** a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make other such orders are deemed appropriate under the circumstance of the particular case. (Emphasis added.)

The word "If" that begins this portion of the Rule gives this Court a clear directive and the discretion to refuse to rehear what this Court has already heard and decided. And, in this instance, heard and heard and heard again for an extended period of time. Therefore, the hearing that is presently set for November 15, 2018, does not need to happen if this Court exercises her discretion to deny SIMON'S Motion under EDCR 2.24(c), or to dispose of it in summary fashion.

Even "if" this Court grants the Motion by allowing reargument, there isn't any basis to entertain the Motion. One, it doesn't contain any new facts. Two, it does not bring to light any new or intervening law. Three, SIMON did not and cannot point to any manifest injustice that must be corrected. Last, SIMON cannot present any evidence or facts that the LDO was clearly

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

erroneous. *Peterson v. Miranda*, 57 F.Supp 3d 1271 (D. Nev. 2014). To the contrary, a simple reading of the Motion is akin to watching the movie Groundhog Day—just the same facts, law, and arguments (aka stuff) that this Court has been seeing, reading, and hearing over and over and over again.

Other than the issue concerning costs, since SIMON cannot meet his burden under the law by pointing out specific findings of this Court that are either unsupported by substantial evidence or clearly erroneous, his latest Motion must be denied. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994).

D. THE COURT'S FINDINGS THAT SIMON ATTACKS IN HIS MOTION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In his Motion, SIMON wants to revisit this Court's findings that: the Viking case settled on the evening of November 15, 2017; the reasonable amount of SIMON'S fee from June of 2016, through September 18, 2017, are the amounts set forth in his four original invoices that were paid in full by PLAINTIFFS; the reasonable amount of SIMON'S fee from September 19, 2017, through November 29, 2017, is $284,982.50, which represents the amount of fees SIMON (& associates) billed in his "super bill" for that specific period of time; and, SIMON is entitled to an attorney's fee of $200,000 in quantum meruit from November 30, 2017, through the conclusion of the case.

Nevada law is very clear that "the ...court's findings will not be set aside unless those findings are clearly erroneous or not supported by substantial evidence." *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994). Other than the one finding concerning costs, SIMON'S Motion fails to offer sufficient evidence to show that the Court's findings are either clearly

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

erroneous and/or not supported by substantial evidence. Therefore, SIMON has failed to meet his burden. As a result, his Motion should be denied.

First, substantial evidence was presented at the hearing that PLAINTIFFS' case against Viking settled on the evening of November 15, 2017. (LDO 5:5-6.) This Court heard evidence that by that date, Viking offered $6,000,000 to PLAINTIFFS to resolve their claims: an amount coupled with material terms that were acceptable to PLAINTIFFS. The Court also heard evidence that on November 16, 2017, Janet C. Pancoast, Esq., counsel for Viking, sent a letter stating that the **amount** of the **settlement** (between Viking and PLAINTIFFS that was reached the day before) would be subject to a confidentiality agreement. (Emphasis added.)

This Court also evaluated evidence in the form of text messages between SIMON and Brian Edgeworth that were sent on November 16, 2017, concerning the Pancoast letter where Mr. Edgeworth stated: "That line is fine. The settlement is the only thing that is confidential. I assume that means the amount." (Emphasis added.) The evidence is clear that Brian Edgeworth did not care about the confidentiality of the amount of the Viking settlement. In other words, substantial evidence presented at the hearing showed that confidentiality wasn't an "essential" term, as now argued by SIMON.

In short, substantial evidence was presented that all of the material terms of the Viking **settlement** were reached on November 15, 2017. The fact that this settlement was reached on November 15, 2017, was perfectly clear to PLAINTIFFS, Viking/Ms. Pancoast, and the mediator, Floyd Hale. The only one who is clearly erroneous as to the date of the Viking settlement is SIMON. For him to attempt to rewrite history and to argue to this Court as to when he feels that the Viking case settled is factually incorrect, strange, and legally insufficient.

Second, substantial evidence was presented at the hearing that (assuming a constructive discharge occurred and that it occurred on November 29, 2017) at the earliest, SIMON was entitled to a fee based on quantum meruit from November 30, 2017, through the conclusion of the

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

case. (LDO 24-25.) In attacking this finding and conclusion, SIMON uses the same law, facts, and arguments that he's made and referenced in several previous filings and arguments with and before this Court. He doesn't offer anything new. Instead, SIMON merely reiterates why he thinks he's right and why he says this Court is wrong. In doing so, SIMON has again failed to meet his burden under EDCR 2.24(c) and the case law interpreting its provisions. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 866 P.2d 1138 (1994). Therefore, his Motion must be denied.

While SIMON has stated in several previous briefs and testified under oath at the evidentiary hearing that he's not seeking a contingency fee from PLAINTIFFS, he's seeking a contingency fee from PLAINTIFFS. He's had his eyes on that prize since August of 2017, a time when adverse facts against Viking had caused the risk of loss to begin to rapidly evaporate. He again makes that wish clear in his Motion at page 19:9-10, when he asks for $1.9 million, the same number he's asked for since he served his Amended Lien in January of 2018. Simple math shows that 40% of the Viking settlement of $6 million is $2.4 million, an amount that is eerily similar to what PLAINTIFFS have already paid in fees, plus the amount of SIMON'S Amended Lien.

While SIMON attacks the findings of this Court on the reasonable amount of SIMON'S fee for the hourly fees billed and paid in full for the time period of April of 2016 through September 19, 2017; the hourly fees billed and ordered to be paid from September 19, 2017, through November 29, 2017; and, the amount of fees in quantum meruit that SIMON is owed from November 30, 2017, through the conclusion of this case, SIMON has not shown one example that these findings are clearly erroneous or unsupported by substantial evidence.

To the contrary, the discretionary findings of this Court that SIMON wrongfully attacks are actually correct and supported by substantial evidence. For example, substantial evidence (such as invoices presented by SIMON and paid by PLAINTIFFS; admissions made by SIMON

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Telephone (702) 369-4161 Facsimile (702) 369-0104

in deposition testimony on September 27, 2017 that all his fees had been paid to date; 16.1 disclosures and computations of damages presented by SIMON as complete billings; etc.) was presented that SIMON was fully, fairly, and reasonably compensated (i.e. PAID IN FULL) by PLAINTIFFS from the beginning of this case in May of 2016, through September 19, 2017. (LDO 15-17.)

Since substantial evidence presented at the hearing supports a finding that SIMON was paid in full from the beginning of the case (May of 2016) through September 19, 2017, this Court is correct to make at finding that no additional fees are owed to SIMON for this time period. (LDO 17-18.)

Additionally, substantial evidence was presented at the hearing that SIMON'S entries on his "super bill" from September 19, 2017, through November 29, 2017, contain admissions of SIMON as to the EXACT amount that he believes PLAINTIFFS owe him for that period of time, which is $284,982.50. (LDO 18-19.) SIMON hasn't presented any new facts or law to show that it was either clearly erroneous for this Court to rely on SIMON'S own billing entries to establish a reasonable fee from September 19, 2107, through November 29, 2017, or that this Court's findings were not supported by substantial evidence. Therefore, his attack on these findings must fail as well.

Finally, this Court had the discretion to find that substantial evidence was presented at the hearing that undermined the credibility of SIMON and his associate, Ashley Ferrel, on the accuracy of SIMON'S "super bill" concerning his attempt to add time to the four invoices that were paid in full by PLAINTIFFS. (See LDO 15-17.); *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994). While SIMON may want this Court to reconsider why he claims he's right and why he believes this Court is wrong—of course, it's really the other way around—he's failed to meet his burden under the law for that drastic remedy to be afforded. (*Id.*)

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

The law that SIMON cites in support of his position on quantum meruit is not only familiar—as it's the same stuff that's been cited by him for months in other briefs—it fails to get him to where he's desperate to go = a contingency fee disguised as quantum meruit. This Court found that "this is not a contingency fee case, and the Court is not awarding a contingency fee." (LDO 24:3-4.) Substantial evidence presented at the hearing showed that SIMON failed to reduce his late-onset dream of a contingency fee to writing. (Or any fee agreement for that matter.) NRPC 1.5(c) prohibits SIMON from obtaining a contingency fee, thus providing further support for this Court's findings.

Furthermore, the Third Restatement, *The Law Governing Lawyers*, as cited by SIMON, does not provide him with a route for a contingency fee in any form in Nevada, including quantum meruit, as Nevada law specifically forbids SIMON from receiving one here. NRPC 1.5(c). Neither do the unpublished opinions of *Golightly v. Gas*sner, 281 P.3d 1176 (Nev. 2009), or *Rosenberg v. Calderon Automation, Inc.*, 1986 Ohio App. LEXIS 5460 (1986). (Note that NRAP 36(c)(2) states: "an unpublished disposition, while publicly available, **does not** establish mandatory precedent....")(Emphasis added.)

Unlike SIMON, Chad Golightly was retained under a written contingency fee agreement and was discharged after an offer of $44,500 was made but before a settlement was reached. In post settlement motion practice, Mr. Golightly asked for (or, **"elected"** to receive under the *Rosenberg* scenario that SIMON wants to believe is the law of Nevada, though it isn't Nevada law) a fee of $9,790, which was 22% of the amount of the offer he'd received and the amount provided for under the contingency fee agreement with Gassner.

Gassner's replacement attorney asked Mr. Golightly to provide evidence of the amount of work he'd performed on behalf of the client, but he refused, citing the contingency fee that the fee agreement provided for upon discharge. The trial court asked Mr. Golightly to provide evidence of the work he'd done on behalf of Gassner to justify the fee. That evidence wasn't p

The Nevada Supreme Court rejected Mr. Golightly's request and position and instead affirmed the award to him of a fee of $1,000 based on quantum meruit, an amount that was about 10% of the amount of his "elected" remedy.

In the Ohio case of *Rosenberg*, again unlike SIMON, attorney Brenner was retained under a one third contingency fee agreement. Brenner, in turn, retained Rosenberg to assist on the case, with the understanding that his fee would be paid by sharing in the contingency fee agreement that the client had signed with Brenner. At that time, Brenner and the client evaluated the case at $16,000,000.

After a favorable result from a jury, Rosenberg suggested to the client that settlement discussions be had with General Motors, the adverse party. The client vehemently refused to negotiate and things began to deteriorate. Thereafter, Rosenberg was discharged before and without any form of payment being rendered. Under an apparent law or procedure in Ohio that is not shared or followed by Nevada (see *Golightly*), Rosenberg elected to be paid via quantum meruit as opposed to a contingency fee, and was subsequently awarded $27,000 (in a case evaluated at $16,000,000).

In affirming the award of the trial court, the appellate court stated in *Rosenberg*: "We find that the trial court exercised its discretion in arriving at a fair and equitable determination of fees for services rendered by Rosenberg." (Emphasis added.) While the *Golightly* case clearly shows that Nevada does not follow the apparent Ohio model of allowing an attorney to elect which form of fee to be paid upon discharge, the court in *Rosenberg* does embrace the well established rule that gives this Court the discretion to arrive at a fair and equitable determination of any fee owed to SIMON. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 866 P.2d 1138 (1994). That's exactly what happened here. (See LDO.)

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On a side note, this Court awarded SIMON $200,000 in fees based on quantum meruit from the period of time when the Court found a constructive discharge had occurred (November 30, 2017) through the conclusion of the case. (LDO 24-25.) SIMON should be thrilled with that award, but there's no indication of that emotion in his Motion. This Court could have just as easily and reasonably awarded SIMON $33,811.25 in fees, which is the amount of fees that SIMON admitted that he (and Ms. Ferrel) billed in his "super bill" for the actual work performed during that time frame. That's what the trial court did in *Rosenberg* (and later affirmed by the appellate court), a case warmly embraced by SIMON.

Since SIMON has not and cannot point to any abuse of discretion or clear error by this Court, since the discretionary findings of this Court are supported by substantial evidence, and since SIMON cannot meet the heavy burden for a Motion for Reconsideration, his Motion should be denied, as indicated.

III.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court deny SIMON'S Motion, as indicated in this Opposition.

DATED this 8 day of November, 2018.

VANNAH & VANNAH

ROBERT D. VANNAH, ESQ.

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

CERTIFICATE OF SERVICE

I hereby certify that the following parties are to be served as follows:

Electronically:

James R. Christensen, Esq.
JAMES R. CHRISTENSEN, PC
601 S. Third Street
Las Vegas, Nevada 89101

Peter S. Christiansen, Esq.
CHRISTIANSEN LAW OFFICES
810 S. Casino Center Blvd., Ste. 104
Las Vegas, Nevada 89101

Traditional Manner:
None

DATED this 8th day of November, 2018.

An employee of the Law Office of
Vannah & Vannah

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

Exhibit 1

Exhibit 1

Gmail by Google

John Greene <jgreene@vannahlaw.com>

Edgeworth Family Trust- Question Regarding Defense Exhibit

7 messages

Wyse, Seleste <Dept10LC@clarkcountycourts.us> Tue, Oct 9, 2018 at 7:54 AM
To: "John Greene (jgreene@vannahlaw.com)" <jgreene@vannahlaw.com>, "James R. Christensen (jim@jchristensenlaw.com)" <jim@jchristensenlaw.com>, "rvannah@vannahlaw.com" <rvannah@vannahlaw.com>, "pete@christiansenlaw.com" <pete@christiansenlaw.com>

Counsel,

As the Judge is reviewing her notes and finalizing her findings she has a question about Defense Exhibit 55. It appears to be a check dated 3/1/18 written from the Trust Account and signed off on by Danny Simon and Robert Vannah. The check is for $68,844.93 and indicates that is reimbursement for costs. The only time that her notes reference this exhibit is during the testimony of Angela Edgeworth. However, it was not clear to the Judge if the Law Office of Danny Simon actually received the proceeds of this check or if this amount was still in dispute. Can you please clarify this with an email cc'ing all parties above?

Thank you very much.

Seleste A. Wyse

Law Clerk to the Honorable Judge Tierra D. Jones

Eighth Judicial District Court, Dept. 10

Dept10LC@clarkcountycourts.us

Phone: (702) 671-4389

Fax: (702) 671-4384

Peter S. Christiansen <pete@christiansenlaw.com> Tue, Oct 9, 2018 at 8:28 AM
To: "Wyse, Seleste" <Dept10LC@clarkcountycourts.us>
Cc: "John Greene (jgreene@vannahlaw.com)" <jgreene@vannahlaw.com>, "James R. Christensen (jim@jchristensenlaw.com)" <jim@jchristensenlaw.com>, "rvannah@vannahlaw.com" <rvannah@vannahlaw.com>

The check in question was received by Mr Simon as a reimbursement of costs and is not included in the asserted attorneys lien.

Thanks

Peter S. Christiansen, Esq.
Christiansen Law Offices
810 S. Casino Center Boulevard, Suite 104
Las Vegas, NV 89101
Phone: 702-232-1920
Fax: 866-412-6992

[Quoted text hidden]

Wyse, Seleste <Dept10LC@clarkcountycourts.us> Tue, Oct 9, 2018 at 8:45 AM
To: "Peter S. Christiansen" <pete@christiansenlaw.com>
Cc: "John Greene (jgreene@vannahlaw.com)" <jgreene@vannahlaw.com>, "James R. Christensen (jim@jchristensenlaw.com)" <jim@jchristensenlaw.com>, "rvannah@vannahlaw.com" <rvannah@vannahlaw.com>

Good morning,

Thank you for your response.

Take care,

Seleste A. Wyse

Law Clerk to the Honorable Judge Tierra D. Jones

Eighth Judicial District Court, Dept. 10

Dept10LC@clarkcountycourts.us

Phone: (702) 671-4389

Fax: (702) 671-4384

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel S. Simon

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST, and AMERICAN GRATING, LLC Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5 and ROE entities 6 through 10; Defendants.	Case No.: A-16-738444-C Dept. No.: 10 **REPLY IN SUPPORT OF MOTION TO AMEND FINDINGS UNDER NRCP 52; and/or FOR RECONSIDERATION** Date of Hearing: 11.15.18 Time of Hearing: 9:30 a.m.
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC Plaintiffs, vs. DANIEL S. SIMON d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	CONSOLIDATED WITH Case No.: A-18-767242-C Dept. No.: 10

I. NRCP 52(b)

Years ago, NRCP 52 was amended to allow a District Court to accept *ex parte* findings submitted by a party. NRCP 52; and, *Foster v. Bank of America*, 365 P.2d 313, 318 (Nev. 1961). In conjunction, NRCP 52 (b) was amended to allow an aggrieved party to file a motion to amend findings at the trial court level. *Foster*, 365 P.2d at 318.

Rule 52 *does not* provide a standard of review for the trial court to apply to amendment of its own findings; nor, has a standard been supplied by the Nevada Supreme Court. NRCP 52; and, *Foster*, 365 P.2d at 318. As such, the ability to amend findings under Rule 52 is left to the Court's discretion.

The absence of a more stringent standard of review in Rule 52 was not an oversight. The Supreme Court clearly could have written a standard of review greater than Court's discretion into the Rule if it wanted to. Rather, the lack of a higher stated standard of review is a function of the "radical" modification of Rule 52, which allows *ex parte* findings and, in turn, allows an aggrieved party a broad ability to seek amendment of findings. *See, Foster*, 365 P.2d at 318.

Simon filed a motion to amend under Rule 52. (Also, as per typical civil practice, Simon included an alternate request for reconsideration under EDCR 2.24.) Simon requested amendment of the findings as raised in the motion. As per the Rule, the Court may amend its own findings per the Court's own discretion.

The opposition is puzzling. The Edgeworths do not mention Rule 52, nor do the Edgeworths address how a District Court may amend its own findings. Instead, the Edgeworths cite two cases that set forth the standard of review applied by an appellate court when findings are challenged on appeal. (*See, e.g.*, Opp., at 7:5-10.) And, the Edgeworths argue about how to address a motion to reconsider.

Under Rule 52, the appellate standards of review for upholding a finding on appeal *do not* apply. Under the Rule, the Court may amend findings at its discretion. At this stage, the District Court *is not* limited to amendment of findings which are clearly erroneous or not supported by substantial evidence.

The Edgeworths do not argue the applicable law, but instead argue standards that do not apply at this stage. Simon asks that the Court address the current motion pursuant to Rule 52, and amend the findings as requested per the Court's discretion.

II. Argument

Simon requests the findings be amended pursuant to Rule 52. Simon set forth substantial factual grounds and legal reasoning for each requested amendment. In opposition, the Edgeworths argued application of the wrong standard of review for a Rule 52 motion. EDCR 2.20(e) requires a party opposing a motion to file a memorandum of points and authorities. Providing the Court with applicable authority is implied. Accordingly, the Court may grant the Simon

motion on the failure to properly oppose the motion, in addition to the grounds which follow. EDCR 2.20(e).

A. The "implied oral contract" typo.

The Court found an implied contract. *E.g.*, Lien D&O at page 9. The Court *did not* find an oral contract. *E.g.*, Lien D&O at page 9.

A contract can be formed by express oral communication *or* implied by conduct. *Certified Fire v. Precision Const*., 283 P.3d 250 (Nev. 2012). Said another way:

> A promise may be stated in words either oral or written, *or* may be inferred wholly or partly from conduct. (Italics added.)

Restatement (Second) of Contracts §4 (1981).

In this case, the Court found an implied contract; a contract inferred from conduct. *E.g.*, Lien D&O at page 9. The Court did not find an oral contract. *E.g.*, Lien D&O at page 9. Thus, the inclusion of the word "oral" in the MTDO appears to be a typo.

Simon asks that the finding in the MTDO at 7:8-9 be amended by removal of the word "oral".

B. Costs.

The cost number in the finding needs to be addressed. Also, how the Court envisioned the costs found to be allocated within the final amount awarded needs clarification, so the amount can be reconciled by the parties.

It is appropriate and necessary for the findings to address the history of the costs advanced by Simon. The uncontested facts are that the attorney liens were filed months before advanced costs were paid by the Edgeworths. (An attorney should not be sued for filing an attorney lien to protect recovery of advanced costs…)

Contrary to the Opposition, Simon is not seeking an award of already paid costs. Simon clearly told the Court,

> In March of 2018, the Edgeworths finally paid the outstanding advanced costs. As of the evidentiary hearing, no advanced costs were sought by Simon and no advanced costs were outstanding.

Motion at 11:25-27. This is not an issue of contention between the parties, it is not clear why the Edgeworths' try to make it one.

The Edgeworths also complain about a $1,700.00 cost charge. Mr. Vannah engaged in an email exchange with the undersigned in late October regarding a $1,700.00 cost charge questioned by the Edgeworths after the evidentiary hearing. The exchange was cordial - at least as far as this case goes. The upshot was that neither Mr. Vannah or the undersigned had a true understanding of the $1,700 cost issue. However, both agreed to look into it. Which was done. Simon reviewed all cost entries and found that an expert included a $1,700 entry properly charged to another case on an Edgeworth billing. Simon agrees that cost is not chargeable to

the Edgeworths and the money will be refunded. Again, this is not an issue of contention between the parties, the Edgeworths should not make it one.

C. The Viking case did not settle on November 15.

Under a Rule 52 motion to amend, a court may amend its own findings per its discretion. This is not an appeal, and the appellate standards of review do not apply. Thus, the Edgeworths' argument misses the mark. In addition, the Edgeworths' argument misses the mark because it is factually incorrect.

By definition, the Viking case did not settle on November 15, because the Viking November 15 counter offer required the Edgeworths to dismiss the Lange case; and, that did not happen. Rather, negotiation continued, the Viking requirement of a Lange dismissal was later removed, and the Edgeworths obtained additional money from Lange.

As a matter of law, a settlement contract with Viking cannot be formed until the essential terms are reached and there is manifestation of mutual consent. Restatement (Second) of Contracts §18 (1981) ("[M]anifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance"); and, *May v. Anderson*, 119 P.3d 1254 (Nev. 2005) (agreement must be had on all essential terms for formation of a settlement contract).

Clearly the Viking case did not settle on November 15th, because the essential terms of the Viking counter offer were not accepted by the Edgeworths.

Rather, negotiation continued, and the Lange case was not dismissed as requested by Viking, to the benefit of the Edgeworths. In short, essential terms were not reached on November 15, because the Edgeworths did not agree to dismiss Lange for no money from Lange as Viking requested.

Also, clearly the Viking case did not settle on November 15, because there is no evidence of manifestation of Edgeworth assent on the 15th. As the uncontroverted facts go, Mr. Hale made a mediator's proposal. Viking did not accept the mediator's proposal as is, but instead made a counter offer on November 15. That is at most half the story; for mutual assent both parties must express their agreement with the mediator's proposal or to a different deal. There is no evidence the Edgeworths sent an acceptance of the mediator's proposal - even had Viking accepted the proposal, which it did not. In short, there is no evidence that the Edgeworths told Viking "we agree to your counter proposal" on November 15. In fact, the Edgeworths own opposition cites to text messages between client and counsel on the 16th, in which the terms offered by Viking are debated.

The facts are that Mr. Edgeworth travelled to China and did not return until November 29, 2017. And, the facts are that the Edgeworths stopped communicating with Mr. Simon. Mr. Simon could not provide assent on behalf of a client who does not communicate. It was not until after Mr. Edgeworths return, that he met with Mr. Vannah, and (presumably) took Mr. Vannah's advice and

counsel regarding the Viking settlement, per the December 1, 2017, settlement agreement.

While the appellate standards of review do not apply to a Rule 52 motion, if they had, as a matter of law, the finding of a settlement on November 15 would be reversible error.

D. The impact of the Edgeworths' decision to discharge Simon.

The uncontroverted facts establish, and the Court found that Simon was constructively discharged by the Edgeworths. The Edgeworths made a conscious decision to hire new counsel, to end communication with Simon, and to follow the advice of new counsel (and to pay new counsel $925 an hour, when they testified that $550 an hour was too high).

The Edgeworth decision to fire their lawyer comes with consequences. Legally, when an attorney is discharged, the attorney may, at the attorney's option, elect to seek payment due under contract or under quantum meruit. While the Edgeworths go to great lengths to try to distinguish the cases which so hold, the Edgeworths overlook the fact that this Court agreed with and adopted the case authority in the findings. The Edgeworths did not ask this Court to amend its findings on the applicable legal authority under Rule 52. In fact, they concede the legal authority is the correct law to apply to the facts of this case.

The appellate standards of review do not apply to a Rule 52 motion to amend; however, if they had, as a matter of law, the Edgeworths cannot use the implied contract as a shield from the Simon lien claim for reasonable value; because by discharging Simon, the Edgeworths disavowed the implied contract:

> A client who voids the contract as stated here cannot then enforce its favorable terms against the lawyer, and the client is liable to the lawyer for the fair value of the lawyer's services (see § 39).

Third Restatement, *The Law Governing Lawyers*, §18, at comment e.

In the Lien D&O, the Court concluded that an implied contract existed between Simon and clients until November 29, 2017, the date of Simon's discharge; and, that Simon must be compensated prior to November 29, 2017, under the hourly payment terms of the implied contract as found by the Court. Lien D&O at pages 15-19. Simon requests the Court amend its finding and apply quantum meruit to determine the amount of the Simon lien claim for fees.

Going further, the last date of submitted and paid for billing was September 19, 2017. At a minimum, quantum meruit should be applied to determine the fee due for work done after September 19 - which is the period when most of the work that lead to the amazing result occurred, and which should be reflected in the fee grant. The main rule is that an attorney should be paid based on results. As even the Edgeworths concede, the results were amazing. Simon should be paid for results.

The main opposition argument raised by the Edgeworths is that Simon is seeking a contingency fee. That is not true. A contingency fee is a *method* of determining a fee by use of a percentage. For example, in *Golightly v. Gassner*, 281 P.3d 1176 (Nev. 2009), Golightly was fired by a client. Golightly elected to seek a percentage of 22% of the amount recovered as his fee under his lien. The reason Golightly did not recover his fee was because the Court has the statutory obligation to review a fee sought by an attorney under a lien for reasonableness. Golightly did not present sufficient evidence of what he did to earn the fee, so the Court awarded $1,000.00. Golightly exercised his election, but then made a bad decision to not adequately support his claim.

In this case, Simon elected to seek payment under quantum meruit. Simon supported his claim with evidence of the huge amount of superior work done by the law firm, the amazing result, and for which the Court was a firsthand observer. The enormous amount of work is further supported by the register of actions, the boxes and boxes of documents produced, as well as undisputed testimony of the parties, including the Edgeworths. The question is how to calculate the fee due. The law clearly allows the Court to use the market rate as a method to determine the fee. Simon presented evidence of the market rate via expert testimony by Will Kemp. Mr. Kemp's knowledge and expertise in this area is unquestioned, and the testimony of Mr. Kemp is uncontroverted.

The distinction between what was sought by Golightly and what is sought by Simon is obvious. Golightly asked the Court to use a percentage, and nothing more. The classic contingency fee. Simon presented evidence of mounds of impressive work, an amazing result, and expert testimony of the market rate; all of which is subject to a reasonableness review by the Court. That is not an application of a simple percentage, as per a contingency fee; but is a fee sought under quantum meruit, subject to Court review.

E. Simon should be paid for all work on the file.

In the alternative to a reasonable fee under quantum meruit, Simon requests amendment and reconsideration of the conclusion that every single entry of additional time in the super bill for a previously billed period was speculative.

The Edgeworths ignored the substantial case law presented regarding compensation for a lawyer on an hourly basis presented by Simon. Instead, the Edgeworths relied upon the appellate standard of review, which invites plain error by this Court.

The bottom line is Simon gets to be paid for work done. Edgeworths did not present one legal argument against the idea that an attorney can correct, amend or supplement a bill. That is because there is not one. Legally, an attorney can seek payment for all work on a file, even if the work was not immediately and contemporaneously billed for. The work in the super bill is not speculative as every

entry was 100% tied to a specific email or document or event. Hundreds of normally billable hours were lost, because of the Simon decision to bill only on tangible events.

Upon questioning by the Court and by Simon, the Edgeworths conceded they did not have any evidence to dispute the billing entries. Plus, Mr. Simon and Ms. Ferrel confirmed that the billing entries were tied to a tangible event on the case. By ignoring every single entry, the Court effectively reduced the Simon rate and provided the Edgeworths with a windfall. There is no legal or equitable reason why Brian Edgeworth should not pay for the time he demanded, and received, on his case.

Lien adjudication is an equitable proceeding, Simon should be paid for the all the work done on the file, anything less provides the Edgeworths with a windfall and causes manifest injustice.

The appellate standards of review do not apply, but if they did, Simon established that refusal to pay an attorney for work performed is reversible error. In contrast, the Edgeworths did not support their legal position.

III. Conclusion

Rule 52 allows a party to request, and a Court to amend its own findings at its discretion. Simon respectfully requests relief under Rule 52 as stated.

Dated this 13th day of November, 2018.

/s/ *James R. Christensen*
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel Simon

CERTIFICATE OF SERVICE

I CERTIFY SERVICE of the foregoing Reply was made by electronic service (via Odyssey) this 13th day of November, 2018, to all parties currently shown on the Court's E-Service List.

/s/ *Dawn Christensen*
an employee of
JAMES R. CHRISTENSEN, ESQ.

ORD

DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and

American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks. This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per

hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's received the first settlement offer for their claims against the Viking Corporation ("Viking"). However, the claims were not settled until on or about December 1, 2017.

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and

out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was $692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Law Office Appropriately Asserted A Charging Lien Which Must Be Adjudicated By The Court

An attorney may obtain payment for work on a case by use of an attorney lien. Here, the Law Office of Daniel Simon may use a charging lien to obtain payment for work on case A-16-738444-C under NRS 18.015.

NRS 18.015(1)(a) states:

> 1. An attorney at law shall have a lien:
> (a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

Nev. Rev. Stat. 18.015.

The Court finds that the lien filed by the Law Office of Daniel Simon, in case A-16-738444-C, complies with NRS 18.015(1)(a). The Law Office perfected the charging lien pursuant to NRS 18.015(3), by serving the Edgeworths as set forth in the statute. The Law Office charging lien was perfected before settlement funds generated from A-16-738444-C of $6,100,000.00 were deposited, thus the charging lien attached to the settlement funds. Nev. Rev. Stat. 18.015(4)(a); Golightly & Vannah, PLLC v. TJ Allen LLC, 373 P.3d 103, at 105 (Nev. 2016). The Law Office's charging lien is enforceable in form.

The Court has personal jurisdiction over the Law Office and the Plaintiffs in A-16-738444-C. Argentina Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish, 216 P.3d 779 at 782-83 (Nev. 2009). The Court has subject matter jurisdiction over adjudication of the Law Office's charging lien. Argentina, 216 P.3d at 783. The Law Office filed a motion requesting adjudication under NRS 18.015, thus the Court must adjudicate the lien.

Fee Agreement

It is undisputed that no express written fee agreement was formed. The Court finds that there was no express oral fee agreement formed between the parties. An express oral agreement is formed when all important terms are agreed upon. *See,* Loma Linda University v. Eckenweiler, 469 P.2d 54 (Nev. 1970) (*no oral contract was formed, despite negotiation, when important terms were not agreed upon and when the parties contemplated a written agreement*). The Court finds that the payment terms are essential to the formation of an express oral contract to provide legal services on an hourly basis.

Here, the testimony from the evidentiary hearing does not indicate, with any degree of certainty, that there was an express oral fee agreement formed on or about June of 2016. Despite Brian Edgeworth's affidavits and testimony; the emails between himself and Danny Simon, regarding punitive damages and a possible contingency fee, indicate that no express oral fee agreement was formed at the meeting on June 10, 2016. Specifically in Brian Edgeworth's August 22, 2017 email, titled "Contingency," he writes:

> "We never really had a structured discussion about how this might be done. I am more than happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc. Obviously that could not have been done earlier snce who would have thought this case would meet the hurdle of punitives at the start. I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell. I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?"

(Def. Exhibit 27).

It is undisputed that when the flood issue arose, all parties were under the impression that Simon would be helping out the Edgeworths, as a favor.

The Court finds that an implied fee agreement was formed between the parties on December 2, 2016, when Simon sent the first invoice to the Edgeworths, billing his services at $550 per hour, and the Edgeworths paid the invoice. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for Simon's associates. Simon testified that he never told the Edgeworths not to pay the bills, though he testified that from the outset he only wanted to "trigger coverage". When Simon repeatedly billed the Edgeworths at $550 per hour for his services, and $275 an hour for the services of his associates; and the Edgeworths paid those invoices, an implied fee agreement was formed between the parties. The implied fee agreement was for $550 per hour for the services of Daniel Simon Esq. and $275 per hour for the services of his associates.

Constructive Discharge

Constructive discharge of an attorney may occur under several circumstances, such as:

- Refusal to communicate with an attorney creates constructive discharge. Rosenberg v. Calderon Automation, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986).
- Refusal to pay an attorney creates constructive discharge. *See e.g.*, Christian v. All Persons Claiming Any Right, 962 F. Supp. 676 (U.S. Dist. V.I. 1997).

- Suing an attorney creates constructive discharge. See Tao v. Probate Court for the Northeast Dist. #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). *See also* Maples v. Thomas, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and Guerrero v. State, 2017 Nev. Unpubl. LEXIS 472.

- Taking actions that preventing effective representation creates constructive discharge. McNair v. Commonwealth, 37 Va. App. 687, 697-98 (Va. 2002).

Here, the Court finds that the Edgeworths constructively discharged Simon as their lawyer on November 29, 2017. The Edgeworths assert that because Simon has not been expressly terminated, has not withdrawn, and is still technically their attorney of record; there cannot be a termination. The Court disagrees.

On November 29, 2017, the Edgeworths met with the Law Firm of Vannah and Vannah and signed a retainer agreement. The retainer agreement was for representation on the Viking settlement agreement and the Lange claims. (Def. Exhibit 90). This is the exact litigation that Simon was representing the Edgeworths on. This fee agreement also allowed Vannah and Vannah to do all things without a compromise. Id. The retainer agreement specifically states:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
>
> a) …
> b) …
> c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

Id.

This agreement was in place at the time of the settlement of the Viking and Lange claims. Mr. Simon had already begun negotiating the terms of the settlement agreement with Viking during the week of November 27, 2017 prior to Mr. Vannah's involvement. These negotiated terms were put

into a final release signed by the Edgeworths and Mr. Vannah's office on December 1, 2017. (Def. Exhibit 5). Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly identified as the firm that solely advised the clients about the settlement. The actual language in the settlement agreement, for the Viking claims, states:

> PLAINTIFFS represent that their independent counsel, Robert Vannah, Esq. and John Greene, Esq., of the law firm Vannah & Vannah has explained the effect of this AGREEMENT and their release of any and all claims, known or unknown and, based upon that explanation and their independent judgment by the reading of this Agreement, PLAINTIFFS understand and acknowledge the legal significance and the consequences of the claims being released by this Agreement. PLAINTIFFS further represent that they understand and acknowledge the legal significance and consequences of a release of unknown claims against the SETTLING PARTIES set forth in, or arising from, the INCIDENT and hereby assume full responsibility for any injuries, damages, losses or liabilities that hereafter may occur with respect to the matters released by this Agreement.

Id.

Also, Simon was not present for the signing of these settlement documents and never explained any of the terms to the Edgeworths. He sent the settlement documents to the Law Office of Vannah and Vannah and received them back with the signatures of the Edgeworths.

Further, the Edgeworths did not personally speak with Simon after November 25, 2017. Though there were email communications between the Edgeworths and Simon, they did not verbally speak to him and were not seeking legal advice from him. In an email dated December 5, 2017, Simon is requesting Brian Edgeworth return a call to him about the case, and Brian Edgeworth responds to the email saying, "please give John Greene at Vannah and Vannah a call if you need anything done on the case. I am sure they can handle it." (Def. Exhibit 80). At this time, the claim against Lange Plumbing had not been settled. The evidence indicates that Simon was actively working on this claim, but he had no communication with the Edgeworths and was not advising them on the claim against Lange Plumbing. Specifically, Brian Edgeworth testified that Robert Vannah Esq. told them what Simon said about the Lange claims and it was established that the Law Firm of Vannah and Vannah provided advice to the Edgeworths regarding the Lange claim. Simon

and the Law Firm of Vannah and Vannah gave different advice on the Lange claim, and the Edgeworths followed the advice of the Law Firm of Vannah and Vannah to settle the Lange claim. The Law Firm of Vannah and Vannah drafted the consent to settle for the claims against Lange Plumbing (Def. Exhibit 47). This consent to settle was inconsistent with the advice of Simon. Mr. Simon never signed off on any of the releases for the Lange settlement.

Further demonstrating a constructive discharge of Simon is the email from Robert Vannah Esq. to James Christensen Esq. dated December 26, 2017, which states: "They have lost all faith and trust in Mr. Simon. Therefore, they will not sign the checks to be deposited into his trust account. Quite frankly, they are fearful that he will steal the money." (Def. Exhibit 48). Then on January 4, 2018, the Edgeworth's filed a lawsuit against Simon in Edgeworth Family Trust; American Grating, LLC vs. Daniel S. Simon; the Law Office of Daniel S. Simon, a Professional Corporation d/b/a Simon Law, case number A-18-767242-C. Then, on January 9, 2018, Robert Vannah Esq. sent an email to James Christensen Esq. stating, "I guess he could move to withdraw. However, that doesn't seem in his best interests." (Def. Exhibit 53).

The Court recognizes that Simon still has not withdrawn as counsel of record on A-16-738444-C, the Law Firm of Vannah and Vannah has never substituted in as counsel of record, the Edgeworths have never explicitly told Simon that he was fired, Simon sent the November 27, 2018 letter indicating that the Edgeworth's could consult with other attorneys on the fee agreement (that was attached to the letter), and that Simon continued to work on the case after the November 29, 2017 date. The court further recognizes that it is always a client's decision of whether or not to accept a settlement offer. However the issue is constructive discharge and nothing about the fact that Mr. Simon has never officially withdrawn from the case indicates that he was not constructively discharged. His November 27, 2017 letter invited the Edgeworth's to consult with other attorneys on the fee agreement, not the claims against Viking or Lange. His clients were not communicating with him, making it impossible to advise them on pending legal issues, such as the settlements with Lange and Viking. It is clear that there was a breakdown in attorney-client relationship preventing

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Simon from effectively representing the clients. The Court finds that Danny Simon was constructively discharged by the Edgeworths on November 29, 2017.

Adjudication of the Lien and Determination of the Law Office Fee

NRS 18.015 states:

1. An attorney at law shall have a lien:

(a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

(b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.

2. A lien pursuant to subsection 1 is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.

3. An attorney perfects a lien described in subsection 1 by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

4. A lien pursuant to:

(a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action; and

(b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including, without limitation, copies of the attorney's file if the original documents received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6, from the time of service of the notices required by this section.

5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.

6. On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.

7. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

Nev. Rev. Stat. 18.015.

NRS 18.015(2) matches Nevada contract law. If there is an express contract, then the contract terms are applied. Here, there was no express contract for the fee amount, however there was an implied contract when Simon began to bill the Edgeworths for fees in the amount of $550 per hour for his services, and $275 per hour for the services of his associates. This contract was in effect until November 29, 2017, when he was constructively discharged from representing the Edgeworths. After he was constructively discharged, under NRS 18.015(2) and Nevada contract law, Simon is due a reasonable fee- that is, quantum meruit.

Implied Contract

On December 2, 2016, an implied contract for fees was created. The implied fee was $550 an hour for the services of Mr. Simon. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for the services of Simon's associates. This implied contract was created when invoices were sent to the Edgeworths, and they paid the invoices.

The invoices that were sent to the Edgeworths indicate that they were for costs and attorney's fees, and these invoices were paid by the Edgeworths. Though the invoice says that the fees were reduced, there is no evidence that establishes that there was any discussion with the Edgeworths as to how much of a reduction was being taken, and that the invoices did not need to be paid. There is no indication that the Edgeworths knew about the amount of the reduction and acknowledged that the full amount would be due at a later date. Simon testified that Brian Edgeworth chose to pay the bills to give credibility to his actual damages, above his property damage loss. However, as the lawyer/counselor, Simon did not prevent Brian Edgeworth from paying the bill or in any way refund the money, or memorialize this or any understanding in writing.

Simon produced evidence of the claims for damages for his fees and costs pursuant to NRCP 16.1 disclosures and computation of damages; and these amounts include the four invoices that were paid in full and there was never any indication given that anything less than all the fees had been produced. During the deposition of Brian Edgeworth it was suggested, by Simon, that all of the fees

had been disclosed. Further, Simon argues that the delay in the billing coincides with the timing of the NRCP 16.1 disclosures, however the billing does not distinguish or in any way indicate that the sole purpose was for the Lange Plumbing LLC claim. Since there is no contract, the Court must look to the actions of the parties to demonstrate the parties' understanding. Here, the actions of the parties are that Simon sent invoices to the Edgeworths, they paid the invoices, and Simon Law Office retained the payments, indicating an implied contract was formed between the parties. The Court find that the Law Office of Daniel Simon should be paid under the implied contract until the date they were constructively discharged, November 29, 2017.

Amount of Fees Owed Under Implied Contract

The Edgeworths were billed, and paid for services through September 19, 2017. There is some testimony that an invoice was requested for services after that date, but there is no evidence that any invoice was paid by the Edgeworths. Since the Court has found that an implied contract for fees was formed, the Court must now determine what amount of fees and costs are owed from September 19, 2017 to the constructive discharge date of November 29, 2017. In doing so, the Court must consider the testimony from the witnesses at the evidentiary hearing, the submitted billings, the attached lien, and all other evidence provided regarding the services provided during this time.

At the evidentiary hearing, Ashley Ferrel Esq. testified that some of the items in the billing that was prepared with the lien "super bill," are not necessarily accurate as the Law Office went back and attempted to create a bill for work that had been done over a year before. She testified that they added in .3 hours for each Wiznet filing that was reviewed and emailed and .15 hours for every email that was read and responded to. She testified that the dates were not exact, they just used the dates for which the documents were filed, and not necessarily the dates in which the work was performed. Further, there are billed items included in the "super bill" that was not previously billed to the Edgeworths, though the items are alleged to have occurred prior to or during the invoice billing period previously submitted to the Edgeworths. The testimony at the evidentiary hearing

indicated that there were no phone calls included in the billings that were submitted to the Edgeworths.

This attempt to recreate billing and supplement/increase previously billed work makes it unclear to the Court as to the accuracy of this "recreated" billing, since so much time had elapsed between the actual work and the billing. The court reviewed the billings of the "super bill" in comparison to the previous bills and determined that it was necessary to discount the items that had not been previously billed for; such as text messages, reviews with the court reporter, and reviewing, downloading, and saving documents because the Court is uncertain of the accuracy of the "super bill."

Simon argues that he has no billing software in his office and that he has never billed a client on an hourly basis, but his actions in this case are contrary. Also, Simon argues that the Edgeworths, in this case, were billed hourly because the Lange contract had a provision for attorney's fees; however, as the Court previously found, when the Edgeworths paid the invoices it was not made clear to them that the billings were only for the Lange contract and that they did not need to be paid. Also, there was no indication on the invoices that the work was only for the Lange claims, and not the Viking claims. Ms. Ferrel testified that the billings were only for substantial items, without emails or calls, understanding that those items may be billed separately; but again the evidence does not demonstrate that this information was relayed to the Edgeworths as the bills were being paid. This argument does not persuade the court of the accuracy of the "super bill".

The amount of attorney's fees and costs for the period beginning in June of 2016 to December 2, 2016 is $42,564.95. This amount is based upon the invoice from December 2, 2016 which appears to indicate that it began with the initial meeting with the client, leading the court to determine that this is the beginning of the relationship. This invoice also states it is for attorney's fees and costs through November 11, 2016, but the last hourly charge is December 2, 2016. This amount has already been paid by the Edgeworths on December 16, 2016.[2]

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[2]There are no billing amounts from December 2 to December 4, 2016.

The amount of the attorney's fees and costs for the period beginning on December 5, 2016 to April 4, 2017 is $46,620.69. This amount is based upon the invoice from April 7, 2017. This amount has already been paid by the Edgeworths on May 3, 2017.

The amount of attorney's fees for the period of April 5, 2017 to July 28, 2017, for the services of Daniel Simon Esq. is $72,077.50. The amount of attorney's fees for this period for Ashley Ferrel Esq. is $38,060.00. The amount of costs outstanding for this period is $31,943.70. This amount totals $142,081.20 and is based upon the invoice from July 28, 2017. This amount has been paid by the Edgeworths on August 16, 2017.[3]

The amount of attorney's fees for the period of July 31, 2017 to September 19, 2017, for the services of Daniel Simon Esq. is $119,762.50. The amount of attorney's fees for this period for Ashley Ferrel Esq. is $60,981.25. The amount of attorney's fees for this period for Benjamin Miller Esq. is $2,887.50. The amount of costs outstanding for this period is $71,555.00. This amount totals $255,186.25 and is based upon the invoice from September 19, 2017. This amount has been paid by the Edgeworths on September 25, 2017.

From September 19, 2017 to November 29, 2017, the Court must determine the amount of attorney fees owed to the Law Office of Daniel Simon.[4] For the services of Daniel Simon Esq., the total amount of hours billed are 340.05. At a rate of $550 per hour, the total attorney's fees owed to the Law Office for the work of Daniel Simon Esq. is $187,027.50. For the services of Ashley Ferrel Esq., the total amount of hours billed are 337.15. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Ashley Ferrel Esq. from September 19, 2017 to November 29, 2017 is $92,716.25.[5] For the services of Benjamin Miller Esq., the total amount of hours billed are 19.05. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Benjamin Miller Esq. from September 19, 2017 to November 29, 2017 is $5,238.75.[6]

The Court notes that though there was never a fee agreement made with Ashley Ferrel Esq.

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[3] There are no billings from July 28 to July 30, 2017.
[4] There are no billings for October 8th, October 28-29, and November 5th.
[5] There is no billing for the October 7-8, October 22, October 28-29, November 4, November 11-12, November 18-19, November 21, and November 23-26.
[6] There is no billing from September 19, 2017 to November 5, 2017.

or Benjamin Miller Esq., however, their fees were included on the last two invoices that were paid by the Edgeworths, so the implied fee agreement applies to their work as well.

The Court finds that the total amount owed to the Law Office of Daniel Simon for the period of September 19, 2018 to November 29, 2017 is $284,982.50.

Costs Owed

The Court finds that the Law Office of Daniel Simon is not owed any monies for outstanding costs of the litigation in Edgeworth Family Trust; and American Grating, LLC vs. Lange Plumbing, LLC; The Viking Corporation; Supply Network, Inc. dba Viking Supplynet in case number A-16-738444-C. The attorney lien asserted by Simon, in January of 2018, originally sought reimbursement for advances costs of $71,594.93. The amount sought for advanced cots was later changed to $68,844.93. In March of 2018, the Edgeworths paid the outstanding advanced costs, so the Court finds that there no outstanding costs remaining owed to the Law Office of Daniel Simon.

Quantum Meruit

When a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract, but is paid based on quantum meruit. *See e.g.* Golightly v. Gassner, 281 P.3d 1176 (Nev. 2009) (*unreported*) (*discharged contingency attorney paid by quantum meruit rather than by contingency fee pursuant to agreement with client*); *citing,* Gordon v. Stewart, 324 P.3d 234 (1958) (*attorney paid in quantum meruit after client breach of agreement*); and, Cooke v. Gove, 114 P.2d 87 (Nev. 1941) (*fees awarded in quantum meruit when there was no contingency agreement*). Here, Simon was constructively discharged by the Edgeworths on November 29, 2017. The constructive discharge terminated the implied contract for fees. William Kemp Esq. testified as an expert witness and stated that if there is no contract, then the proper award is quantum meruit. The Court finds that the Law Office of Daniel Simon is owed attorney's fees under quantum meruit from November 29, 2017, after the constructive discharge, to the conclusion of the Law Office's work on this case.

In determining the amount of fees to be awarded under quantum meruit, the Court has wide discretion on the method of calculation of attorney fee, to be "tempered only by reason and fairness". Albios v. Horizon Communities, Inc., 132 P.3d 1022 (Nev. 2006). The law only requires that the court calculate a reasonable fee. Shuette v. Beazer Homes Holding Corp., 124 P.3d 530 (Nev. 2005). Whatever method of calculation is used by the Court, the amount of the attorney fee must be reasonable under the Brunzell factors. Id. The Court should enter written findings of the reasonableness of the fee under the Brunzell factors. Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury Standish, 216 P.3d 779, at fn2 (Nev. 2009). Brunzell provides that "[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant. Brunzell v. Golden Gate National Bank, 455 P.2d 31 (Nev. 1969).

The Brunzell factors are: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed; and (4) the result obtained. Id. However, in this case the Court notes that the majority of the work in this case was complete before the date of the constructive discharge, and the Court is applying the Brunzell factors for the period commencing after the constructive discharge.

In considering the Brunzell factors, the Court looks at all of the evidence presented in the case, the testimony at the evidentiary hearing, and the litigation involved in the case.

1. *Quality of the Advocate*

Brunzell expands on the "qualities of the advocate" factor and mentions such items as training, skill and education of the advocate. Mr. Simon has been an active Nevada trial attorney for over two decades. He has several 7-figure trial verdicts and settlements to his credit. Craig Drummond Esq. testified that he considers Mr. Simon a top 1% trial lawyer and he associates Mr. Simon in on cases that are complex and of significant value. Michael Nunez Esq. testified that Mr. Simon's work on this case was extremely impressive. William Kemp Esq. testified that Mr. Simon's work product and results are exceptional.

2. *The Character of the Work to be Done*

The character of the work done in this case is complex. There were multiple parties,

multiple claims, and many interrelated issues. Affirmative claims by the Edgeworths covered the gamut from product liability to negligence. The many issues involved manufacturing, engineering, fraud, and a full understanding of how to work up and present the liability and damages. Mr. Kemp testified that the quality and quantity of the work was exceptional for a products liability case against a world-wide manufacturer that is experienced in litigating case. Mr. Kemp further testified that the Law Office of Danny Simon retained multiple experts to secure the necessary opinions to prove the case. The continued aggressive representation, of Mr. Simon, in prosecuting the case that was a substantial factor in achieving the exceptional results.

3. The Work Actually Performed

Mr. Simon was aggressive in litigating this case. In addition to filing several motions, numerous court appearances, and deposition; his office uncovered several other activations, that caused possible other floods. While the Court finds that Mr. Edgeworth was extensively involved and helpful in this aspect of the case, the Court disagrees that it was his work alone that led to the other activations being uncovered and the result that was achieved in this case. Since Mr. Edgeworth is not a lawyer, it is impossible that it was his work alone that led to the filing of motions and the litigation that allowed this case to develop into a $6 million settlement. All of the work by the Law Office of Daniel Simon led to the ultimate result in this case.

4. The Result Obtained

The result was impressive. This began as a $500,000 insurance claim and ended up settling for over $6,000,000. Mr. Simon was also able to recover an additional $100,000 from Lange Plumbing LLC. Mr. Vannah indicated to Simon that the Edgeworths were ready so sign and settle the Lange Claim for $25,000 but Simon kept working on the case and making changes to the settlement agreement. This ultimately led to a larger settlement for the Edgeworths. Recognition is due to Mr. Simon for placing the Edgeworths in a great position to recover a greater amount from Lange. Mr. Kemp testified that this was the most important factor and that the result was incredible. Mr. Kemp also testified that he has never heard of a $6 million settlement with a $500,000 damage case. Further, in the Consent to Settle, on the Lange claims, the Edgeworth's acknowledge that they

were made more than whole with the settlement with the Viking entities.

In determining the amount of attorney's fees owed to the Law Firm of Daniel Simon, the Court also considers the factors set forth in Nevada Rules of Professional Conduct – Rule 1.5(a) which states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

NRCP 1.5. However, the Court must also consider the remainder of Rule 1.5 which goes on to state:

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:
> (1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;
> (2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

(3) Whether the client is liable for expenses regardless of outcome;
(4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and
(5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.
Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

NRCP 1.5.

The Court finds that under the Brunzell factors, Mr. Simon was an exceptional advocate for the Edgeworths, the character of the work was complex, the work actually performed was extremely significant, and the work yielded a phenomenal result for the Edgeworths. All of the Brunzell factors justify a reasonable fee under NRPC 1.5. However, the Court must also consider the fact that the evidence suggests that the basis or rate of the fee and expenses for which the client will be responsible were never communicated to the client, within a reasonable time after commencing the representation. Further, this is not a contingent fee case, and the Court is not awarding a contingency fee. Instead, the Court must determine the amount of a reasonable fee. The Court has considered the services of the Law Office of Daniel Simon, under the Brunzell factors, and the Court finds that the Law Office of Daniel Simon is entitled to a reasonable fee in the amount of $200,000, from November 30, 2017 to the conclusion of this case.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court must adjudicate the lien. The Court further finds that there was an implied agreement for a fee of $550 per hour between Mr. Simon and the Edgeworths once Simon started billing Edgeworth for this amount, and the bills were paid. The Court further finds that on November 29, 2017, the Edgeworth's constructively discharged Mr. Simon as their attorney, when they ceased following his advice and refused to communicate with

him about their litigation. The Court further finds that Mr. Simon was compensated at the implied agreement rate of $550 per hour for his services, and $275 per hour for his associates; up and until the last billing of September 19, 2017. For the period from September 19, 2017 to November 29, 2017, the Court finds that Mr. Simon is entitled to his implied agreement fee of $550 an hour, and $275 an hour for his associates, for a total amount of $284,982.50. For the period after November 29, 2017, the Court finds that the Law Office of Daniel Simon properly perfected their lien and is entitled to a reasonable fee for the services the office rendered for the Edgeworths, after being constructively discharged, under quantum meruit, in an amount of $200,000.

ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Adjudicate the Attorneys Lien of the Law Office of Daniel S. Simon is hereby granted and that the reasonable fee due to the Law Office of Daniel Simon is $484,982.50.

IT IS SO ORDERED this 19 day of November, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10; Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XXVI **Consolidated with** CASE NO.: A-16-738444-C DEPT NO.: X
EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	**DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)**

AMENDED DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James

Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc.,

dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks. This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no

indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly

express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was $692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

Breach of Contract

The First Claim for Relief of the Amended Complaint alleges breach of an express oral contract to pay the law office $550 an hour for the work of Mr. Simon. The Amended Complaint alleges an oral contract was formed on or about May 1, 2016. After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied contract. As such, a claim for breach of contract does not exist and must be dismissed as a matter of law.

Declaratory Relief

The Plaintiff's Second Claim for Relief is Declaratory Relief to determine whether a contract existed, that there was a breach of contract, and that the Plaintiffs are entitled to the full amount of the settlement proceeds. The Court finds that there was no express agreement for compensation, so there cannot be a breach of the agreement. The Plaintiffs are not entitled to the full amount of the

settlement proceeds as the Court has adjudicated the lien and ordered the appropriate distribution of the settlement proceeds, in the Decision and Order on Motion to Adjudicate Lien. As such, a claim for declaratory relief must be dismissed as a matter of law.

Conversion

The Third Claim for Relief is for conversion based on the fact that the Edgeworths believed that the settlement proceeds were solely theirs and Simon asserting an attorney's lien constitutes a claim for conversion. In the Amended Complaint, Plaintiffs allege "The settlement proceeds from the litigation are the sole property of the Plaintiffs." Amended Complaint, P. 9, Para. 41.

Mr. Simon followed the law and was required to deposit the disputed money in a trust account. This is confirmed by David Clark, Esq. in his declaration, which remains undisputed. Mr. Simon never exercised exclusive control over the proceeds and never used the money for his personal use. The money was placed in a separate account controlled equally by the Edgeworth's own counsel, Mr. Vannah. This account was set up at the request of Mr. Vannah.

When the Complaint was filed on January 4, 2018, Mr. Simon was not in possession of the settlement proceeds as the checks were not endorsed or deposited in the trust account. They were finally deposited on January 8, 2018 and cleared a week later. Since the Court adjudicated the lien and found that the Law Office of Daniel Simon is entitled to a portion of the settlement proceeds, this claim must be dismissed as a matter of law.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The Fourth Claim for Relief alleges a Breach of the Implied Covenant of Good Faith and Fair Dealing based on the time sheets submitted by Mr. Simon on January 24, 2018. Since no express contract existed for compensation and there was not a breach of a contract for compensation, the cause of action for the breach of the covenant of good faith and fair dealing also fails as a matter of law and must be dismissed.

Breach of Fiduciary Duty

The allegations in the Complaint assert a breach of fiduciary duty for not releasing all the funds to the Edgeworths. The Court finds that Mr. Simon followed the law when filing the attorney's lien. Mr. Simon also fulfilled all his obligations and placed the clients' interests above his when completing the settlement and securing better terms for the clients even after his discharge. Mr. Simon timely released the undisputed portion of the settlement proceeds as soon as they cleared the account. The Court finds that the Law Office of Daniel Simon is owed a sum of money based on the adjudication of the lien, and therefore, there is no basis in law or fact for the cause of action for breach of fiduciary duty and this claim must be dismissed.

Punitive Damages

Plaintiffs' Amended Complaint alleges that Mr. Simon acted with oppression, fraud, or malice for denying Plaintiffs of their property. The Court finds that the disputed proceeds are not solely those of the Edgeworths and the Complaint fails to state any legal basis upon which claims may give rise to punitive damages. The evidence indicates that Mr. Simon, along with Mr. Vannah deposited the disputed settlement proceeds into an interest bearing trust account, where they remain. Therefore, Plaintiffs' prayer for punitive damages in their Complaint fails as a matter of a law and must be dismissed.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court adjudicated the lien. The Court further finds that the claims for Breach of Contract, Declaratory Relief, Conversion, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of the Fiduciary Duty, and Punitive Damages must be dismissed as a matter of law.

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ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Dismiss NRCP 12(b)(5) is GRANTED.

IT IS SO ORDERED this 19 day of November, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served on all parties as noted in the Court's Master Service List and/or mailed to any party in proper person.

Tess Driver
Judicial Executive Assistant
Department 10

MATF
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Daniel S. Simon

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST, and AMERICAN GRATING, LLC Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5 and ROE entities 6 through 10; Defendants.	Case No.: A-16-738444-C Dept. No.: 10 **MOTION FOR ATTORNEY FEES AND COSTS** Date of Hearing: Time of Hearing:
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC Plaintiffs, vs. DANIEL S. SIMON d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	CONSOLIDATED WITH Case No.: A-18-767242-C Dept. No.: 10

The Law Office of Daniel Simon, Daniel Simon, individually and Simon Law, by and through their attorneys, Peter Christiansen, Esq. and James R. Christensen, Esq. move for Attorney's Fees and Costs pursuant to NRS 7.085, NRS 18.010(2)(b), NRS 41.670 and NRCP 11.

This motion is made and based upon the papers and pleadings on file herein, exhibits attached, the points and authorities set forth herein, and all other evidence that the Court deems just and proper, as well as the arguments of counsel at the time of the hearing hereon.

Dated this 7th day of December, 2018.

/s/ James R. Christensen

JAMES CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
(702) 272-0406
(702) 272-0415
jim@jchristensenlaw.com
Attorney for Daniel S. Simon

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD

You, and each of you, will please take notice that the undersigned will bring on for hearing the Motion for Attorney's Fees and Costs before the above- entitled Court located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155 on the _____ day of January 15, 2019, 2018, at 9:30 a.m./~~p.m.~~ in Department 10, Courtroom 14B.

Dated this 7th day of December, 2018.

/s/ James R. Christensen

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
Phone: (702) 272-0406
Facsimile: (702) 272-0415
Email: jim@jchristensenlaw.com
Attorney for Daniel S. Simon

MEMORANDUM OF POINTS & AUTHORITIES

I. Introduction

This Court found that the attorney lien of Defendant Daniel S. Simon dba Simon Law ("Simon") was proper and that the lawsuit brought by Plaintiffs Edgeworth Family Trust and American Grating, LLC's (hereafter "Plaintiffs") against Simon had no merit. Accordingly, on October 11, this Court dismissed Plaintiffs' Complaint in its entirety and issued three decisions: Decision and Order on Motion to Dismiss NRCP 12(b)(5); Decision and Order on Motion to Adjudicate Lien and Decision; and Decision and Order on Special Motion to Dismiss Anti-SLAPP. On November 19, 2018, this Court filed an Amended Decision and Order on Motion to Dismiss NRCP 12(b)(5) ("MTDO"), attached hereto as **Exhibit 1** and an Amended Decision and Order on Motion to Adjudicate Lien ("Lien D&O"), attached hereto as **Exhibit 2**. The Decision and Order on Special Motion to Dismiss Anti-SLAPP ("ASO") is attached hereto as **Exhibit 3**

Plaintiffs' complaint brought claims that were not well grounded in fact or law. For example, it is clear that the conversion claim was frivolous and filed for an improper purpose, when the Court examines the facts known to Plaintiffs when they filed the complaint on January 4, 2018; which were, Simon did not have the money and had not stolen any money. In fact, he did not even have the ability to

steal the money as Mr. Vannah equally controlled the account. Additionally, there was no merit to Plaintiffs' claims that:

- Simon "intentionally" converted and was going to steal the settlement proceeds;
- Simon's conduct warranted punitive damages;
- Daniel S. Simon individually should be named as a party;
- Simon had been paid in full;
- Simon refused to release the full settlement proceeds to Plaintiffs;
- Simon breached his fiduciary duty to Plaintiffs;
- Simon breached the covenant of good faith and fair dealing; and,
- Plaintiffs were entitled to Declaratory Relief because they had paid Simon in full.

There are several provisions within Nevada law that favor awarding attorney fees and costs when the claims asserted and maintained by a party are not well-grounded in fact or warranted by existing law to deter vexatious and frivolous claims. Consequently, Simon is entitled to attorney fees and costs pursuant to three separate and distinct grounds under NRS 7.085, NRS 18.010(2)(b), NRS 41.670 and NRCP 11 as described below.

II. Statement Of Relevant Facts

Simon represented Plaintiffs in a complex and hotly contested products liability and contractual dispute stemming from a premature fire sprinkler activation in April of 2016 which flooded Plaintiffs speculation home during its construction causing $500,000.00 in property damage. **Exhibit 2**, Lien D&O, pp. 2-7.

In May/June of 2016, Simon helped Plaintiffs on the flood claim as a favor, with the goal of ending the dispute by triggering insurance to adjust the property damage loss. Simon and Plaintiffs never had an express written or oral attorney fee agreement.

In June of 2016, a complaint was filed. In November of 2016, a joint case conference was held.

In August/September of 2017, Simon and clients agree that the flood case dramatically changed. The case had become extremely demanding and was dominating the time of the law office precluding work on other cases. Determined to help his friend at the time, Simon and the clients made efforts to reach an express attorney fee agreement for the new case. In August of 2017, Daniel Simon and Brian Edgeworth agreed that the nature of the case had changed and had discussions about an express fee agreement based on a hybrid of hourly and contingency fees. However, an express agreement could not be reached due to the

unique nature of the property damage claim and the amount of work and costs necessary to achieve a great result. Simon and the clients agree that the attorney fee was in flux during this period.

Although efforts to reach an express fee agreement failed, Simon continued to forcefully litigate Plaintiffs' claims by serving and assertively pursuing discovery and dynamic motion practice, including the filing of a motion to strike Vikings' answer and exclude crucial defense experts.

In mid-November of 2017, an offer was made by Viking. The first meaningful Viking offer was made in the context of mediation, as a counter offer to a mediator's proposal. The first Viking offer was made as several dispositive motions and an evidentiary hearing on the request to strike Vikings answer were pending. The first Viking offer contained contingencies and provisions which had not been previously agreed to.

Following the Viking offer in mid-November, Simon continued to vigorously pursue the litigation against Viking pending resolution of the details of settlement, and against the co-defendant, Lange Plumbing. Simon also again raised the desire for an express attorney fee agreement with the clients.

On November 29, 2017, the Edgeworths constructively fired Simon by retaining new counsel, Vannah and Vannah, and ceased all direct communications with Simon.

On November 30, 2017, Vannah and Vannah provided Simon notice of retention.

On November 30, 2017, Simon served an attorney lien pursuant to NRS 18.015. However, Simon continued to protect his former clients' interests in the complex flood litigation, to the extent possible under the unusual circumstances.

On December 1, 2017, the Edgeworths entered into an agreement to settle with Viking and release Viking from all claims in exchange for a promise by Viking to pay six million dollars ($6,000,000.00 USD).

On January 2, 2018, Simon served an amended attorney lien.

On January 4, 2018, Edgeworth's, through Vannah, sued Simon, alleging Conversion (stealing) and various other causes of actions based on the assertion of false allegations. At the time of this lawsuit, Vannah and Edgeworth actually knew that the settlement funds were not deposited in any other account and arrangements were being made at the request of Edgeworth and Vannah to set up a special account so that Vannah on behalf of Edgeworth would control the funds equally pending the lien dispute.

On January 8, 2018, Vannah met Simon at Bank of Nevada and deposited the Viking settlement check into a special trust account opened by mutual agreement for this case only. In addition to the normal safeguards for a trust account, this account required signatures of both Vannah and Simon for a

withdrawal. Thus, Simon stealing money from the trust account was an impossibility.

On January 9, 2018, Plaintiffs served their complaint which alleged that Simon stole their money-money which was safe kept in a Bank of Nevada account, earning them interest. Edgeworth and Vannah both knew Simon did not and could not steal the money, yet they pursued their serious theft allegations knowing the falsity thereof.

Simon responded with two motions to dismiss, which detailed the facts and explained the law on why the complaint was frivolous. Rather than conceding the lack of merit as to even a portion of the complaint, Plaintiffs maintained the actions and filed an Amended Complaint to include new causes of action for the Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Fiduciary Duty and reaffirmed all the false facts in support of the conversion claims. The false facts asserted alleged, among other things, extortion, blackmail, and stealing by Simon, and sought punitive damages. When these allegations were made and causes of actions maintained on an ongoing basis, Vannah and Edgeworth both actually knew they were false and had no legal basis whatsoever because their allegations were a legal impossibility.

The facts elicited at the five-day evidentiary hearing further confirmed that the allegations in both complaints were false and that the complaints were filed for an improper purpose as a collateral attack on the lien adjudication proceeding; which forced Simon to retain counsel and experts to defend the suit.

On October 11, the Court dismissed Plaintiffs amended complaint. Of specific importance, the Court found that:

- On November 29, Simon was constructively discharged.
- On December 1, Simon appropriately served and perfected a charging lien on the settlement monies.
- Simon was due fees and costs from the settlement monies subject to the proper attorney lien.
- Found no evidence to support the conversion claim.

The Court *did not find* that Simon converted the clients' money.

Based on the ruling of the Court, as a matter of law, Simon is entitled to attorney fees and costs under Nevada law pursuant to NRS 7.085, NRS 18.010(2)(b), NRS 41.670 and NRCP 11. Because the Court found Simon properly asserted a charging lien pursuant to Nevada law, Plaintiffs' claims against Simon had no merit and there was no basis in law or fact for the conversion claim.

The Court can grant attorney fees based solely on the most egregious cause of action for conversion (and punitive damages) which was a legal impossibility based on the uncontroverted facts known to Plaintiffs at the time they filed the complaint. In addition, the Court may grant attorney fees based on the frivolous and vexatious nature of the lawsuit which is shown by the totality of the circumstances, including the wild accusations contained in the Complaints and three separate affidavits of Brian Edgeworth that were confirmed as false at the evidentiary hearing. The mere fact that Vannah and Edgeworth attempted to name Mr. Simon personally underscores their willfulness and transparent motives.

III. Argument

A. Applicable Law.

There are several provisions within Nevada law that favor awarding attorney fees and costs when the claims maintained by a party are not well-grounded in fact or warranted by existing law to deter vexatious and frivolous claims. Nevada Revised Statute 18.010(2)(b) and (3) state:

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> > (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. *The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.* It is the intent

of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

(Emphasis added.)

Further, Nevada Revised Statute 7.085 states:

1. If a court finds that an attorney has:

(a) Filed, maintained or defended a civil action or proceeding in any court in this State and such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good faith; or

(b) Unreasonably and vexatiously extended a civil action or proceeding before any court in this State,

~ the court shall require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct.

2. The court shall liberally construe the provisions of this section in favor of awarding costs, expenses and attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award costs, expenses and attorney's fees pursuant to this section and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Additionally, under Nevada's Anti-SLAPP statutes that protect communications made to courts -- such as requesting adjudication of an attorney lien -- attorney fees and costs are also provided to deter frivolous and vexatious claims:

> 1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:
>
> > (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.
> >
> > (b) The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the person against whom the action was brought.
> >
> > (c) The person against whom the action is brought may bring a separate action to recover:
> >
> > > (1) Compensatory damages;
> > >
> > > (2) Punitive damages; and
> > >
> > > (3) Attorney's fees and costs of bringing the separate action.
>
> 2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.

3. In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:

(a) An amount of up to $10,000; and

(b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.

NRS 41.670.

Finally, NRCP 11 provides sanctions as follows:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (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 service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

NRCP 11(b) and (c).

B. Attorney Fees and Costs Is Proper and Necessary.

Simon properly asserted a charging lien pursuant to Nevada law. *See* **Exhibit 1**, p. 8. Plaintiffs' claims *were not* maintained upon reasonable grounds. *See* NRS 18.010(2)(b). The claims were not "well-grounded" in fact, "warranted by existing law" or warranted "by an argument for changing the existing law that [was] made in good faith." *See* NRS 7.085(1)(a). In fact, Plaintiffs and their counsel openly admitted the falsity of the allegations and that conversion was a legal impossibility. This is disturbing since the conversion claim is an accusation of stealing and severely tarnishes the reputation of the lawyer accused.

Plaintiffs did not present any "well-grounded" facts as alleged in their Complaint (and also their Amended Complaint) to prove that:

- Simon "intentionally" converted and was going to steal the settlement proceeds;
- Simon's conduct warranted punitive damages;
- Daniel S. Simon individually should be named as a party;
- Simon had been paid in full;
- Simon refused to release the full settlement proceeds to Plaintiffs;
- Simon breached his fiduciary duty to Plaintiffs;
- Simon breached the covenant of good faith and fair dealing;
- Plaintiffs were entitled to Declaratory Relief because they had paid Simon in full; and,
- Simon extorted, blackmailed or did anything remotely similar.

Plaintiffs' claims were maintained via the Complaint, Amended Complaint, and three affidavits provided by Brian Edgeworth that Simon had been paid in full already; that Simon tried to steal the settlement proceeds; and that Simon tried to "blackmail" the Edgeworths. *See* **Exhibit 4**, ¶¶ 36-37 and 40-44; and Affidavit of Brian Edgeworth, dated February 2, 2018, pp. 3, ¶ 12, ll. 23-24, attached hereto as **Exhibit 5**. These were false facts that were asserted to smear the reputation of Simon, to harass Simon and were brought for an improper purpose to prevent adjudication of the attorney lien.

Plaintiffs and their counsel knew the facts were false when the complaint was filed and when the complaint was served. Plaintiffs and their counsel knew Simon did not have possession of the settlement funds and knew that an allegation that Simon had stolen the money was an impossibility. Plaintiffs and counsel knew that a conversion action brought on a contractual claim was a legal impossibility and knew that a conversion action against Simon when Simon did not have possession of the funds was an impossibility. Yet, counsel signed the complaint under NRCP 11 without any regard for the falsity of the allegations. In fact, Mr. Vannah conceded in an email that he personally did not believe Simon would steal the money, yet his office prepared and filed a public lawsuit on January 4, 2018 alleging the theft via the conversion claim.

Following the first Simon motion to dismiss, Mr. Edgeworth reaffirmed the false and impossible allegations in his three affidavits. Rather than acknowledging that Simon did not and could not steal or convert the settlement money as a matter of law, Plaintiffs and counsel continued to assert these facts in pleading after pleading. Even at the most recent reconsideration motion, Mr. Vannah told this court that the money in the trust account was all of the Edgeworth's. This is baffling in light of the representations by Mr. Vannah and Edgeworth during the evidentiary hearing when they both admitted "we always knew we owed Mr. Simon money for his work" and at the time the complaint for conversion was filed

he was owed in excess of $68,000 for costs alone. By maintaining the frivolous and serious claim of theft, this conduct compelled Simon to vigorously defend these false accusations incurring substantial fees and costs.

Simon followed the law for asserting an attorney lien. There was no blackmail, stealing or conversion. Yet, Plaintiffs and their counsel asserted those false claims beginning with the filing of the Complaint on January 4, 2018, through the Amended Complaint on March 15, 2018; and, in three affidavits by Brian Edgeworth -- all the way up to the Evidentiary Hearing. *See* **Exhibits 4 and 6** and Affidavits of Brian Edgeworth, dated February 12, 2018 and March 15, 2018, attached respectively hereto as **Exhibits 7 and 8**.

In addition to being false, the claims were made for an improper purpose. The Court should recall that at every opportunity, Plaintiffs and their counsel argued against this Court adjudicating the lien, a remedy provided by statute, based solely on the nature of their fallacious conversion claim.

It was only at the evidentiary hearing, and upon thorough cross examination, that Plaintiffs conceded that Plaintiffs owe Simon money and that was never in dispute. Mr. Vannah also conceded this crucial fact only at the time of the evidentiary hearing when the plaintiffs and their counsel all stated "We never disputed that we have always owed Simon money." This confirms the frivolous nature of the complaints at the time of the filing in January and again in March,

2018. Further, there were no contentions, much less actual evidence, of Simon's "reckless disregard" of Plaintiffs' rights that rose to the level of fraud, malice and oppression to support Plaintiffs' claims for punitive damages.

Plaintiffs and their attorneys' conduct is clear evidence of maintaining claims that had no grounding in fact or law. Their actions warped a lien adjudication matter into vexatious false claims of blackmail and oppressive conduct that were directed both personally and professionally against Daniel Simon which necessitated hiring counsel and experts to vigorously defend against those claims.

Simon can certainly adjudicate his lien without counsel as he had done on other occasions, but in light of the serious nature of the false claims filed by Plaintiffs, Simon had to hire his own legal team at great expense. Plaintiffs should be held accountable for the consequences of their decision to pursue frivolous claims against Simon.

3. Nevada law favors the award of attorney's fees and costs.

The Nevada Supreme Court addressed awarding attorney fees for frivolous claims directly in *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993) (*superseded* by statute on other grounds). In *Bergmann*, Fred and Harriet Boyce consulted their former attorney, Roger Bergmann, for advice regarding investment strategies. *Id.* at 673. Bergmann mentioned an investment brokerage firm named

Lemons & Associates during the consultation, and the Boyces invested a significant amount of money with Lemons & Associates. *Id.* Subsequently, Lemons & Associates became insolvent and Steve Lemons was incarcerated. *Id.* The Boyces then sued Bergmann, alleging six causes of action, including fraud and misrepresentation; breach of the implied covenant of good faith and fair dealing; intentional and negligent infliction of emotional distress; attorney malpractice; negligent misrepresentation; and a claim for the Boyce's daughter's losses. *Id.* The Boyces also sought punitive damages against Bergmann. *Id.*

Bergmann filed a motion for attorney's fees pursuant to NRS 18.010(2)(b), NRCP 11 and NRCP 68. The district court denied Bergmann's motion for fees, finding that the Boyce's claims had survived the NRCP 12(b)(5) motion and that only some of the claims had been dismissed pursuant to NRCP 41(b) during the trial. *Id.*

The Nevada Supreme Court concluded that the district court abused its discretion and remanded the case back to the district court to conduct the proper analysis for awarding attorney's fees. The *Bergmann* Court stated that "[i]n assessing a motion for attorney's fees under NRS 18.010(2)(b), the trial court must determine whether the plaintiff had reasonable grounds for its claims. **Such an analysis depends upon the actual circumstances of the case rather than a**

hypothetical set of facts favoring plaintiff's averments." *Id.* at 675 (emphasis added). Further, the Court specifically noted:

> [T]he fact that the Boyce's complaint survived a 12(b)(5) motion to dismiss was irrelevant to the trial court's inquiry as to whether the claims of the complaint were groundless. The trial court could not base its refusal to award attorney's fees upon the 12(b)(5) ruling. The trial court also based its refusal to award fees upon the fact that it dismissed only a few of the Boyce's claims for failure to present sufficient evidence. In fact, only one of the Boyce's claims survived at trial. **The prosecution of one colorable claim does not excuse the prosecution of five groundless claims.**

Id. (Emphasis added) (*citing Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 735 P.2d 125, 140 (Ariz. Ct. App. 1986) (case remanded for trial court to apportion attorney's fees between grounded and groundless claims); *Department of Revenue v. Arthur*, 153 Ariz. 1, 734 P.2d 98, 101 (Ariz. Ct. App. 1986) ("The fact that not all claims are frivolous does not prevent an award of attorneys' fees."); *Fountain v. Mojo*, 687 P.2d at 501 ("[A] prevailing party must be afforded an opportunity to establish a reasonable proration of attorney fees incurred relative to the defense of a frivolous or groundless claim.")).

The *Bergmann* Court also found that the lower court abused its discretion in denying attorney's fees under NRCP 11: "NRCP 11 sanctions ***should*** be imposed for frivolous actions." *Id.* at 676 (emphasis added). The Court stated as follows:

> A frivolous claim is one that is 'both baseless and made without a reasonable and competent inquiry.' Thus, a determination of whether a claim is frivolous involves a two-pronged analysis: (1) the court must determine whether the pleading is 'well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law'; and (2) whether the attorney made a reasonable and competent inquiry.
>
> The first prong of the test has a component which is similar to the analysis required under NRS 18.010(2)(b): The trial court must examine the actual circumstances surrounding the case to determine whether the suspect claims were brought without reasonable grounds. As we noted previously, the trial court did not base its decision upon such an examination, but instead upon the fact that the complaint survived a Rule 12(b)(5) motion to dismiss. The legal standard applied to a rule 12(b)(5) motion to dismiss differs from the legal standard applied to a Rule 11 motion for sanctions. Thus, the trial court abused its discretion by applying an incorrect legal standard to the question whether Bergmann could recover fees as a sanction under NRCP 11.

Id. at 676-77 (citations omitted).

When applying the foregoing analysis, the *Bergmann* Court noted that the record contained "ample evidence" for which the trial court could have concluded that the Boyce's attorney failed to make a reasonable and competent inquiry, and, therefore, the trial court's error "may well have affected Bergmann's substantial rights." *Id.* at 677.

The facts in the present case are much stronger than in *Bergmann*, and the evidence is more than substantial. Plaintiffs filed their lawsuit and included claims for Conversion and punitive damages. This Court found that Simon had not even received the settlement proceeds until after Plaintiffs had filed their lawsuit: "When the Complaint was filed on January 4, 2018, Mr. Simon was not in possession of the settlement proceeds as the checks were not endorsed or deposited in the trust account." *See*, **Exhibit 1**, pp. 7:15-16. In fact, this was conceded and known to Plaintiffs when filing the complaint. Plaintiffs had actual knowledge of the when and how the settlement money was deposited into a special trust account controlled by Vannah. Thus, Plaintiffs and their counsel had actual knowledge that no money was stolen or converted. Rather than correcting the wild accusations, Vannah maintained the frivolous theft claims in pleading after pleading. Additionally, there was no breach of contract; no breach of fiduciary duty; no breach of the covenant of good faith and fair dealing; and Plaintiffs were not entitled to Declaratory Relief, much less punitive damages. *Id.,* pp.6-8. Instead, Simon followed the law in asserting an attorney lien and aggressively represented his former clients throughout the entire process.

Plaintiffs and their counsel knew the facts of this case and that this was a fee dispute and nothing more. Nevertheless, they chose to pursue their claims through a separate action asserting wild accusations in multiple pleadings, oppositions and

affidavits, despite admitting at the start of the evidentiary hearing that Simon was always owed money. It is undisputed that there were not any reasonable grounds to file a lawsuit.

Nevada law on this matter is clear. Courts must "***liberally construe***" the provisions "***in favor***" of awarding attorney fees against parties who maintain claims without reasonable grounds for doing so. *See* NRS 18.010(2)(b) and NRS 7.085(2) (emphasis added). Here, the Court must determine if Plaintiffs' claims were well-grounded in fact or existing law or they had made a good faith argument for a change in the existing law. *See Bergmann*, 109 Nev. at 675-77; *see also Iorio v. Check City P'ship,* LLC, 2015 Nev. Unpub. LEXIS 658, *9-10 (affirming the lower court's *Bergmann* analysis and upholding the court's award of attorney fees and sanctions pursuant to NRCP 11 and NRS 18.010(2)(b)); and *Ginena v. Alaska Airlines, Inc.*, 2013 U.S. Dist. LEXIS, *13-14 (holding that plaintiffs' voluntarily dismissed claims right before trial were groundless and weighed in favor of awarding fees). In *Bennett v. Baxter Group*, 224 p.3d 230 (Ariz 2010), a lawyer was sanctioned for holding onto a claim long after he should have dropped it and then the lawyer dropped it on the eve of trial.

In Edgeworth, they should not have pursued the impossible claim of theft initially and certainly should have dropped the theft claim from the amended complaint.

This Court has found that Plaintiffs and their counsel did not show that their claims were well-grounded in fact or existing law, as was established in the evidentiary hearing and concluded in the Court's ruling on Simon's Motion to Dismiss pursuant to NRCP 12(b)(5). *See* **Exhibit 1**.

Consequently, NRCP 11 and NRS 7.085 sanctions are appropriate, and attorney fees and costs for Simon are proper pursuant to NRS 18.010(2)(b), NRS 7.085, NRCP 11, and NRS 41.670.

While Simon recognizes that the Court determined the Anti-SLAPP Motion to Dismiss to be moot as the NRCP 12(b)(5) motion was granted, the same facts can still apply within NRS 41.670 to provide attorney's fees and costs to Simon. The attorney lien was a communication to the court and was protected via Nevada's Anti-SLAPP statutes; therefore, Plaintiffs' claims were – once again – not grounded in fact or law to allow prosecution against Simon. This was made clear to Plaintiffs in the initial special motion to dismiss –Anti-SLAPP, yet they continued to maintain the frivolous action, which is the exact conduct the legislature intended to deter. Therefore, Simon respectfully requests that its Motion be granted and that the Court award attorney's fees and costs as detailed below.

C. Simon's Attorney's Fees and Costs

As discussed above, Simon has adjudicated liens in the past without retaining counsel. This usually involves a simple motion hearing and the Court decides based on the pleadings and argument. Instead, Plaintiffs' lawsuit asserting false and wild accusations necessitated retaining counsel to defend himself and his firm against their frivolous claims. Simon retained James Christensen, Esq. and Peter Christiansen, Esq. to defend the wild accusations and litigate all of the issues and claims within the Evidentiary Hearing. Thus, Simon has incurred the following attorney's fees and costs:

1.	James Christensen, Esq. Legal Fees	$ 62,604.48 [1]
2.	Peter Christiansen, Esq. Legal Fees	$199,495.00 [2]
3.	Total Costs	$ 18,434.73 [3]
	a. Will Kemp, Esq. Expert Fees	$ 11,498.15
	b. David Clark, Esq.	$ 5,000.00
	c. Miscellaneous Costs	$ 1,936.58
TOTAL ATTORNEY'S FEES AND COSTS		**$280,534.21**

[1] James Christensen's Invoices, attached hereto as Exhibit 9
[2] Peter Christiansen's Invoices, attached hereto as Exhibit 10
[3] Costs Summary and supporting documentation attached hereto as Exhibit 11

Please note that these fees and costs do not include substantial time expended by Simon and his firm in defending the frivolous claims that were filed solely to harass Simon in a vexatious manner to destroy his reputation. The effects of the theft claim of conversion still remain unknown on his practice and reputation, but are clearly substantial. The fees and costs are the reasonable expenses Simon incurred in defending Plaintiffs' claims that went far beyond an attorney lien adjudication.

Our Supreme Court has also adopted the view in stating that the trial court should "either ... award attorney's fees or ... state the reasons for refusing to do so." *Pandelis Const. v. Jones-Viking Assoc.,* 103 Nev. 129, 734 P.2d 1239 (1987). Accordingly, if attorney's fees and costs are not allowed there should be very compelling reasons supporting such a decision.

IV. Conclusion

Simon respectfully requests that the Motion for Attorney Fees and Costs be GRANTED, in the sum of **$280,534.21** ($262,099.48 in attorney's fees and $18,434.73 in costs).

Dated this 7th day of December, 2018.

/s/ James R. Christensen

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
Phone: (702) 272-0406
Facsimile: (702) 272-0415
Email: jim@jchristensenlaw.com
Attorney for Daniel S. Simon

CERTIFICATE OF SERVICE

I CERTIFY SERVICE of the foregoing **MOTION FOR ATTORNEY FEES AND COSTS** was made by electronic service (via Odyssey) this 7th day of December, 2018, to all parties currently shown on the Court's E-Service List.

/s/ Dawn Christensen

an employee of
JAMES R. CHRISTENSEN, ESQ.

Exhibit 1

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10; Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XXVI **Consolidated with** CASE NO.: A-16-738444-C DEPT NO.: X
EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	**DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)**

AMENDED DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James

Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc.,

dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks. This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no

indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly

express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was $692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

Breach of Contract

The First Claim for Relief of the Amended Complaint alleges breach of an express oral contract to pay the law office $550 an hour for the work of Mr. Simon. The Amended Complaint alleges an oral contract was formed on or about May 1, 2016. After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied contract. As such, a claim for breach of contract does not exist and must be dismissed as a matter of law.

Declaratory Relief

The Plaintiff's Second Claim for Relief is Declaratory Relief to determine whether a contract existed, that there was a breach of contract, and that the Plaintiffs are entitled to the full amount of the settlement proceeds. The Court finds that there was no express agreement for compensation, so there cannot be a breach of the agreement. The Plaintiffs are not entitled to the full amount of the

settlement proceeds as the Court has adjudicated the lien and ordered the appropriate distribution of the settlement proceeds, in the Decision and Order on Motion to Adjudicate Lien. As such, a claim for declaratory relief must be dismissed as a matter of law.

Conversion

The Third Claim for Relief is for conversion based on the fact that the Edgeworths believed that the settlement proceeds were solely theirs and Simon asserting an attorney's lien constitutes a claim for conversion. In the Amended Complaint, Plaintiffs allege "The settlement proceeds from the litigation are the sole property of the Plaintiffs." Amended Complaint, P. 9, Para. 41.

Mr. Simon followed the law and was required to deposit the disputed money in a trust account. This is confirmed by David Clark, Esq. in his declaration, which remains undisputed. Mr. Simon never exercised exclusive control over the proceeds and never used the money for his personal use. The money was placed in a separate account controlled equally by the Edgeworth's own counsel, Mr. Vannah. This account was set up at the request of Mr. Vannah.

When the Complaint was filed on January 4, 2018, Mr. Simon was not in possession of the settlement proceeds as the checks were not endorsed or deposited in the trust account. They were finally deposited on January 8, 2018 and cleared a week later. Since the Court adjudicated the lien and found that the Law Office of Daniel Simon is entitled to a portion of the settlement proceeds, this claim must be dismissed as a matter of law.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The Fourth Claim for Relief alleges a Breach of the Implied Covenant of Good Faith and Fair Dealing based on the time sheets submitted by Mr. Simon on January 24, 2018. Since no express contract existed for compensation and there was not a breach of a contract for compensation, the cause of action for the breach of the covenant of good faith and fair dealing also fails as a matter of law and must be dismissed.

Breach of Fiduciary Duty

The allegations in the Complaint assert a breach of fiduciary duty for not releasing all the funds to the Edgeworths. The Court finds that Mr. Simon followed the law when filing the attorney's lien. Mr. Simon also fulfilled all his obligations and placed the clients' interests above his when completing the settlement and securing better terms for the clients even after his discharge. Mr. Simon timely released the undisputed portion of the settlement proceeds as soon as they cleared the account. The Court finds that the Law Office of Daniel Simon is owed a sum of money based on the adjudication of the lien, and therefore, there is no basis in law or fact for the cause of action for breach of fiduciary duty and this claim must be dismissed.

Punitive Damages

Plaintiffs' Amended Complaint alleges that Mr. Simon acted with oppression, fraud, or malice for denying Plaintiffs of their property. The Court finds that the disputed proceeds are not solely those of the Edgeworths and the Complaint fails to state any legal basis upon which claims may give rise to punitive damages. The evidence indicates that Mr. Simon, along with Mr. Vannah deposited the disputed settlement proceeds into an interest bearing trust account, where they remain. Therefore, Plaintiffs' prayer for punitive damages in their Complaint fails as a matter of a law and must be dismissed.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court adjudicated the lien. The Court further finds that the claims for Breach of Contract, Declaratory Relief, Conversion, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of the Fiduciary Duty, and Punitive Damages must be dismissed as a matter of law.

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ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Dismiss NRCP 12(b)(5) is GRANTED.

IT IS SO ORDERED this 19 day of November, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served on all parties as noted in the Court's Master Service List and/or mailed to any party in proper person.

Tess Driver
Judicial Executive Assistant
Department 10

Exhibit 2

ORD

DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10; Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XXVI **Consolidated with** CASE NO.: A-16-738444-C DEPT NO.: X
EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	**DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN**

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and

American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen carlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks. This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per