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.

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC,

Appellants,

vs.

DANIEL S. SIMON; and THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation,

Respondents.

LAW OFFICE OF DANIEL S. SIMON; DOES 1 through 10; and, ROE entities 1 through 10;

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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Supreme Court No. 77678

District Court Case
No.: A-16-738444-C
Consolidated with:
A-18-767242-C

Consolidated with:
Supreme Court No. 78176

Consolidated with:
Supreme Court No. 79821

IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TIERRA JONES

Respondents,

and

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC,

Real Parties in Interest.

REPLY BRIEF ON CROSS-APPEAL AND REPLY IN SUPPORT

OF PETITION FOR A WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

No such corporations involved.

Peter S. Christiansen, Esq., Nevada Bar No. 5254, has also appeared in the Eighth Judicial District Court for the Petitioner.

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I. Introduction

The overarching presentation of the consolidated cases on appeal/petition is of an attorney lien adjudication complicated by an attempt to punish an attorney for seeking adjudication by vexatious pursuit of a baseless conversion complaint. Simon requests relief which is supported by the law and the facts. In contrast, when the sinister language is set aside and the matter viewed objectively, the Edgeworths are left with *ad hoc* rescue arguments, adopted with apparently no concern for accuracy or consistency, which do not save or advance their position.

To demonstrate: On January 4, 2018, the Edgeworth conversion complaint was filed, days before the settlement checks were deposited into the agreed upon interest bearing jointly controlled trust account specially created for the settlement.[1] In contrast, in their reply brief,[2] the Edgeworths state that the conversion complaint was filed "When Simon refused to release the full amount…litigation was filed and served to recover from Simon the damages Appellants had sustained."[3]

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[1] I-AA00111-AA00120

[2] The Edgeworth Answering/Reply brief of February 14, 2020 is referred to herein as "Edgeworth Reply" brief for brevity's sake.

[3] Edgeworth Reply Brief at p. 10

The *ad hoc* rescue excuse for the conversion complaint is problematic because when the conversion complaint was filed no checks had been deposited and no justiciable claim existed. Plus, *there never were any recoverable damages at any time*, because the settlement money in dispute was and is safekept in trust and the Edgeworths earn interest on the entire sum, including the amount due Simon.

Every cause of action of the conversion complaint, and the amended conversion complaint, is based on the existence of an express oral contract for legal services at $550 an hour formed on or about May 1, 2016.[4] Every cause of action is based on the assertion that Simon was paid in full and that the Edgeworths were entitled to the entire settlement.[5] This is problematic because the Edgeworths have conceded they always knew they owed money Simon for attorney's fees and costs ($68,000) for services related to the case.[6]

[4] I-AA00113:9-19; III-AA00690:13-23
[5] I-AA00118:6-8; III-AA00695:11-13
[6] V-AA01057; V-AA01120-AA01121

The conversion complaints are based upon an alleged failure to pay or provide a timeline for payment of an undisputed sum from the settlement proceeds.[7] On January 8, 2018, the settlement checks were deposited. On January 16, after checks cleared, the Edgeworths received an undisputed sum of just under $4,000,000.00,[8] which the Edgeworths agree made them more than whole.[9] Still, the amended conversion complaint filed in March 2018 alleges a continuing failure to provide an undisputed sum.[10]

The conversion complaints infer time is money. Following the first conversion complaint, on January 24, Simon filed a motion to adjudicate the lien. The Edgeworths opposed adjudication based on their conversion complaint. In a reversal of the time is money theme, the Edgeworths sought to prevent expedited adjudication of the statutory attorney lien and instead argued for full blown discovery and a jury trial.[11]

[7] III-AA00693:3-13
[8] I-AA00125
[9] I-AA000125; VIII-AA01899:15-24
[10] III-AA00688-00699
[11] III-WA00615:8-15

In support of the motion to adjudicate, Simon attached Brian Edgeworth's August 22, 2017, "contingency" email in which Brian admits that no express fee agreement existed.[12] In opposition, Brian Edgeworth provided sworn testimony to the District Court that the contingency email was sent only after the settlement value of the case had significantly increased.[13] Brian attacked his own clear admission in the contingency email by providing an alternate context. Brian told the Court under oath:

> As discovery in the underlying LITIGATION neared its conclusion in the late fall of 2017, after the value of the case blossomed from one of property damage of approximately $500,000 to one of significant and additional value do (sic) to the conduct of one of the defendants, *and after a significant sum of money was offered to PLAINTIFFS from defendants*, SIMON became determined to get more, so he started asking me to modify our CONTRACT. *Thereafter*, I sent an email labeled "Contingency". (Italics added.)[14]

The attempt to explain away the contingency email failed. The contingency email was sent August 22, 2017. On August 23, 2017, Brian Edgeworth sent an email in which he bemoaned the lack of an opportunity to settle the case, which clearly refutes his later claim of a prior offer of a "significant sum of money".[15] Brian's *ad hoc* rescue attempt at explaining away the contingency email is disproven by his own words; and, the

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[12] I-AA00027

[13] V-AA01007:17-AA01009:16

[14] V-AA01007:17-AA01009:16

uncontested fact that the first offer was not made until months later and the first significant offer was made even later following the second mediation in November 2017.

Tellingly, the Edgeworths withdrew the *ad hoc* rescue argument against the contingency email in subsequent declarations to the Court.[16] Thus, when the District Court considered the matter, the Edgeworths did not have a credible argument against the plain meaning of the contingency email - that there was no express oral fee agreement. Also, the District Court had direct evidence of a statement made by Brian Edgeworth under oath that was not credible.

At the evidentiary hearing, when confronted with the emails from May of 2016 which confirmed no express fee agreement was formed around May 1, Brian Edgeworth changed his position and testified that contract formation really occurred on June 10. However, the new date of contract formation conflicts with the conversion complaint, Brian's sworn declarations, and is not supported by emails sent June 10, or any other

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[15] I-AA00028

[16] Compare III-AA00554-AA00559 with III-AA00658-AA00666 with III-AA00678-AA00687

day.[17] Again, Brian Edgeworth's *ad hoc* rescue attempt demonstrated to the Court that he was not credible.

At the evidentiary hearing, the Edgeworths agreed that Simon was owed money (albeit they disagreed on the amount).[18] The Edgeworths thus refuted the conversion complaints' allegation that the Edgeworths were entitled to the full amount of the settlement. In the reply brief, the Edgeworths reverse again, abandon their admission before the District Court, and go back to the assertion they are entitled to the full amount of the settlement to explain their decision to file the conversion complaint.[19]

The Edgeworths also continue to rely upon commentary offered by counsel at a deposition, while ignoring the testimony of Brian Edgeworth at the same deposition in which Brian Edgeworth testified that the fees were in excess of the billed amounts and were increasing every day.[20]

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[17] IV-AA00964:11-16; I-AA00004; I-AA00027

[18] V-AA01057:16-25

[19] *Compare;* amended complaint, Edgeworths due full settlement at III-AA00695:11-13; *with,* always knew Simon was owed money at hearing at V-AA01057:16-25; *and with,* Edgeworths due full settlement Edgeworth Reply Brief at p. 10.

[20] I-RA000012:18-RA000013:19. Brian testified fees were over $500,000.00 and were increasing, thus displaying actual knowledge that fees were in excess of the amount billed by Simon, which were then less than $400,000.00.

After the District Court adjudicated the attorney lien, the Edgeworths filed a notice of appeal. As a natural consequence of that act by the Edgeworths, the disbursal of the remaining disputed settlement funds in trust was delayed, because the Edgeworths did not accept the adjudication. The Edgeworths embraced delay.

However, not soon after, the Edgeworths filed a motion before the District Court requesting an order that the remaining disputed settlement funds held in trust be disbursed pursuant to the adjudication decision, despite their own appellate challenge of same. Time was again money. The District Court denied the motion citing the pending appeal initiated by the Edgeworths.[21]

In the reply brief, the Edgeworths use the fact settlement funds are still safekept in trust pending resolution of their own appellate challenge as an *ad hoc* rescue argument in support of the conversion complaint, without disclosing that the Edgeworth motion to disburse was denied by the District Court.[22] In other words, the Edgeworths attempt to create an *ex post facto*

[21] I-RA000112-RA000113

[22] Edgeworth Reply Brief at p.12, Edgeworths argue, "After Simon's lien was adjudicated in the amount of $484,982.50, Simon still wrongfully retains an interest in, and exercises dominion and control over, $1,007,878.80 of Appellants' funds." Also, while the Edgeworths cite to and

factual basis for the conversion complaint by omitting that the remaining settlement funds are still held in trust following the District Court's denial of their Motion.

Finally, the Edgeworths do their best to ignore that the District Court found that no express oral contract was ever formed. The District Court entered the following findings:

> -The Court finds that there was no express oral fee agreement formed between the parties.[23]
> -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 2016.[24]

The District Court made its determination through a procedurally correct process, based upon extensive briefing, thousands of pages of exhibits, five days of live testimony, and the opportunity to assess the credibility of the witnesses in open court. The District Court crafted its own findings of fact and conclusions of law, which the Edgeworths never directly address.

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included the motion to disburse in their appendix, the rest of the pleadings and the minute order are not included in the appendix.

[23] IX-AA02180:15-16

[24] IX-AA02180:22-23

To avoid the Court's findings and conclusions, the Edgeworths propose, without supporting authority, that the findings of fact and conclusions of law of the District Court can be ignored because the Court did not expressly invoke NRCP 12(d), even though no such requirement exists. *See, Myer v. Sunrise Hospital*, 117 Nev. 313, 320-21, 22 P.3d 1142, 1148 (2001). And, even though the District Court *told* both parties that the Court would use the evidence adduced at the hearing to reach a decision on the pending motion(s) to dismiss.[25]

This is not a matter where the facts remain in hot dispute. The facts have been settled by the District Court by taking evidence and testimony at the evidentiary hearing, which is exactly what the Court said it was going to do and is exactly what a District Court should do. *McDonald Carano Wilson v. Bourassa Law*, 131 Nev. 904, 908, 362 P.3d 89, 91 (2015) (the court should make findings and conclusions); and, *Valiente v. Behar*, 2019 WL 6971195 (Dec. 2019) (unpublished) (*Valiente* is not cited for authority, it is used for the case reference to the evidentiary hearing held by the District Court, which is the general practice in the Eighth Jud. Dist. Court). Notably, the Edgeworths did not file an objection to the hearing, nor did they ask for a stay and file a writ. The Edgeworths accepted the process, they cannot

now claim that the process was improper. As such, the findings of fact based on substantial evidence must be upheld on appeal.

At the end of the day, the Edgeworths timely received an undisputed sum of four million dollars, the Edgeworths admit they were not entitled to the entire amount of the settlement, and the Edgeworths ignore, and ask this Court to ignore, procedurally correct and well-founded findings of fact and conclusions of law that no express oral fee contract existed. The three main factual pillars used by the Edgeworths to build up their conversion complaint have fallen. On top of which, the Edgeworths do not address the elements for conversion and cannot establish a prima facie conversion case. Mr. Simon never had the money to convert, Simon followed the law by filing an attorney lien, which was found to be proper by the District Court[26] and was conceded as such in the Edgeworth reply brief.[27] Yet, the Edgeworths continue their rhetoric and vexatious pursuit of the conversion complaint. *See*, *Hill v. Norfolk and Western Railway Co*., 814 F.2d 1192 (1987) (in *Hill* Judge Posner discusses when it is time for a litigant to stop).

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[25] III-WA00705:20- WA00706:22

[26] IX-AA02180:1-7

[27] *See, e.g*. Edgeworth Reply Brief at iii.

It is against this backdrop that Simon asks for limited relief. Simon requests:

1. The counter appeal be granted, and the case be remanded with instructions to the District Court to make a substantive ruling on the special anti-SLAPP motion to dismiss the conversion complaint.

2. Writ relief issue consisting of instructions to the District Court to adjudicate the Simon statutory lien under quantum meruit, and to avoid enforcement of the terminated payment term of the discharged implied contract.

3. Writ relief issue consisting of instructions to the District Court to substantively consider, and to accept or reject with explanation, all the hours worked as documented on the superbill.

II. Anti-SLAPP Standard of Review

The correct standard of review for a grant or denial of an anti-SLAPP motion is *de novo*. *Coker v. Sassone*, 135 Nev. 8, 10-11, 432 P.3d 746, 748-749 (2019). In the opening brief, Simon cited the abuse of discretion standard of review used in *Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017) (Simon opening brief at page 21) which applied to an earlier version of the statute. The undersigned apologizes for the error.

III. Summary of the Argument

The District Court's dismissal of the conversion case was not dispositive of and did not moot Simon's special anti-SLAPP motion to dismiss. The anti-SLAPP statute provides unique remedies not found by

the Court. Accordingly, a justiciable issue remains, and a substantive ruling is required.

The District Court properly found that the Edgeworths discharged Simon and terminated the implied contract. Accordingly, the law requires the District Court to adjudicate the Simon statutory lien by quantum meruit, and not by enforcing the payment terms of the terminated contract.

The superbill was created in a reasonable and unrefuted manner and the Edgeworths did not establish any inaccuracies, despite the repeated unsupported claims to have done so. Also, the superbill was at times relied upon by the District Court (and the Edgeworths) and other times not, without a substantive basis provided. Accordingly, the District Court should consider the whole of the superbill in its quantum meruit adjudication of the lien or provide reasoning why the Court did not consider the superbill or portions of the superbill.

IV. The Simon Anti-SLAPP Motion to Dismiss was not Moot.

The facts of this dispute naturally lead to the filing of an anti-SLAPP special motion to dismiss. The Edgeworths sued Simon for conversion of settlement proceeds *before* the settlement proceeds were even deposited.

The Edgeworths sued Simon for conversion of settlement proceeds even though the Edgeworths proposed, and Simon agreed, to deposit the money into a separate interest-bearing trust account, with all interest inuring to the Edgeworths, and over which Edgeworth counsel has joint signatory control.[28] Further, because the Edgeworths filed a notice of appeal and continued the dispute over the settlement funds held in trust, the Edgeworths continue to earn interest on the fees the District Court found are owed to Simon.

The Edgeworths sued Simon for conversion based on the existence of an oral contract, when Brian Edgeworth admitted in the contingency email no such contract existed, and the District Court found no such contract was formed.[29]

The Edgeworths sued Simon to punish him, and for stealing as testified to by Angela Edgeworth.[30] Of course, the Edgeworths replacement lawyer admitted there was no basis to the stealing allegation,[31] and the police have yet to be notified of the alleged million-dollar theft. Yet, stealing

[28] VIII-AA01874:17- AA01875:13
[29] IX-AA02180:15-AA02181:12
[30] VIII-AA01873:10-21
[31] III-WA00614:14-18; I-AA00122-AA00124

was used as an *ad hoc* rescue attempt in the reply to support the claim for conversion.[32]

Importantly, the Edgeworths sued Simon for conversion *because Simon used an attorney lien to resolve a dispute over the amount of due and owing attorney fees and costs.* Because the Edgeworths sued Simon over the use of a statutory lien, the foundation of the Edgeworths conversion case was Simon's use of a protected communication under the anti-SLAPP statue. NRS 41.637[33]; *Abrams v. Sanson*, 136 Nev. Adv. Op. 9, ---P.3d---(2020).

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[32] Edgeworth Reply Brief at p. 25

[33] NRS 41.637: Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,

which is truthful or is made without knowledge of its falsehood.

This Court has recognized that because the anti-SLAPP statutes are similar, California law can be looked to for guidance. *Coker*, 135 Nev at 11, 432 P.3d at 749. In California, use of an attorney lien to resolve a fee dispute is a protected activity. *See, e.g*., *Jensen v. Josefsberg*, 2018 WL 5003554 (C.A. 2nd Dist. Div. 2, 2018)(unpublished)(a complaint challenging an attorney lien as unethical was subject to dismissal under the Anti-SLAPP statute); *Finato v. Fink*, 2018 WL 4719233 (C.A. 2nd Dist. 2018) *review denied* 2019 (unpublished)(*Finato* recognized filing an attorney lien was a protected activity under the Anti-SLAPP law and on appeal ordered dismissal of lien related claims for malpractice, breach of fiduciary duty and breach of contract); *Kattuah v. Linde Law Firm*, 2017 WL 3033763 (C.A. 2nd Dist. Div. 1 Calif. 2017) (unpublished)(reversing denial of an Anti-SLAPP motion); *Roth v. Badener*, 2016 WL 6947006 (C.A. 2nd Dist. Div. 2 Calif 2016)(reversing a denial of an Anti-SLAPP motion)(unpublished); *Becerra v. Jones, Bell, Abbott, Fleming & Fitzgerald LLP*, 2015 WL 881588 (C.A. 2nd Dist. Div. 8 Calif 2015)(unpublished); *Beheshti v. Bartley*, 2009 WL 5149862 (Calif, 1st Dist., C.A. 2009)(unpublished)(order granting Anti-SLAPP motion affirmed); *Transamerica Life Insurance Co., v. Rabaldi*, 2016 WL 2885858

(U.S.D.C.C.D. Calif. 2016)(unpublished)(an attorney lien is "protected petitioning activity").

Resolution of a special motion to dismiss brought under the anti-SLAPP statute requires a two-part analysis by the District Court. First, the Court must determine if a protected communication is involved. If a protected communication is involved, as seems likely here; then, the Court must determine if the Plaintiff can establish a prima facie case. *Abrams*, 136 Nev. Adv. Op. 9, ---P.3d---.

If a special motion to dismiss is granted, then the moving party may be due fees and may pursue a separate action under NRS 41.670(1). The right to a separate action, and the route to fees, do not exist elsewhere in the law. These are unique remedies under the anti-SLAPP statute.

Below, the District Court dismissed the offending conversion complaint and awarded sanctions/fees/costs in the amount of $55,000.00 against the Edgeworths. The Court then denied the special motion to dismiss as moot.[34] The idea that the special motion to dismiss was moot can be fairly understood in that setting. After all, a dismissal with sanctions would normally be the end of the story. However, while understandable,

[34] IX-AA02069:9-12

that view is not correct under the mootness doctrine because of the unique remedies available under the anti-SLAPP statute.

Mootness turns on the existence of an actual controversy. *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). Therefore, even after the offending complaint was dismissed and sanctions/fees/costs awarded of $55,000.00, the issue of the potential remedy of a separate action remained, as well as the opportunity for additional fees under the anti SLAPP statute.

Accordingly, Simon requests the case be remanded to the District Court with instructions to substantially rule on the anti-SLAPP motion to dismiss.

V. An extraordinary writ should issue.

After the Edgeworths filed their notice of appeal, Simon decided to challenge what appear to be errors of law made by the District Court in its adjudication process. Simon identified two apparent errors. First, while the District Court correctly found the implied fee contract had been terminated by the Edgeworths, and cited the correct law that absent a contract a fee adjudication should be made via quantum meruit, the Court calculated a portion of the fee due Simon by applying the payment term of the terminated contract. Simon submits that the entire fee should be

determined by quantum meruit and not by enforcement of a repudiated payment term.

Second, the District Court identified a limited concern with what has been called the superbill, then used the limited concern to disregard large portions of the superbill, while later relying upon the superbill to determine a portion of the fee due. Simon agrees that the method of calculation of a fee under quantum meruit is left to the discretion of the District Court, however, the method and manner of calculation cannot be capricious. Because the rationale for disallowing portions of the superbill did not apply to all the portions disallowed, and the Court used other portions of the superbill for which the Court's rationale for disallowing a portion of the superbill must apply, the Court's treatment of the superbill and its rulings related to it appear to be in conflict and are thereby capricious. Accordingly, Simon respectfully requests that if the matter is returned to the District Court the Court is instructed to make specific findings regarding acceptance and/or rejection of the superbill.

As a preliminary matter, Simon will first address the Edgeworth claim that an extraordinary writ is warranted.

A. Consideration of the writ is warranted.

An attorney does not have a right of direct appeal from a fee adjudication. Accordingly, it is well-settled in Nevada that an attorney seeking appellate review must pursue extraordinarily relief. *See, e.g*., *A.W. Albany v. Arcata Associates, Inc*., 106 Nev. 688, 799 P.2d 566 at n. 1 (1990).

The Edgeworths contest this well settled premise at page 32 of their reply brief. However, the only citation made by the Edgeworths is to *Pan*, which supports consideration of the writ. *Pan v. Dist. Ct*. 120 Nev. 222, 88 P.3d 840 (2004). *Pan* primarily held that a party with a right of direct appeal may not seek writ relief. Thus, because Simon does not have a right of direct appeal, *Pan* supports consideration of extraordinary relief.

It is possible that the Edgeworths cited *Pan* because while the writ was considered in *Pan*, the petitioner was ultimately denied extraordinary relief. Of course, the petitioner in *Pan* was denied relief because the petitioner submitted an inadequate appendix which lacked crucial documents and provided an inadequate recitation of facts. *Id*., at 229, 88 P.3d at 844. Those issues do not apply to the Simon petition. However, the Edgeworths appendix is inadequate. For example, the Edgeworths complain of continuing harm from disputed settlement funds being held in

trust during appellate review of the adjudication decision, but the Edgeworths did not include the entire briefing before the District Court or mention the decision of the Court.

B. Because the implied contract was terminated by the Edgeworths, the payment term cannot be used to reach a fee.

The Edgeworths constructively discharged Simon when the Edgeworths ended communication with Simon, hired replacement counsel, ignored Simons advice, accused Simon of theft and then sued Simon for conversion. In fighting against the District Court's well founded finding of facts and conclusions of law on this issue, the Edgeworths did not provide a rationale for an appellate court to intervene.

At best for the Edgeworths, the District Court was faced with two competing factual claims about constructive discharge and the Court then made a reasoned choice. The Edgeworths briefing promotes their own narrative of the well-being of the attorney client relationship but does not demonstrate to this Court why the findings were not based on substantial evidence and the conclusions of the District Court were clearly erroneous. Thus, the appeal must fail.

In truth, the case against the Edgeworths on this point is much stronger. The District Court found that the Edgeworths ended communication with Simon.[35] The Edgeworths do not disagree. Thus, there is no factual dispute.

As to the conclusion of law based upon the undisputed fact, ending communication with a lawyer has been held to constructively terminate an attorney client relationship. *See, e.g*., *Rosenberg v. Calderon Automation, Inc.*, 1986 Ohio App. LEXIS 5460 (1986). In general, as a lawyer, it is hard to imagine representing a civil client in a product defect property damage case who won't talk to you. Accordingly, even with ignoring all the other basis of constructive termination, the Court's finding was undisputed, and the related conclusion was not clearly erroneous.

Lacking facts or law, the Edgeworths resort to unsupported conclusory rhetoric and argue that "under no logic or reason whatsoever" could the attorney client relationship be viewed as broken down.[36]To place the Edgeworths argument in context, the proposition asserted that the attorney client relationship was well and good is being made by the party that accused Simon of Plan Zombie, the Simon Rule, of threatening the

[35] IX-AA02184:24-AA02185:2

[36] Edgeworth Reply Brief at p. 20

Edgeworths at a meeting in early November of 2017, of trying to extort and blackmail the Edgeworths, of stealing from the Edgeworths for which they sued Simon to punish him, and of bringing dispute to the entire profession. Granted that the Edgeworths rhetoric regarding the Simon is unsupported nonsense; even so, it makes it clear that the *ad hoc* rescue well-being argument is absurd.

A clear motive for the Edgeworths position that the relationship with Simon was well and good (despite their rhetoric demeaning Simon in every other aspect of the dispute) is to avoid a quantum meruit determination of the entire fee due Simon. The District Court properly concluded:

> 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*. *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).[37]

The Edgeworth argument against discharge, which they make even after having sued Simon for conversion (stealing) and seeking punitive damages, has one goal, to avoid quantum meruit.

[37] IX-AA02190:16-27

Under quantum meruit, the District Court has wide discretion in selection of the method of calculation of a reasonable fee. *Albios v. Horizon Communities, Inc.,* 132 P.3d 1022, 1034 (Nev. 2006). The fee may be set in any manner, as long as it is reasonable under the Brunzell factors. *See, e.g., Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143, (2015); *Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish*, 216 P.3d 779, at fn2 (Nev. 2009). Further, because Simon was discharged the terms of what fee agreement may have, or may not have existed is moot, because the discharge terminates the contract and the fee must be reached via quantum meruit, as found by the District Court.

Under quantum meruit, the ethical rule concerning written contingency fees does not apply and does not limit a courts ability to determine a reasonable fee. The ethical rule applies to lawyers who charge their clients by an agreed upon method of calculation of the fee by a contingent percentage of the recovery and thus allows those who cannot pay by the hour access to the courts and access to an incentivized lawyer. Restatement Third, The Law Governing Lawyers, §35 (*cmt*. *b*). The ethical rule also serves to prevent disputes regarding contingency fees between a lawyer and a likely unsophisticated/inexperienced client. *Ibid*. Those concerns do not apply to the District Court (or to these clients). The role of

the Court is to determine a reasonable fee, and by definition a reasonable fee is ethical and protects the client.

In the oft cited case of *Fracasse v. Brent*, 6.Cal.3d 784 (1972), the Supreme Court of California recognized that a discharged contingency lawyer could receive the full value of the contingency under quantum meruit if reasonable under the circumstances presented-even though the attorney had been discharged and the contract terminated. *Fracasse* mentioned discharge “on the courthouse steps” as a fact pattern that could lead to an award of fees that matched the contingency.

This case presents differently, but not in a manner that impacts the analysis. The District Court has wide discretion under quantum meruit to determine a reasonable fee by any rational method. *Logan*, 131 Nev. at 266, 350 P.3d at 1143. The wide discretion includes examination of the market rate; which is, what other lawyers charge for the same or similar services. Restatement Third, The Law Governing Lawyers, §39 (market value or market price may be used to set a fee in a lien dispute).

Market rate is a rational method to set value. Comparable sales are a mainstay of determining the value of property in the real estate world. Union negotiations of labor rates dwell on what same or similar workers

make. The compensation of every actor or sports figure is inevitably compared to what others in their field make.

The Edgeworths use of words and phrases like bonus or contingency fee do not change the reasonable fee analysis. The terms are add-ons by the Edgeworths used to mis-characterize Simon's position. At the hearing, Brian Edgeworth admitted bonus was his own word, which was never used by Simon.[38] Simon also never sought a contingency fee, despite the Edgeworths unsupported assertions. Simon consistently sought what was reasonable and fair.[39] In the reply brief the Edgeworths accuse Simon of asking for a 40% contingency fee in his letter of November 27, 2017.[40] That is untrue. While Simon mentioned 40% as his typical fee for context, Simon requested a flat fee, the amount of which equates to a percentage well below 40%, if one were to do the math.[41]

The Edgeworths trip over their own conflicting rhetoric on constructive discharge because they are desperate to avoid a quantum meruit determination. Under quantum meruit the unrefuted testimony of renowned trial lawyer Will Kemp concerning the market rate for services for the work

[38] V-AA01059:25-AA01060:9
[39] I-AA00051-AA00055
[40] Edgeworth Reply Brief at p.23
[41] I-AA00051-AA00055

done by Simon enters the reasonable fee analysis. Mr. Kemp opined a $2.4 million-dollar fee was reasonable and fair by performing an exhaustive *Brunzell* analysis and an analysis of the market rate. Mr. Kemp also confirmed that the mediator, Mr. Floyd Hale, anticipated a reasonable fee of $2.4 million for Simon as part of his mediator's proposal. In order to avoid Will Kemp's expert opinion, and dodge paying what is reasonable, the Edgeworths argue that Simon is a bad stealing lawyer such that he can be sued for conversion, but not so bad that they would ever consider firing him.

The Edgeworths also present another *ad hoc* rescue argument that the lien is unreasonable on its face in order to avoid Will Kemp's opinion; and, that there is substantial evidence that Simon knew it was unreasonable. Neither argument was pursued or found below.

The Edgeworths did not argue or establish that the lien was unreasonable in amount on its face. The Court's findings and conclusions found a proper lien and are contrary to the Edgeworths unsupported assertion. The Edgeworths do not argue against the Court's finding, likely because the only evidence on the reasonableness of the lien supported its amount. Not only did Will Kemp opine that the Simon lien was low, but the evidence received by the Court hit every *Brunzell* factor for a large fee,

including the enormous amount of unbilled work and the undeniably fantastic result.

Instead, the Edgeworths argument below was that the lien conflicted with the alleged contract.[42] However, the alleged oral contract was found to have never existed, the implied contract was found to be terminated, and any argument is waived because Mr. Vannah invited Simon's lien. Mr. Vannah told the District Court:[43]

> MR. VANNAH: So there's $6 million that went into the trust account.
>
> THE COURT: Okay.
>
> MR. VANNAH: Mr. Simon said this is how much I think I'm owed. We took the largest number that he could possibly get, and then we gave the clients the remainder.
>
> THE COURT: So the six --
>
> MR.VANNAH: In other words, he chose a number that – *in other words we both agreed that*, look, here's the deal. Odds you can't take and keep the client's money, which is about 4 million. *So I asked Mr. Simon to come up with a number that would be the largest number that he would be asking for. That money is still in the trust account*. (Italics added.)

The Edgeworths are pursuing a challenge to one aspect of a quantum meruit recovery. The Edgeworths complain that the Court's finding of reasonable fees in the amount of $200,000 was error. The Edgeworths

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[42] See, e.g., III-AA00690:20-AA00691:4.

[43] VIII-AA01874:17-AA01875:13

challenge must fail. First, the Court performed a four-page *Brunzell* analysis in reaching the value, and the analysis used post discharge events and acts by Simon on which to base its findings; like the increased Lange offer, and Simon's continued review of documents and attendance at hearings to move the underlying case forward-made necessary because Vannah claimed an inability to take care of what are now called mere ministerial acts.[44]

Second, the Edgeworths refuted their argument that the work done by Simon after discharge was only ministerial. For example, when Vannah threatened Simon with increased damages if Simon withdrew, the threat was partly based on the large amount of time it would take Vannah to come up to speed in order to match Simon's knowledge of the case.[45] Vannah repeated the sentiment in Court on February 6, 2018.[46] Further, the Edgeworths theme is that Simon sought a bonus only after a significant offer was made,[47] but the Edgeworths were petrified when Simon allegedly threatened to withdraw because that would critically damage the case,[48]

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[44] Edgeworth Reply Brief at p. 21
[45] I-AA00122-AA00124
[46] III-WA00612:22-24
[47] V-AA01059:25-AA01060:9
[48] I-AA00122-AA00124

yet the threat now has no weight, because only ministerial work remained.[49] The Edgeworths assertions follow a long and winding road.

Third, the Edgeworths mistakenly rely upon the date of January 8, 2018 as the end of Simon's continuing work post discharge to protect his former clients (as he is ethically obligated to do).[50] That date is incorrect and misleading. Simon's services for the Edgeworths continued after January 8. As just one example, on February 6, 2018, Simon addressed the Court on the issues of settlement checks and a motion for good faith settlement.[51]

The District Court correctly set forth the analysis to follow when an attorney has been discharged, which is to use quantum meruit. Unfortunately, having correctly concluded that the contract was terminated, the District Court then applied the payment term of the discharged/breached/repudiated contract in reaching a reasonable fee. That was clear error.

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[49] Edgeworth Reply Brief at p. 21

[50] *See, e.g.*, Edgeworth Reply Brief at p. 19-20.

[51] III-WA-00578-623

C. The superbill

The Edgeworths position on the superbill is unsupported. In the Answering brief the Edgeworths assert the bill contains "some do-overs, add-ons, and mistakes".[52] In support, the Edgeworths cite to the superbill itself. However, there is no evidence of a mistake on the face of the bill. Further, when Brian Edgeworth tried to attack the integrity of the bill at the evidentiary hearing, the District Court exposed the faulty reasoning of Mr. Edgeworth.[53]

The single complaint about the bill was too many hours on less than a handful of days. Ms. Ferrel explained under oath that the few high hour days occurred as a natural consequence of using the date of events to landmark billing entries.[54] Thus, while a motion might be written over several days, the date filed was used as the landmark date to bill.[55] Ms. Ferrel also testified that because only confirmable events were used, all work noted can be independently verified.[56] Because every billing entry can be independently verified, the superbill is completely reliable.

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[52] Edgeworth Reply Brief at p. 9
[53] VIII-AA01818:18-AA01820:9
[54] VI-AA01369:15-AA01371:8
[55] VI-AA01369:15-AA01371:8
[56] VI-AA01452:14-AA01454:11

The problem on appeal is that the decision of the District Court to disregard the superbill rests on only an appeal to incredulity-not on any facts adduced at the hearing. It is well recognized when denying attorney fees that the District Court should provide an adequate explanation as to why the entire bill was disregarded when only a handful of days were referenced. *Watson v. Rounds, 358 P.3d 228 (2015).* The evidence which was admitted supports the integrity of the superbill.[57] Also, the Court's decision to rely upon the superbill for parts of its analysis, contrasted against the decision to disregard the superbill based on the appeal to incredulity for other parts of the analysis, without further explanation, creates an appearance that the Court's decision regarding the superbill was inconsistent, in conflict and therefore capricious.

VI. Conclusion

Simon did excellent work for his friends, put an undisputed sum of $4,000,000.00 in their pockets on a half million-dollar property damage case, and got sued as a result. Simon let his guard down and did not realize a fee agreement was needed with his close friends-an agreement which protects the lawyer as much as the client. Fortunately for all

[57] VI-AA01485; VI-AA01486

concerned, the State of Nevada understands that attorney client fee disputes occur and created a statutory scheme to resolve them.

The District Court, and Simon, followed the law. Simon can't be sued for following the law. Also, the District Court findings and conclusions, based on substantial evidence, need not be ignored just because the Edgeworths want to punish Simon in a collateral action, especially when the Edgeworths have not made a due process or constitutional argument against the process they participated in. The Edgeworths have not established they are due any relief.

Simon seeks limited relief. Simon requests:

> The counter appeal be granted, and the case be remanded with instructions to the District Court to make a substantive ruling on the special anti-SLAPP motion to dismiss the conversion complaint.
>
> Writ relief issue consisting of instructions to the District Court to adjudicate the Simon statutory lien under quantum meruit, and to avoid enforcement of the terminated payment term of the discharged implied contract.
>
> Writ relief issue consisting of instructions to the District Court to substantively consider, and to accept or reject with explanation, all the hours worked as documented on the superbill.

In contrast to the Edgeworth appeal, Simon's limited relief is well supported by the facts and the law.

DATED this 28th day of March, 2020.

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VERIFICATION

STATE OF NEVADA)
) :ss
COUNTY OF CLARK)

I, James R. Christensen, am an attorney for Petitioner herein. I hereby certify that I have read the foregoing Reply Brief on Cross-Appeal and Reply in Support of Petition for a Writ of Mandamus, have personal knowledge concerning the matters raised therein, and to the best of my knowledge, information, and belief, the factual matters set forth are as documented in the records of the case and Appendix, and that the arguments herein are not frivolous nor interposed for any improper purpose or delay.

I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

/s/ James R. Christensen
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief on Cross-Appeal and Reply in Support of Petition for a Writ of Mandamus complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft word for office 365 MSO in 14 point Arial font. I further certify that this brief complies with the page or type volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it does not exceed 40 pages (as instructed by Court Order).

I hereby certify that I have read this , and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply Brief on Cross-Appeal and Reply in Support of Petition for a Writ of Mandamus complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that it is not in conformity with the Nevada Rules of Appellate Procedures.

DATED this 28th day of March, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of March, 2020, I served a copy of the foregoing Reply Brief on Cross-Appeal and Reply in Support of Petition for a Writ of Mandamus and Reply Appendix on the following parties by electronic service pursuant to Nevada Rules of Appellate Procedure:

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