IN THE SUPREME COURT FOR THE STATE OF NEVADA

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JEFFREY D. SPENCER, Appellant, vs. HELMUT KLEMENTI, EGON KLEMENTI, ELFRIEDE KLEMENTI, MARY ELLEN KINION, ROWENA SHAW, and PETER SHAW, Respondents.	Case No. 77086 *Consolidated with* Case No. 77711

APPEAL FROM SUMMARY JUDGMENT
IN THE NINTH JUDICIAL DISTRICT COURT, DOUGLAS COUNTY
HONORABLE STEVEN R. KOSACH

RESPONDENT'S ANSWERING BRIEF

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ATTORNEYS FOR RESPONDENT HELMUT KLEMENTI

IN THE SUPREME COURT FOR THE STATE OF NEVADA

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JEFFREY D. SPENCER, Appellant, vs. HELMUT KLEMENTI, EGON KLEMENTI, ELFRIEDE KLEMENTI, MARY ELLEN KINION, ROWENA SHAW, and PETER SHAW, Respondents.	Case No. 77086 *Consolidated with* Case No. 77711

RESPONDENT HELMUT KLEMENTI'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of respondent's stock: None.

2. Names of all law firms whose attorneys have appeared for Respondent Helmut Klementi (including proceedings in the district court) or are expected to appear in this court.

LEMONS, GRUNDY & EISENBERG

LAW FIRM OF LAUB AND LAUB

3. If litigant is using a pseudonym, the litigant's true name: None.

DATED: August 1, 2019.

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INTRODUCTION

Appellant Spencer sued his neighbors, including Respondent Helmut Klementi, after Spencer was acquitted following a criminal jury trial. The district court granted summary judgment in favor of Helmut, finding Spencer had not met his burden to offer any evidence in support of his claims that Helmut defamed Spencer or instigated or pressured Spencer's criminal prosecution. The district court also awarded attorneys' fees to Helmut after Spencer failed to oppose the motion for attorneys' fees. The district court did not err in granting summary judgment because Spencer failed to come forward with evidence supporting a genuine issue of material fact as to his claims against Helmut; Helmut's statements made to police officers, the Douglas County Planning Commission, and during Spencer's trial are privileged; and, there was no evidence of malicious prosecution by Helmut as the victim of an alleged crime. The judgment against Spencer should be affirmed.

JURISDICTIONAL STATEMENT

Helmut does not disagree with the jurisdictional statement by Spencer.

ROUTING STATEMENT

Helmut disagrees with Spencer's routing statement suggesting this appeal be retained by this Court. While Spencer concedes this is a tort case where the judgment did not exceed $250,000, Spencer contends this appeal presents two issues of first impression: (1) application of privilege to quasi-judicial proceedings, and (2)

application of privilege to claims for malicious prosecution. *Appellant's Opening Brief* (AOB) at p. viii.

Both of these issues, however, have been already addressed by this Court's prior jurisprudence. In *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983) and *Knox v. Dick*, 99 Nev. 514, 665 P.2d 267 (1983), this Court squarely held that absolute privilege applies to quasi-judicial proceedings and Nevada does not carve out an exception for "public comment." Similarly, in *Harrison v. Roitman*, 131 Nev. Adv. Op. 92, 362 P.3d 1138 (2015), this Court clarified that application of absolute privilege is not limited to defamation claims. The Court followed the "functional approach" test to resolve questions related to immunity. Spencer never opposed application of the functional approach test in his "response" to Helmut's summary judgment motion. 6 A. App. 1262-1263. The district court properly analyzed the functional approach test to apply it in this case. 7 A. App. 1476.

Thus, not only has Spencer has failed to preserve this issue for appeal, he has also failed to demonstrate that this issue should even remain with this Court. Instead, this case is properly and presumptively within the jurisdiction of the Court of Appeals pursuant to NRAP 17(b)(5) (appeals from judgments of less than $250,000 in tort cases).

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STATEMENT OF ISSUES

Helmut disagrees with Spencer's statement of issues. The only issue before the Court is whether the district court erred in granting Helmut's summary judgment motion when Spencer failed to come forward with any evidence to raise a genuine issue of material fact in support of his claims against Helmut after years of discovery. Spencer, however, has expanded this issue into four separate issues, perhaps hoping this Court will issue a reversal on one of his ill-preserved sub-issues.[1]

STATEMENT OF THE CASE

This action is a civil lawsuit for personal injuries filed by Helmut Klementi[2] on December 17, 2014, after his neighbor, Jeffrey Spencer, violently and intentionally ran into him on an icy street on December 18, 2012. 1 A. App. 1. Helmut was 78 years old at the time. 6 A. App. 1275. Mr. Spencer was arrested for battery and elder abuse that night, and his case proceeded to a criminal trial. 2 R.

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[1] Spencer's claims against Helmut in district court were: (1) defamation, (2) malicious prosecution, (3) conspiracy to commit defamation, (4) conspiracy to commit malicious prosecution, (5) intentional infliction of emotional distress, and (6) punitive damages, which is not its own separate cause of action anyway. Other than the issues Spencer addresses in his opening brief, he has abandoned any other claims or theories, and this brief will not address additional unraised theories. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288 (2006).

[2] Helmut's twin brother, Egon Klementi, passed away during this case, but is survived by his wife, Elfriede. The Klementi respondents' first names are used for clarity.

App. 378, 1 A. App. 108-113. Helmut was the victim of the battery and a State's witness in Spencer's criminal trial. *Id.* Spencer was ultimately acquitted of the charges. 1 A. App. 115-117.

Helmut and Spencer ultimately reached a settlement for the personal injuries Helmut sustained, which resulted in a stipulation for dismissal of Helmut's claims against Spencer. 1 R. App. 175. The settlement, however, did not release Spencer's counterclaims against Helmut. *Id.* Spencer's answer to Helmut's civil complaint included a counterclaim and third-party complaint against Helmut and multiple other parties for malicious prosecution and civil conspiracy to commit malicious prosecution. 1 A. App. 5.[3] The case went through years of discovery, with Spencer amending his counterclaim and third-party complaint against Helmut and the other respondents several times to also include claims for defamation, civil conspiracy to commit defamation, intentional infliction of emotional distress, and punitive damages. 2 A. App. 423-442

On April 22, 2016, respondent Mary Ellen Kinion filed a motion for summary judgment on Spencer's claims for malicious prosecution and civil conspiracy to commit malicious prosecution. 1 A. App. 45. The parties argued the motion at a hearing on December 15, 2016. 1 A. App. 179-234. This hearing also addressed

[3] Attorney David Zaniel, Esq. defended Spencer against Helmut's personal injury claim. For Spencer's counterclaims and third-party complaint, he was represented by William Routsis, Esq. (his criminal trial attorney) and Lynn Pierce, Esq.

whether Spencer's motion to amend his complaint to add respondents Peter and Rowena Shaw should be granted. 1 R. App. 1-27, 1 A. App. 186-191. At the hearing, the district court gave Spencer's counsel additional leeway to submit supplemental briefing on statements made during their argument. 1 A. App. 229-230. In fact, because Spencer's counsel had subpoenaed information from the district attorney's office that had not yet been produced, the district court found it appropriate to "withhold making a call" on summary judgment until the parties had an opportunity to review that discovery and supplement their briefs. 1 A. App. 225. Thus, the parties scheduled a hearing for January 30, 2017 to present supplemental arguments on Kinion's summary judgment motion and Spencer's motion to amend. 1 A. App. 233. Spencer's counsel did not object to this procedure. 1 A. App. 230.

At the same hearing, the district court also withheld its decision on Spencer's motion to amend based on the subpoenaed evidence from the district attorney's office that had not yet been produced. 1 A. App. 225. Citing to the policy of liberal amendments under NRCP 15, the court also stated it "might want to hear" from deputy district attorney Maria Pence ("Ms. Pence") to determine whether it should permit Spencer to amend his third party complaint to add the Shaw respondents. 1 A. App. 225-226. Before the hearing concluded, the district court specifically questioned the parties if they had any objection to the deputy district attorney appearing at the next hearing. 1 A. App. 233. Spencer's counsel did not object. *Id.*

In fact, Spencer's counsel actually suggested that, "why don't we just have an evidentiary [hearing] on the issue," where Spencer could question Ms. Pence. *Id.*

On January 30, 2017, all parties appeared for the evidentiary hearing and argument on the pending motions. 2 A. App. 283-422. Again, Spencer's counsel did not object to the presence of Ms. Pence at this hearing. *Id.* Instead, Spencer's counsel participated extensively in questioning Ms. Pence. 2 A. App. 312-362. Spencer's counsel was cautioned on multiple occasions during the hearing for his inappropriate behavior and refusing to listen and accept Ms. Pence's testimony. 2 A. App. 225-226, 334, 343-344. After all parties had an opportunity to question Ms. Pence, the district court granted summary judgment in favor of Kinion. 2 A. App. 405-407. Based on Ms. Pence's testimony, the court found Kinion did nothing to elevate or influence charges against Spencer. *Id.* The court did, however, allow Spencer to amend his third party complaint to add the Shaws to the litigation. 2 A. App. 408-409.

Even after the evidentiary hearing where it was established probable cause existed to proceed with criminal charges against Spencer, he still pursued his claims for malicious prosecution and conspiracy against Helmut. 2 A. App. 423.

In spring of 2018, after three years of discovery, the respondents each filed summary judgment motions. 3 A. App. 557, 5 A. App. 1102, 5 A. App. 1129, 1 R. App. 178. Helmut's motion was filed on April 12, 2018 and sought summary

judgment on all claims against him based on Spencer's failure to produce any evidence in support of his claims against Helmut. 1 R. App. 178-516.

In addition to their summary judgment motions, Kinion and Elfriede also filed a motion for spoliation of evidence for Spencer's failure to preserve and produce what he claimed was video surveillance evidence of Helmut trespassing on his property that he contended supported his claims against Helmut and the respondents. 1 R. App. 517-549. This motion was joined by Helmut. 1 R. App. 550. Kinion also filed a motion to strike Spencer's expert witness designation for his blatant failure to follow Nevada rules on expert disclosures. 1 R. App. 553-557. Helmut joined this motion as well. 1 R. App. 568.

The district court scheduled a hearing on all pending motions, which occurred July 12, 2018. 3 R. App. 600-661.[4] After considering the evidence and arguments by the parties, the district court granted summary judgment in favor of the respondents, including Helmut. The district court specifically found Spencer had not come forward with any evidence to take to the jury on his claims that Helmut had defamed Spencer or engaged in malicious prosecution. 3 R. App. 655-656. The district court entered its written order granting summary judgment on August 23,

[4] The transcript of this hearing provided by Spencer is illegible at certain parts because the court reporting agency's contact information encroaches on the text of the bottom of each page. Helmut has included a clean copy for the Court in Respondents' Joint Appendix at 3 R. App. 600-661.

2018 and the notice of entry of order was served on August 30, 2018. 7 A. App. 1465, 7 A. App. 1502-04.

On July 18, 2018, Spencer's counsel filed a "Substitution of Counsel," withdrawing from the case. 3 R. App. 662-66. Spencer thereafter represented himself *in pro per*. *Id.*

Helmut next filed a timely cost memorandum and motion for attorney's fees. 7 A. App. 1572, 1626. Spencer failed to oppose Helmut's motion, even though it was served on him. 7 A. App. 1635, 3. R. App. 681-685. Spencer did not oppose any of the motions for attorney's fees that were filed after the July 12, 2018 hearing. 7 A. App. 1697; 3 R. App. 681-685. Spencer did not file a motion to retax Helmut's verified cost memorandum. 7 A. App. 1713. On November 5, 2018, the district court entered its order granting the motions for attorneys' fees. 7 A. App. 1697. This appeal followed.

STATEMENT OF FACTS

Spencer's recitation of facts is inherently unreliable, as much of his "factual citations" are to his legal briefs or counsel's arguments made to the district court. Arguments of counsel do not constitute evidence of the case. *Jain v. McFarland*, 109 Nev. 465, 475, 851 P.2d 450, 457 (1993) (citing cases). This Court should ignore all such unsupported "facts." Instead, Helmut encourages this Court to adopt the following statement of facts, which is supported by actual evidence.

A. The underlying criminal case.

At the time of Spencer's criminal case and the underlying civil case, Helmut lived in the Kingsbury General Improvement District ("KGID") in Stateline, Nevada. 1 R. App. 215. His brother Egon lived down the street from Spencer. *Id.* In May 2012, there was a dispute among the neighbors over a six-foot fence that Spencer had constructed in violation of Douglas County Code. *Id.*; 1 R. App. 320-325. Spencer was forced by Douglas County officials to remove the fence. 1 R. App. 320-325, 2 R. App. 272-273. Later that year, in December 2012, Egon, Elfriede, and Kinion experienced issues with their driveways being "bermed-in" with snow by Spencer, who operated the neighborhood snowplow. 2 R. App. 371-372.

On the evening of December 18, 2012, Helmut attended, but did not speak at, a KGID meeting. 1 R. App. 316, 2 R. App. 371. The KGID chair instructed neighbors to photograph the snow berms. 2 R. App. 372. After the meeting, Helmut went to Egon and Elfriede's home for dinner and, after dinner, stepped outside to photograph the snow berms blocking Egon's driveway. 1 R. App. 216. As Helmut was taking pictures of the snow berms, he was violently pushed and knocked to the ground by Spencer. 1 R. App. 216, 2 R. App. 376, and see *footnote 6,* supra. In Spencer's deposition, he admitted he knocked Helmut to the ground, that it was not an accident, and that he intended to push Helmut to stop Helmut from getting away. 2 R. App. 284, 2 R. App. 377, 2 R. App. 386-387. Spencer gave responding officers

a ridiculous explanation that he thought Helmut was a teenager in a hoodie trying to break into Spencer's truck. 2 R. App. 377.

Douglas County Sheriff's deputies arrived and performed an investigation at the scene, including interviewing Spencer. 2 R. App. 374-382. Deputy McKone found it incredible that Spencer could mistake his then-78 year old neighbor as a teenager in a hoodie. 2 R. App. 379. He noted Helmut was not even wearing a hood. 2 R. App. 378. The deputy looked at the pictures from Helmut's camera and found the latest pictures were of Egon's fence and the snow berm in front of Egon's house. 2 R. App. 377. The deputy also found no evidence of Helmut's footprints around Spencer's truck. 2 R. App. 377-378. Based on the inconsistencies between Spencer's iteration of events and his investigation, Deputy McKone arrested Spencer that evening for battery and elder abuse. 2 R. App. 378, 405.[5] It was the deputy's belief that Spencer had used the excuse of someone breaking into his truck to confront and commit a battery on Helmut. 2 R. App. 379. Helmut was taken to the hospital and treated for his injuries, which included a fractured rib, closed head

[5] Spencer's appendix omits two exhibits from Helmut's summary judgment motion: exhibit 8, the deposition transcript of Deputy McKone and exhibit 12, testimony of Maria Pence. Spencer's own brief establishes the necessity of these exhibits based on his factual representations and argument that summary judgment was inappropriate. See, e.g., *AOB* pp. xii-xiii, 5, 10, 11, 16. The necessity of having to include these (and other) documents in Respondents' appendix is grounds for imposing monetary sanctions against Spencer. NRAP 30(g)(2); NRAP 30(b)(2) - (3). Helmut has included these exhibits in the Respondents' Appendix at 2 R. App. 389-417 and 434-439.

injury, and injuries to his abdominal and pelvic area. 6 A. App. 1274-81. At the hospital, Helmut told Deputy McKone what occurred, including his belief that Spencer had punched him and knocked him to the ground. 2 R. App. 378. As part of his investigation, Deputy McKone also reviewed video surveillance footage from respondent Rowena Shaw, which revealed that the area around Spencer's truck was "undisturbed" before, during, and after the assault upon Helmut. 2 R. App. 382.

After Spencer's arrest, Helmut obtained a temporary protective order. 2 R. App. 419. Helmut also attended a Douglas County Planning Commission meeting on January 8, 2013. 2 R. App. 426. There, Helmut read a statement that accurately said Spencer confronted and punched him while he was taking pictures of the snow berm against Egon's fence, and that Helmut had a restraining order against Spencer. 1 R. App. 216, 2 R. App. 432. Helmut also testified as the victim of a crime at Spencer's preliminary hearing and trial. 1 R. App. 217. Spencer was eventually acquitted of the charges against him. 1 A. App. 115-117.

B. Spencer's counterclaims against Helmut.

Spencer filed a counterclaim against Helmut, initially for malicious prosecution and conspiracy, later adding defamation, conspiracy to commit defamation, IIED, and punitive damages. 2 A. App. 423-442. The parties engaged in several years of discovery, including Spencer's deposition. 2 R. App. 259-318. Spencer was asked to specifically identify the derogatory statements that he

attributed to Helmut. 2 R. App. 280, 299-300. Spencer was unable to do so, other than a vague reference to "derogatory stuff against me." *Id.* Spencer testified there was "a lot of video[,] a lot of statements" he had not yet produced that he claimed supported his case. 2 R. App. 299. He also repeatedly testified his recollection was not accurate enough to answer the questions posed to him. 2 R. App. 278-280, 300.

Six months after Spencer's deposition, Ms. Pence extensively testified at the evidentiary hearing concerning her decision to prosecute Spencer. 2 A. App. 289. She testified that no one but her was involved in the decision to charge Spencer, which was made after her review of the Douglas County Sheriff's report and her investigation. 2 A. App. 300. Ms. Pence testified she elevated Spencer's battery charge from a gross misdemeanor to a felony after her receipt of Helmut's medical records, which "showed that there was serious injuries and that he was in prolonged physical pain." 2 A. App. 301. At no point did Ms. Pence testify that any statements, participation, or pressure from Helmut caused her to prosecute Spencer. 2 A. App. 289-374.

Nearly two years after Spencer's deposition and over a year after Ms. Pence's testimony, Helmut moved for summary judgment on the basis that Spencer had still failed to come forward with any evidence to support his claims that Helmut defamed him or instigated or pressured the prosecution of Spencer's case. 1 R. App. 178-213.

Spencer filed a "Response" to Helmut's motion. 6 A. App. 1250. The exhibits attached to Spencer's response consisted of Spencer's declaration, incomplete medical records of Helmut from the December 18, 2012 assault, and a previously unproduced letter from Spencer's doctor. 6 A. App. 1270. Spencer's declaration did not identify a single statement that he contended was defamatory by Helmut, nor did it contain any evidence concerning how Helmut had contributed or pressured the district attorney to prosecute Spencer. *Id.* Spencer also referenced his own deposition testimony to support his response. 6 A. App. 1253. Finally, Spencer filed a "video exhibit," contending it validated his testimony.[6] 3 R. App. 582-585. Spencer's "response" argued that if there was "any slightest doubt as to the operative facts," summary judgment was improper. 6 A. App. 1256.

On July 12, 2018, the district court heard oral arguments on all outstanding motions, including summary judgment, spoliation, and to strike Spencer's expert. Spencer's attorneys again argued to the court that summary judgment should not be

[6] This Court entered its *Order Granting Motion to Transmit Exhibit* on July 29, 2019, instructing the district court to transmit the video surveillance exhibit filed by Spencer by August 12, 2019. At the time of filing this brief, the video exhibit has not been transmitted. But, the Court can access it in the following manner: by navigating to the folder titled "Dec 18 12 collide." Selecting the "play" button in that subfolder will open a video player to "Cam 7." The video can be fast-forwarded to 8:41:45, where Helmut first appears on screen and passes the camera to go take pictures of the snow berm in Egon's driveway. At 8:42:45, Helmut shuffles back into view from the right. At exactly 8:43:00, Spencer appears at the right side of the screen at a full run and slams into Helmut, shoving him down into the street.

granted if there was any slightest doubt as to the operative facts. 3 R. App. 615-616. The district court disagreed with the erroneous standard offered by Spencer's counsel and granted summary judgment in favor of Helmut, finding Spencer had not met his burden as the nonmoving party. 6 A. App. 1450-51, 7 A. App. 1465, 1471.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

A. Standard of review.

Helmut agrees that review of a district court's order granting summary judgment is *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). An appellate court, however will affirm a district court's decision on any grounds supported by the record. *Rostein v. Steele*, 103 Nev. 571, 747 P.2d 230 (1987).

B. Summary of argument.

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

respondents together for purposes of his argument. See *AOB*, p. 16. Rather, the record shows the district court did not err by granting summary judgment to Helmut.

Further, Spencer failed to properly preserve the issues he now asserts on appeal. Designating an issue as one of "first impression" does not mean the issue was properly preserved in the record below. Spencer waived the alleged issues of which he now complains. The district court, however, did not err in its application of privilege to Helmut's statements and properly rejected Spencer's claim that application of privilege should be submitted to a jury, contrary to Nevada law. 6 A. App. 1257.

ARGUMENT

A. The district court properly granted summary judgment to Helmut.

It is well established a party may not defeat a properly supported summary judgment motion by relying on "gossamer threads of whimsy, speculation, and conjecture." *Wood*, 121 Nev. at 732. Instead, the nonmoving party must transcend the pleadings, rely on more than general allegations and conclusions, and present specific facts that demonstrate the existence of a genuine issue of material fact. *Boesiger*, 135 Nev. Adv. Op., at *2. It is not the district court's job to wade through the record for some specific facts that may support the nonmoving party's claim. *Schuck v. Sig. Flight Support of Nev., Inc.*, 126 Nev. 434, 439, 245 P.3d 542 (2010).

A review of the record before the district court reveals Spencer's allegations against Helmut were merely that – allegations lacking evidentiary support. Spencer never identified the specific statements Helmut purportedly made that Spencer contends were defamatory and he even fails to do so now on appeal. Instead, Spencer grouped Helmut and the third-party defendants together, asserting, for example, that "numerous statements were disseminated by the Counterdefendant and Third Party Defendants which could have no purpose other than to harm Mr. Spencer to have his fence variance request denied." 6 A. App. 1265. He stated this with no citation to any evidence regarding what these statements were and to whom they were published. *Id.*

In opposition to Helmut's motion, Spencer relied on the following: his deposition testimony, his declaration, Helmut's medical records, and Spencer's medical records. 6 A. App. 1253, 1270. During Spencer's deposition, however, he could not identify a single statement made by Helmut that he contended was defamatory. 2 R. App. 280, 299-300. Moreover, although Spencer testified he had "a lot of video and a lot of statements" he had not yet produced, he never produced that purported evidence to defeat summary judgment. 2 R. App. 299, 6 A. App. 1270-1281. Similarly, Spencer's declaration failed to attribute any defamatory statement to Helmut or assert how Helmut engaged in malicious prosecution. 6 A. App. 1272.

In *Schuck*, this Court addressed the same situation. This Court affirmed the district court on summary judgment for the defendant where the plaintiff failed to specify the disputed issues of fact with a concise statement of material facts claimed to be in dispute, failed to cite to any particular portions of the record, and relied on conclusory assertions. 126 Nev. at 436-37. The court concluded it was not the district court's obligation to hunt through the record to find some specific fact to support the nonmoving party's claim.[7] *Id.* at 438. The *Schuck* plaintiff also opposed summary judgment by relying on the old "slightest doubt" standard just like Spencer did here. *Id.* at 439. Spencer's argument is identical to that of *Schuck*. In his "Response," Spencer asserts that Helmut's testimony changed between Spencer's preliminary hearing and trial. 6 A. App. 1257. He failed, however, to provide any citation or evidence for the district court's review. *Id.* He contends Helmut "tampered with evidence" but fails to provide a citation to anywhere in the record where this occurred. 6 A. App. 1261.

Spencer also failed to provide any evidence that Helmut initiated, pressured, or continued Spencer's criminal case without probable cause or with malice. 6 A. App. 1262-1263. He failed to rebut the testimony of Deputy McKone that it was his sole decision to arrest Spencer and failed to rebut the testimony of Ms. Pence that it

[7] As one court aptly observed: "[I] the summary judgment context ... judges are not pigs hunting for truffles in the record." *Foley v. Wells Fargo Bank*, 772 F.3d 63, 79 (1st Cir. 2014).

was her sole decision to charge and prosecute Spencer. 2 R. App. 405, 2 A. App. 300. Spencer's subjective "disagreement with the conclusions" of Pence and McKone does not defeat summary judgment. 6 A. App. 1254-1255.

Spencer's own authority cited in his brief, *Catrone v. 105 Casino Corp*, 82 Nev. 166, 414 P.2d 106 (1966) actually supports the district court's decision. In *Catrone*, this Court affirmed the district court's order granting summary judgment in a malicious prosecution case. The defendants offered an affidavit from the investigating officer, who explained that he alone recommended criminal prosecution of the plaintiff based on his investigation. *Id.* at 169-170. The court agreed the plaintiff failed to meet his burden on summary judgment and held that absent competent evidence that the officer commenced criminal prosecution "because of direction, request, or pressure" from defendants, summary judgment was proper. *Id.* at 172. Here, it was undisputed that Deputy McKone's decision to arrest Spencer was made based on Spencer's inconsistencies that the deputy observed and investigated at the scene. 2 R. App. 376-382. Spencer failed to rebut this on summary judgment. In fact, Spencer's argument addressing malicious prosecution as to Helmut was less than a page long and did not cite a single piece of evidence. 6 A. App. 1262-1263. Ultimately, the district court concluded that probable cause existed for Spencer's arrest and prosecution, further evidenced by Spencer's bind-over from justice court for trial. 7 A. App. 1475, 2 A. App. 321-322.

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

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

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B. The district court did not err by calling deputy district attorney Pence; and Spencer waived any argument re: the propriety of Pence's testimony.

Spencer devotes a significant portion of his brief asserting the district court erred by "engaging in its own investigation" by calling Ms. Pence. *AOB*, pp. 11-16. This argument fails for two reasons: (1) NRS 50.145 permits a judge, upon his/her own motion, to call witnesses, and (2) Spencer waived this issue because he failed to object – in fact, he encouraged Ms. Pence's testimony. 1 A. App. 233.

First, NRS 50.145 expressly permits a judge to call a witness, either upon the judge's own motion or at the suggestion of a party. All parties are entitled to cross-examine the witness called. NRS 50.145(1). *Id.* The statute permits the judge to question the witnesses, and it also permits a party to object to questions asked and to evidence adduced by the witness at any time prior to submission of the issue. NRS 50.145(2); see *Smith v. United States*, 321 F.2d 427, 431 (9th Cir. 1963) (noting wide discretion of district court to call witnesses); and *Barba-Reyes v. United States*, 387 F.2d 91, 93 (1967) (no error by trial court in questioning witness whose testimony may have hurt appellant, especially where appellant failed to object).

Here, the district court sought to hear from Ms. Pence in order to determine whether Spencer's motion to amend his third party complaint should be granted in order to add the Shaws. 1 A. App. 225-226. The reason the district court stayed its ruling on Kinion's summary judgment motion and Spencer's motion to amend was

to allow Spencer's own counsel to produce discovery from the district attorney's office and to permit the parties to supplement, if they wished. 1 A. App. 225. Spencer failed to assert even the slightest objection to the district court's decision to call Ms. Pence – in fact, Spencer expressly suggested that the hearing be an evidentiary hearing so he could cross-examine Ms. Pence. 1 A. App. 233. Indeed, Spencer fully availed himself of that opportunity. 2 A. App. 312-362. Based on the foregoing, the district court was well within its discretion to call Ms. Pence and did not err.

Second, and relatedly, Spencer failed to preserve this argument for appeal. A party that fails to raise an issue or argument to the district court subsequently waives that issue or argument on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (refusing to consider argument on appeal where appellant neglected to raise it in district court). The exceptions to this well-established principle are matters of jurisdiction, constitutional concern, or plain and serious error, which Spencer does not argue here. *AOB*, pp. 11-16. In fact, Spencer fails to identify how the district court's alleged error affects summary judgment in favor of Helmut, who did not file his motion until a year later. *AOB,* p. 16. Spencer argues the district court adopted the wrong standard of review; however, the record is clear the district court rejected Spencer's "slightest doubt" standard and applied the correct standard under NRCP 56. 7 A. App. 1466. At the time of Helmut's motion,

the district court properly considered whether Spencer offered any genuine evidence to rebut Ms. Pence's testimony that she alone was responsible for charging and prosecuting Spencer based on her investigation. 2 A. App. 300.

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

In *Pearson*, this Court rejected the suggestion by the appellant that the trial judge erred by entering a custody order when the appellant's own attorney failed to object and conceded to the procedure for the judge's determination of custody. 110 Nev. at 297-299.[8] The court found appellant's failure to object and appellant's agreement with the trial court's procedure for determining custody issues fell squarely under the doctrine of invited error. *Id.* at 297.

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[8] This Court reluctantly vacated the trial court's order because the appellant was so inadequately represented by counsel in such a serious case as a child custody determination. *Id.* at 299.

Similarly, here, Spencer cannot now be heard to complain of any error by the district court calling Ms. Pence because he failed to object, expressly consented to the procedure, and then availed himself of the opportunity to cross-examine Ms. Pence.

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

As another basis for granting summary judgment (in addition to finding that Spencer failed to meet his burden), the district court found that Helmut's statement to the Douglas County Planning Commission (the "Commission") was absolutely privileged based on established Nevada authority.[9] 7 A. App. 1473-74. Spencer, however, asserts this issue is one of first impression in Nevada and the district court erred by applying the privilege and not determining the relevance of Helmut's statement. *AOB*, pp. iii, 17-22. All three points are wrong.

Nevada follows the long-standing common law rule that statements made in the course of judicial proceedings are absolutely privileged. *Nickovich v. Mollart*, 51 Nev. 306, 274 P. 809, 810 (1929); *Circus Circus,* 99 Nev. at 60-61, 657 P.2d at 104. This privilege clearly extends to "quasi-judicial proceedings before executive officers, boards, and commissions, including proceedings in which the administrative body is considering an employee's claim for unemployment

[9] Helmut only addresses his statement to the Commission because Spencer does not contend the court erred in applying qualified privilege of Helmut's statements to Deputy McKone or absolute privilege of Helmut's testimonial statements.

compensation." *Circus Circus*, 99 Nev. at 60-61. The *Circus Circus* court did not "suggest" or state this proposition only in dicta, like Spencer asserts. *AOB*, pp. 17, 19. Further, the *Circus Circus* court's holding was not limited to the unemployment statute at issue, as Spencer's myopic reading suggests. *Id.* Rather, the court looked at the absolute privilege as a whole and found the trial court erred in interpreting the unemployment statute because it misunderstood the "very broad" test of relevancy under the privilege, which "need have only 'some relation to the proceeding,'" or "some bearing on the subject matter.'" *Id.* at 61.

In *Knox v. Dick*, this Court also held (not suggested) that "absolute privilege is applicable not only to judicial but also to quasi-judicial proceedings, and that defamatory statements made in the course of those proceedings are privileged." 99 Nev. 514, 518, 665 P.2d 267, 270 (1983). The appellant argued the administrative board was not a quasi-judicial body. *Id.* at 518. The *Knox* court rejected this, finding that because the administrative board was governed by the Clark County Code and proceedings were governed consistent with the Code's guidelines, the administrative board was a quasi-judicial body. *Id.*

Courts apply a broad construction of whether the statement is relevant to the quasi-judicial proceeding, with any doubt resolved in favor of relevancy or pertinency. *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) citing *Circus Circus*, 99 Nev. at 61, 657 P.2d at 104; and *Club Valencia Homeowners v. Valencia*

Assoc., 712 P.2d 1024, 1027 (Colo.Ct.App. 1985) ("No strained or close construction will be indulged to exempt a case from the protection of privilege.").

Spencer cites no authority that the "public comment" portion of a quasi-judicial proceeding is exempt from application of the absolute privilege. *AOB*, pp. 17-22. That is because Nevada jurisprudence does not carve out such an exception. See *Circus Circus*, supra, *Knox*, supra. In fact, a California court also addressed and rejected Spencer's assertion that a statement made during public comment is not absolutely privileged. In *Whelan v. Wolford*, the court found the trial court did not err by dismissing a complaint based on application of absolute privilege for a statement made by the defendant during a city planning commission meeting. 164 Cal. App. 2d 689, 331 P.2d 86 (Cal. App. 4th Dist. 1958). There, the defendant wrote a statement and testified at a planning commission hearing during public comment that the plaintiff was "running a disorderly house," characterizing plaintiff as an immoral and disreputable person. *Id.* at 88. Just like Spencer here, the plaintiff argued the defendant's comments were "not germane to the application before the commission." *Id.* The court appropriately rejected this argument, and instead held that because the planning commission was an official proceeding authorized by law and the publication had a "reasonable relation" to the application, the absolute privilege applied. *Id.* at 89.

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

Spencer argues the trial court erred in applying absolute privilege; however, Spencer also urged the trial court to allow the jury to decide whether privilege would apply. 6 A. App. 1257. This would have been clear error, as "absolute privilege and relevance are questions of law for the court to decide." *Circus Circus*, 99 Nev. at 61. The district court rejected Spencer's invitation to commit reversible error.

Finally, Spencer's argument that the district court did not determine the relevancy of Helmut's statement is belied by the record. 7 A. App. 1474. In its order, the trial court addressed the relevancy of the fence to the ultimate assault. *Id.* Further, Spencer's own multiple references to the court concerning the "fence issue" establish the relevancy of the fence issue to the assault. 2 A. App. 293-294, 2 A. App. 429; 6 A. App. 1251; 6 A. App. 1425-1426 ("So this has been a pattern of attack all going back to a handful of neighbors [sic] didn't want them to build a fence they were building."). The district court found Helmut's statement was relevant to the subject controversy, which was the ongoing neighborhood dispute over

Spencer's fence that culminated in the December 18, 2012 assault. 7 A. App. 1474. The court correctly construed the privilege broadly, resolving any doubts in favor of privilege and finding the statement relevant. *Fink*, 118 Nev. 433.

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

In addition to finding that Spencer failed to produce any evidence that Helmut requested or pressured Ms. Pence to commence or continue criminal proceedings against Spencer (7 A. App. 1475-76), the district court also applied the factors set forth in *Harrison v. Roitman*, 131 Nev. Adv. Op. 92, 392 P.3d 1338 (2015) to determine that Helmut had absolute immunity from malicious prosecution for being a victim of a crime and testifying in Spencer's criminal case. 7 A. App. 1476. Spencer contends this was error. He failed, however, to meaningfully preserve this argument as to Helmut. A party fails to preserve an issue where it fails to urge that point to the district court. *Palmieri v. Clark County*, 131 Nev. Adv. Op. 102, 367 P.3d 442, 455, n. 14 (Nev. App. 2015). While a court reviews summary judgment *de novo*, this standard of review "does not trump th[at] general rule" of waiver. *Schuck*, 126 Nev. at 436, 245 P.3d at 544. Spencer's entire argument on malicious prosecution as to Helmut is less than a page long and fails to meaningfully argue that application of absolute privilege to malicious prosecution is not proper. 6 A. App.

1262-63.[10] Instead, his terse argument focuses on whether Ms. Pence was immune from suit and whether Helmut's pre-trial statements were subject to qualified privilege. *Id.* Spencer did not address this claimed issue in oral argument before the district court. 6 A. App. 1410-14. Spencer has waived the issue.

Even if the Court finds Spencer's single, conclusory sentence was sufficient to preserve this issue, the district court did not err in its application of the privilege. In *Roitman*, this Court recently recognized that absolute immunity protects witnesses from tort liability *in general* and did not limit the doctrine's application to only defamation claims. 131 Nev. Adv. Op. 92, 362 P.2d at 1143. The *Roitman* court followed the "functional approach" test set out by the Supreme Court to determine whether absolute privilege applied: (1) whether the immunity seeker performed functions sufficiently comparable to those afforded immunity at common law, (2) whether harassment or intimidation by personal liability is sufficiently great to interfere with the person's performance of their duties, and (3) whether procedural safeguards exist that adequately protect against illegitimate conduct. *Id.* at 1140-42. Here, the district court properly analyzed and applied the functional approach factors to find Helmut should be afforded immunity from malicious prosecution because of

[10] His one sentence in this regard states "If the Motion's argument is accepted, there is no such tort as malicious prosecution." 6 A. App. 1262. No citations or argument other than this solitary sentence are offered.

the likelihood of Spencer's harassment[11] and because adequate safeguards existed when Helmut was cross-examined at Spencer's preliminary hearing and trial. 7 A. App. 1476. The policy behind application of the privilege in this case is sound, because permitting victims of a crime to be subject to a civil lawsuit for their testimony would deter crime victims from coming forward out of fear of civil liability and damages. See *Ganea v. S. Pac. R. Co.*, 51 Cal. 140, 142 (1875) (parties should not be liable in damages merely because acquittal occurs when parties cause arrest of alleged offender in good faith). Spencer never objected to or disagreed with application of these factors or provided any authority against application of the factors. 6 A. App. 1262-63.

Further, absolute privilege for malicious prosecution is not categorically rejected. For example, in *Martin v. O'Daniel*, the court held the only reason the defendants were *not* protected by absolute immunity against a malicious prosecution claim was because they engaged in "a wide range of activities to encourage and promote the prosecution" of the plaintiff, including concealing exculpatory evidence from the prosecutor. 507 S.W.3d 1, *5 (Ky. Sept. 22, 2016).

Spencer's authorities, by contrast, do not offer any persuasive reason why the district court's application of the functional approach test in this case was wrong to

[11] An original charge against Spencer in this case was felony intimidation of a witness. 2 A. App. 338.

extend the absolute privilege to Helmut. In *Jacobs v. Adelson*, for example, the court examined the specific issue of whether the defendant's statement to the media regarding ongoing civil litigation was privileged. 130 Nev. 408, 414, 325 P.3d 1282, 1286 (2014). The court held absolute privilege did not apply in this context because statements to the media did little to aid the civil case. *Id.* The *Greenberg* case, also relied on by Spencer, adopted a legal-malpractice exception to the well-established litigation privilege in order to further and protect the attorney client relationship. *Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 631, 331 P.3d 901, 903 (2014). It did not address a crime victim's testimony during an accused's criminal action. *Id.*

Similarly, *Pope v. Motel 6* discusses qualified privilege for statements made to police and actually supports the district court's order granting summary judgment because *Pope* held a qualified privilege existed so crime victims could report what they perceived as a commission of a crime and not be subject to "frivolous lawsuits." 121 Nev. 307, 317, 114 P. 3d 277 (2005); 7 A. App. 1473.

Finally, *Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 375, (1956), also relied on by Spencer, involved a civil action for malicious prosecution, which is not recognized in Nevada. See *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (the tort only involves prior criminal proceedings). Moreover, the *Albertson* court held the absolute privilege was not applicable "when the requirements of

favorable termination, lack of probable cause, and malice are satisfied." *Id.* at 410 (emphasis supplied). That case concerned a motion to dismiss, not summary judgment, and the court found the plaintiff had adequately stated a claim for relief such that the defense of absolute privilege should not apply. *Id.* at 410-11.

By contrast here, Spencer failed to meet his burden on summary judgment to come forward with any evidence that Helmut initiated, procured, or actively participated in the continuation of Spencer's criminal proceedings. 7 A. App. 1475, 6 A. App. 1262-63; *Lester v. Buchanen*, 112 Nev. 1426, 1429, 929 P.2d 910, 912 (1996) (no evidence video store directed, requested, or pressured police officers or district attorney to prosecute plaintiff); *Boren v. Harrah's Entm't, Inc.*, 2010 WL 4934477, at *6 (D. Nev. 2010) (presence of probable cause negated malice in gambler's malicious prosecution claim against casino); *Williams v. Taylor*, 181 Cal. Rptr. 423, 428 (Ct. App. 1982) (employee's acquittal and prosecutor's dismissal of charges was not evidence of lack of probable cause in employee's malicious prosecution claim against employer).[12]

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[12] On page 8 of his brief, Spencer asserts he presented evidence of malicious prosecution as to Kinion. Spencer never makes this argument as to Helmut. Moreover, his cited cases are completely inapplicable, especially to Helmut. *Sycamore Ridge Apartments, LLC v. Naumann*, involved a "civil action" for malicious prosecution, which Nevada does not recognize, and concerned the propriety of a motion to dismiss, not summary judgment. 69 Cal. Rptr. 3d 561, 572 (2007). *Benjamin v. Hooper Elec. Supply Co., Inc.* involved a store manager who searched a patron's automobile for a stereo and reported the patron to police for receiving stolen property. 568 So. 2d 1182, 1185-86 (Miss. 1990). After recognizing

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

E. Spencer failed to object to Helmut's motion seeking attorneys' fees.

Spencer contends he did not oppose Helmut's motion for attorneys' fees "as such opposition would have been futile." *AOB*, p. 6.[13] Not surprisingly, Spencer provides no citation for this assertion. NRAP 28(e)(1). Spencer's failure to oppose Helmut's motion is fatal to his contention on appeal. *Old Aztec Mine, Inc.*, 97 Nev. at 52; D.C.R. 13(3).

In this case, the district court invited the prevailing parties to seek attorneys' fees based on its findings that no genuine evidence supported Spencer's claims. 3 R. App. 658-659. After the hearing, Spencer's counsel withdrew from representation and Spencer represented himself in *pro per*. 3 R. App. 662-666. Spencer was served with Helmut's motion for attorney's fees. 7 A. App. 1365, 3 R. App. 681-685. No opposition was ever filed by Spencer, so Helmut's unopposed motion was granted.

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malicious prosecution as a disfavored tort that discouraged reporting of crimes, the court held affirmative advice, encouragement, or pressure in the criminal proceeding was required. *Id.* 1188. There was a genuine issue of fact for the jury because the plaintiff actually supplied evidence of the defendant's "extra-judicial pursuit" of the plaintiff. *Id. at* 1189. Again, Spencer failed to present any evidence to the district court regarding Helmut and he fails to point to any on appeal. *AOB*, pp. 5-6, 22-24.

[13] Spencer also never moved to retax Helmut's cost memorandum. 7 A. App. 1713.

7 A. App. 1697. There is no support for Spencer's statement that opposing Helmut's motion would have been "futile." *AOB*, p. 6. In fact, Spencer invites a dangerous precedent by suggesting that if a party deems an action "futile" during district court proceedings, it can simply sit on its hands and do nothing while still adequately preserving the issue for appeal. This is not the law in Nevada. *Old Aztec Mine, Inc.*, 97 Nev. at 52. The district court did not err by granting an unopposed motion.

The district court also did not err by granting fees under NRS 18.010(2)(b), which are to be granted "liberally" in situations like this. *Capanna v. Orth*, 134 Nev. Adv. Op. 108, 432 P.3d 726, 734-35 (2018) (no abuse of discretion where record reflected district court's assessment of the evidence and legislature's mandate that NRS 18.010(2)(b) be liberally construed in favor of attorney fees). Spencer's assertion on appeal that he had "credible evidence to make claims against Helmut" is disingenuous, because he merely cites to the testimony of Ms. Pence, which does not mention Helmut at all and Helmut's privileged statement to the Commission. *AOB*, p. 25. The district court's determination of whether any evidence supported Spencer's claims for the purpose of awarding attorney's fees was well within its discretion – in fact, Nevada jurisprudence commands such an analysis. *Capanna*, 134 Nev. Adv. Op. 108, 432 P.3d at 734-35, n. 6 citing *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993). The court's fee award was proper.

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CONCLUSION

Spencer failed to meet his burden on summary judgment to demonstrate a genuine issue of material fact for trial as to Helmut. The district court saw through his baseless assertions and properly granted summary judgment. Spencer failed to preserve the majority of issues he raises on appeal. The judgment should be affirmed as to Helmut.

DATED: August 1, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using MS Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitation in NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 8,333 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 1, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date, *Respondent's Answering Brief* was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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