*Supreme Court Case No. 77086*
*District Court Case No. 14-CV-0260*

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IN THE SUPREME COURT OF THE STATE OF NEVADA



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JEFFERY D. SPENCER

*Appellant,*

v.

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

*Respondents.*

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# RESPONDENT'S BRIEF

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District Court, Douglas County
The Honorable Judge Kosach
Civil Case No. 14-CV-0260

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## I. DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that following are persons and entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualifications 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 Respondents Mary Ellen Kinion, Egon Klementi, and Elfriede Klementi (including proceedings in the district court) or are expected to appear in this court:

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH, LLP

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

Dated this ___ day of August, 2019

By: /s/ Michael A. Pintar

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## II. INTRODUCTION

This appeal arises from the district court granting summary judgment for the Respondents. The district court also awarded attorney's fees to Respondents, Kinion and Elfriede[1]. Spencer opposed the first motion for attorney's fees filed by Kinion, but did not oppose the second motion for attorney's fees filed by Kinion or the motion for attorney's fees filed by Elfriede.

The district court did not err in granting summary judgment because Spencer failed to produce evidence that supported a genuine issue of material fact as to his claims against Kinion and Elfriede. The judgment against Spencer should be affirmed.

## III. ROUTING STATEMENT

Mary Kinion and Elfriede Klementi disagree with Spencer's routing statement suggesting this appeal should be retained by this Court. Spencer argues 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. However, both of these issues have already been 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 held that absolute privilege applies to quasi-judicial proceedings and Nevada does not carve out an

[1] Egon Klementi passed away and was dismissed from the case. 3 AA 554-556.

exception for "public comment." As for applying absolute privilege to a malicious prosecution claim, in *Harrison v. Roitman*, 131 Nev. Adv. Op. 92, 362 P.3d 1138 (2015), this Court stated that the absolute privilege is not limited to defamation claims. Spencer failed to oppose the application of the test laid out in *Harrison* during the summary judgment stage and thus Spencer has failed to preserve this issue for appeal. This case is properly within the jurisdiction of the Court of Appeals, pursuant to NRAP 17(b)(5).

## IV. ISSUES PRESENTED

Respondent's Mary Kinion and Elfriede Klementi disagree with Spencer's statement of the issues. The only issue before the Court is whether the district court erred in granting summary judgment, where Spencer did not present any evidence to raise an issue of material fact in support of his claims. Spencer has expanded this singular issue in hopes that this Court will reverse one of his "sub-issues."[2]

## V. STATEMENT OF THE CASE

This is an action stemming from disputes between neighbors that live in the Kingsbury Grade General Improvement District ("KGID") on the south shore of Lake Tahoe. The dispute escalated to the point that in 2013, Spencer was arrested for assault on an elderly neighbor, Helmut Klementi. (5 AA 1005-1018). Following trial

[2] Any issue that Spencer has not addressed in his opening brief, he has therefore abandoned, 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).

in the criminal action, Helmut Klementi ("Helmut") filed a civil action against Spencer seeking recovery for personal injuries arising from the assault. (1 AA 1-4). In response, Spencer asserted a counterclaim against Helmut as well as third-party claims against Helmut's brother and sister-in-law, Egon and Elfie Klementi, and Kinion. (1 AA 5-15). Spencer filed the following counterclaims: (1) defamation, (2) malicious prosecution, (3) civil conspiracy for defamation, (4) civil conspiracy for malicious prosecution, (5) punitive damages, and (6) intentional infliction of emotional distress. (1 AA 5-15).

### A. Mary Ellen Kinion's Motion for Summary Judgement on Malicious Prosecution

Kinion was granted summary judgment on Spencer's claims against her for malicious prosecution. (3 AA 520-24). Kinion filed her motion for summary judgment in April 2016. (1 AA 45). In her motion, Kinion put forth that the Douglas County Sheriff Deputy was the one who chose to arrest Spencer, and he had no communication with Kinion on the night of the incident. (5 AA 1005-1018). Further, there was no evidence that Kinion actively participated in the continuation of a criminal proceeding because it was the Douglas County District Attorney's Office choice to prosecute Spencer. Kinion's only involvement was sending the District Attorney a letter which she did not push onto authorities or insist that prosecution be continued. (1 AA 52-54).

Spencer claimed in his opposition that Kinion had made several false statements to the District Attorney and other officials, which in turn caused the District Attorney to increase the charges against Spencer. (1 AA 96, 97-99). The entire crux of Spencer's argument relied on Kinion's testimony at trial in which she stated that the District Attorney had not asked her to write a letter regarding the events she witnessed. (1 AA 151).[3]

Initially, Spencer presented Kinion's letter at a hearing in December 2016, without ever producing it to the other parties. (1 AA 179-234). As such, the district court abstained from ruling on the Summary Judgment motion until Spencer produced records from the District Attorney's office and gave all the parties time to supplement their briefing. (1 AA 179-234). Before that hearing ended, the district court explicitly asked the parties if they had any objection to the deputy district attorney appearing at the next hearing. (1 AA 233). Spencer's counsel did not object. *Id.* In fact, Spencer's counsel plainly requested that the next hearing be an evidentiary hearing where Spencer could question the deputy district attorney, Maria Pence. *Id.*

During the hearing on January 30, 2017, Ms. Pence testified that she told Kinion, "You know, if there's something that you think is relevant to the case please feel free to write something and send it to the District Attorney's office." (2 AA 295, 307). Ms. Pence also testified that her decision to increase the charges against Spencer

[3] Spencer's Appendix omits the letter from Kinion's Motion for Attorney's Fees.

was based on her review of Helmut's medical records and how the assault against him was much more severe that she had originally understood. (2 AA 297).

Ms. Pence testified an additional criminal complaint had been filed on January 16, 2013, alleging felony witness intimidation and gross misdemeanor of exploitation of an elderly person. (2 AA 357-58). Ms. Pence testified that these charges occurred before she received the February 22, 2013 letter from Ms. Kinion. (Id.).

Ms. Pence also testified the snowplow incident was never enhanced or changed at any point in time. (2 AA 357, 364). Ms. Pence testified her charging decisions came from the Douglas County Sheriff's Office report and her office's investigation. She testified Kinion's letter did not influence her in regards to charging the elder abuse, because she had already charged for elder abuse before the letter. (2 AA 361-2). The only enhancement of any criminal charge was the change from a misdemeanor battery against Helmut to a felony of battery causing substantial bodily harm. (2 AA 358). Ms. Pence was clear that the reason for the enhancement of the charge was because of Helmut's age and his medical records which showed significant injuries. (2 AA 297).

The district court granted Kinion's motion for summary judgement, stating "I believe [the District Attorney]. I do not believe that the charge was enhanced by anything that Ms. Kinion did." (2 AA 407). The Order stated that "nothing Kinion did or said resulted in the charges against Spencer being enhanced." (3 AA 523).

### B. Kinion's First Motion for Attorneys' Fees

After the hearing granting her motion for summary judgement on the malicious prosecution claim, Kinion moved for an award of attorney's fees and costs under NRS 18.010(2)(b). (2 AA 446-70). Kinion asserted in her motion that Spencer and his counsel failed to perform an adequate investigation into the claim before asserting it. The district court agreed with Kinion and granted Kinion's motion for fees and costs on the malicious prosecution claim, finding that Spencer had "no basis factually or legally to bring the claim." (3 AA 547).

### C. Second Round of Motions for Summary Judgment

In October 2017, Helmut and Spencer settled Helmut's claims for personal injuries with Spencer's homeowners insurance company paying a substantial amount. (3 AA 541). In April 2018, the third-party defendants, including Ms. Kinion and Elfriede, filed motions for summary judgment to resolve all of the claims against them. (3 AA 557; 4 AA 451 – 5 AA 1155). All of the motions had similar arguments, including: 1) Spencer had not provided any evidence to support his claims, 2) there could be no defamation, because the statements made by the parties were true and protected by either qualified or absolute privilege because the statements were made in quasi-judicial or judicial proceedings; 3) the civil conspiracy claims fail, because the torts underlying the civil conspiracy claims fail as a matter of law; 4) punitive damages are not a stand-alone claim; and 5) there was no evidence of anyone acting

intentionally or with a reckless disregard of causing emotional distress, and there were no "physical manifestations" of emotional distress. (5 AA 1135-1143; see also 3 AA 565; 4 AA 824; 5 AA 1109). The district court held a hearing on July 12, 2018 to decide the motions. (6 AA 1397). The district court ultimately granted all of the motions for summary judgment after hearing arguments. (6 AA 1451-52).

### D. Grant of Attorney's Fee's to Kinion, Elfriede, and Helmut

The district court during the July 12, 2018 hearing stated, "I am inviting attorney's fees... What I'm saying is if there's any attorney's fees, they should be about the same amount, around the same amount that I granted to Mr. Pintar." (6 AA 1453). Appellant maintains, without any citation to the record, this means the District Court would grant any motion made for fees and any opposition would have been futile. However, this is plainly not what the Court stated. Rather, this was an invitation by the Judge to the prevailing parties to *file* a Motion for Attorney's Fees they and that the Court would consider the Motion. Appellant had every opportunity to oppose the Motion and failed to do so. As there was no opposition, the District Court judge granted the motions. (7 AA 1701).

## VI. STATEMENT OF THE FACTS

Spencer's recitation of the facts contains numerous arguments of counsel and is not an accurate factual rendition of the underlying events. The Court is asked to refer to the following recital of the facts pursuant to NRAP 28(b).

This action stemmed from a neighborhood dispute concerning a fence during the summer of 2012. That summer, the Spencer's decided to build a six-foot tall fence around their property. (1 AA 62). The height of that fence was out of compliance with standards developed by Douglas County and the Spencer's were ultimately forced to remove the fence. (6 AA 906 and 1245).

The following winter, Mr. Spencer, who operated the neighborhood snow plow, started placing excessively high berms of snow in front of the driveways belonging to the neighbors who objected to his fence. (1 AA 64-65). On December 12, 2012, Kinion went outside and discovered that an excessively high berm of snow and ice was blocking her driveway, but that all the other driveways on her street were clear. (Id.). In response, Kinion called KGID and soon after, workers from KGID appeared and cleared the snow berm from her driveway. (Id.). Kinion saw Marilyn Spencer stop her car in the road in front of Kinion's house, call someone on her phone, and then drive away. (Id.). Fifteen minutes later, another snowplow, which Kinion thought was driven by Spencer, put the berm back in front of Kinion's driveway. (Id.).

Kinion went outside to attempt to identify the snowplow driver and saw the snowplow proceed towards Egon Klementi's house. (Id. at 69). Egon was in his driveway shoveling snow, and Kinion observed the snowplow approach Egon's house, increase its speed and put its blade down, and propel old snow and debris from the road into Egon. (Id.). Having witnessed this event, Kinion immediately called and

checked on Mr. Klementi. (Id.). Egon advised he was going to call 911 and report the incident, Kinion later called 911 herself to advise them that she was a witness. (Id.).

Several days after the snowplow incident, on December 18, 2012, Kinion and a number of other neighbors attended a KGID meeting. (6 AA 1245-47). At this time, Kinion and the other neighbors complained about the excessively high berms left by Spencer in their driveways; Kinion also advised the KGID members of what she had witnessed days earlier regarding the snowplow incident involving Egon. (Id.). KGID representatives informed the neighbors they should photograph the berms. (Id.).

Following the meeting, Helmut went into the street to take pictures of the snow berm that was piled in front of his brother's property. (4 AA 817). While doing so, Helmut was knocked to the ground by Spencer. (Id.). The Douglas County Sheriff's Office was called out and Deputy McKone arrived on the scene. (5 AA 1005-1018). The deputies on scene did not speak with Mary Kinion. (Id.).

According to the Sheriff's report, Spencer informed Deputy McKone that he attacked Helmut because he believed Helmut was breaking into his truck and there had been a string of break-ins recently. (Id.). Spencer stated he believed Helmut was a teenager in a hoodie, and admitted to grabbing Helmut and throwing him on the ground. (Id.). Deputy McKone did not believe Spencer's account of the story, did not believe that Spencer could have mistaken his 78-year old elderly neighbor as a teenager, and found other inconsistencies, including that there were no footprints

around Spencer's truck. (Id.). As a result, Deputy McKone arrested Spencer for battery and abuse of an elder. (Id.).

Following Spencer's arrest, the Douglas County Deputy District Attorney's office pursued criminal charges. (1 AA 108; 2 AA 338-39, 357-358). Kinion spoke with the deputy district attorney, Maria Pence, who told her "You know, if there's something that you think is relevant to the case please feel free to write something and send it to the District Attorney's office.'" (2 AA 295, 307). Kinion complied and sent a letter to the District Attorney on February 22, 2013. (2 AA 357, 364). Ms. Pence later testified at a hearing on January 30, 2017, that her charging decisions stemmed from the Douglas County Sheriff's Office report and that Kinion's letter did not influence her decision to charge the case. (2 AA 361-2).

The criminal case went to trial in the Fall of 2013 and Spencer was acquitted of all criminal charges. (1 AA 115-17). Before the statute of limitations lapsed, Helmut filed a civil complaint against Spencer for the assault and battery. (1 AA 1). In response, Spencer asserted third-party claims against Helmut, Helmut's brother and sister-in-law, Egon and Elfie Klementi, and Kinion for defamation, malicious prosecution, civil conspiracy, punitive damages, and intentional infliction of emotional distress, resulting in the action that is the subject of this appeal. (1 AA 5-15). The parties engaged in several years of discovery, including Spencer's deposition

(4 AA 892). Subsequently, the parties filed the Motions for Summary Judgment which were granted by the District Court.

## VII. STANDARD OF REVIEW

Mary Kinion and Elfriede Klementi agree 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 should affirm a district court's decision on any grounds supported by the record. *Rostein v. Steele*, 103 Nev. 571, 747 P.2d 230 (1987).

## VIII. ARGUMENT

### A. The District Court did not err as a matter of law when it granted Motions for Summary Judgment to Kinion and later respondents.

Spencer's primary argument on appeal is that Kinion's statements made to the District Attorney and KGID led to the amendment of the criminal charges against him. (1 AA 96-99). Spencer contends that the only reason he was charged for the gross misdemeanor charge of elder abuse is because Kinion lied to the District Attorney. However, there was no evidence to support this theory. As explained above, Ms. Pence made plain that her decision to prosecute and escalate charges had absolutely nothing to do with Ms. Kinion's letter or any actions by Kinion.

Moreover, in making this claim, Spencer confuses the snowplow incident involving Egon which occurred on December 12, 2012, with the assault and battery on Helmut that occurred on December 18, 2012. Ms. Pence testified her decision to

increase the charges against Spencer was based on her review of Helmut's medical records and how the injuries he sustained were much more severe than originally understood.

To succeed on a claim for malicious prosecution, a plaintiff must establish "(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). "A malicious prosecution claim requires that the defendant initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff." *Id.* Nevada courts have addressed the "initiated" and "procured the institution of", but they have not addressed how a plaintiff may address the "actively participated" method.

1. The District Court Properly Found There Was Probable Cause

The Court was correct in finding that there was probable cause to charge Spencer. Nevada courts follow *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 254 Cal.Rptr. 336, 765 P.2d 498, 504 (1989), in which the California Supreme Court offered a persuasive rationale for the requirement that the court, rather than the jury, determine the existence of probable cause:

> The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors, and courts have recognized that there is a significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim. To avoid improperly deterring individuals

> from resorting to the courts for the resolution of disputes, the common law affords litigants the assurance that tort liability will not be imposed for filing a lawsuit unless a court subsequently determines that the institution of the action was without probable cause.

*Dutt v. Kremp*, 111 Nev. 567, 572, 894 P.2d 354, 358 (1995), overruled on other grounds by *LaMantia v. Redisi*, 118 Nev. 27, 38 P.3d 877 (2002) (overruled to the extent that the opinion suggests that a plaintiff may claim malicious prosecution in the absence of a prior criminal proceeding). Under this test, the court must determine whether, on the basis of the facts known to the attorney, a reasonable attorney would have believed that the institution of the prior action was legally tenable. *Id.* This is an objective standard. Plainly here, there was probable cause. Mr. Spencer violently assaulted Helmut without provocation and his explanation to Deputy McKone was completely contradicted by the evidence. Moreover, Helmut's civil claims against Spencer were ultimately settled for a substantial amount confirming the veracity of the claims.

2. The Court Properly Held the Hearing with the District Attorney and Appellant Waived Any Objections to that Hearing

The district court held an evidentiary hearing with Ms. Pence to better understand what occurred in this case. Spencer did not object to the district court requesting Ms. Pence testify and, in fact, explicitly requested that Ms. Pence appear before the Court and extensively questioned Ms. Pence during the hearing. Spencer's conduct in this case is 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) After that evidentiary hearing, the district court properly held that there was probable cause for the criminal charges; indeed, violently attacking a 78-year-old man without provocation should be criminally prosecuted.

The common law affords litigants the assurance that tort liability will not be imposed on them unless a court subsequently determines that the institution of the action was without probable cause. In this case, the judge determined that there was probable. The district court further determined the deputy district attorney was not unduly influenced by Kinion when bringing these charges. In fact, Kinion had no influence on Ms. Pence at all.

Even if the district court determined that Kinion had some influence on Ms. Pence's decision to prosecute, which she did not because there was no evidence to support the theory, Kinion had a good faith belief that the information she was offering to Ms. Pence was true. The Restatement (Second) of Torts § 653 states that, "A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and (b) the proceedings have terminated in favor of the accused."

Comment (g) of the Restatement deals with influencing a public prosecutor, and it states that, "A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain."

3. The District Court did not apply an erroneous interpretation of malicious prosecution

As explained above, there was probable cause to bring criminal charges against Spencer, and thus, prong one of the malicious prosecution test is not met. Moreover, during the January 30, 2017 hearing, the Court questioned Ms. Pence to determine if Kinion played any role in Spencer's prosecution. Ms. Pence unequivocally explained that Spencer's letter played no role in the prosecution or the escalation of charges.

In the *LaMantia* case, the court found that "LaMantia presented no evidence that Redisi actively pressured or directed Televiewto improperly use the legal process

to proceed against LaMantia for an ulterior purpose other than resolving Televiews legal dispute with LaMantia." *Id.* The same can be said for this case. Spencer did not present any evidence that Kinion had an ulterior motive other than bringing an offender to justice. Spencer's only evidence of Kinion having an ulterior motive was the fact that at the original snowplow incident the officer who came to investigate the incident did not make an arrest. However, Spencer provided no evidence or credible argument that Kinion believed her statements regarding the original snowplow incident were false.

4. Kinion Had No Involvement in the Decision to Arrest Spencer and the Subsequent Decision by The District Attorney To Enhance the Charges

Nevada Courts have also found that "[t]o recover for malicious prosecution, [plaintiff] had to demonstrate that police officers 'commenced the criminal prosecution because of direction, request, or pressure' from [defendants]." *M&R Investment Co. v. Mandarino*, 103 Nev. 711, 720, 748 P.2d 488, 494 (1987) (citing *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 414 P.2d 106 (1966)). *Lester v. Buchanen,* 112 Nev. 1426, 1429, 929 P.2d 910, 913 (1996). In *Catrone*, the Officer alone recommended criminal prosecution, just like in this case, and the Court properly granted summary judgment. *Id. at 172.* Similarly, in *Lester v. Buchanen*, the court found that Video Express could not be held liable for commencing the criminal action because they merely reported information they believed to be true without directing or

pressuring the police to commence the criminal proceeding. 112 Nev. 1426, 1429, 929 P.2d 910, 913 (1996). This is all Kinion did in this case. She reported information that she believed to be true, and there is no evidence that she pressured or directed the police or district attorney to commence a criminal proceeding.

The Court found that there was not a want of probable cause, and therefore, it found that Kinion and the other third-party defendants could not be held liable for malicious prosecution.

### B. The District Court properly applied clear Nevada law in determining that the statements of Kinion and Elfriede are privileged

Spencer alleges Kinion and Elfriede are liable for defamation because of statements they made to the Douglas County Sheriff Department, the Douglas County District Attorney, KGID, the Douglas County Planning Commission and/or the South Lake Tahoe Justice of the Peace. Notwithstanding, even if the statements were not true (they are), Kinion and Elfriede are protected by either a qualified privilege or absolute privilege because each statement was made in the context of reporting a crime or was made in a quasi-judicial or judicial proceeding. Summary judgment was properly granted by the District Court because each of the alleged statements were made by Kinion and Elfriede in a either judicial or quasi-judicial proceeding.

Spencer claims this is a matter of first impression, however, the legal issue of whether statements such as those allegedly made by Kinion and Elfriede are protected by privilege has been unequivocally determined by the Nevada Supreme Court.

1. The statements made to KGID and the Douglas County Planning Commission are entitled to absolute privilege

Nevada recognizes and follows the "long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged." *Circus Circus Hotels, Inc.*, 99 Nev. at 60-61, 657 P.2d at 104; *Nickovich v. Mollart*, 51 Nev. 306, 274 P. 809, 810 (1929). The absolute privilege also applies to "quasi-judicial proceedings before executive officers, boards, and commissions..." *Id.* The absolute privilege precludes liability, as a matter of law, even where the defamatory statements are "published with knowledge of their falsity and personal ill will toward the plaintiff." *Id.* The policy behind the privilege is that, "in certain situations, the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege..". *Id.*; *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (holding that the privilege is applicable to quasi-judicial proceedings so "the right of individuals to express their views freely upon the subject under consideration is protected.").

Spencer's contention that "neither of these authorities establishes immunity for statements made in public comment before a government body" is without merit. *AOB* pp. 17. The cases explicitly indicate that public comment on issues of concern for a

subject under consideration by a quasi-judicial body are privileged. The *Circus Circus* case applies the broad relevancy test, where the statements made to these judicial and quasi-judicial bodies only need to have "some relation" to the proceeding, so long as it has some bearing on the subject matter of the proceeding. 99 Nev. at 60-61, 657 P.2d at 104. If it has some relation to the proceeding, then the statements are entitled to absolute privilege. *Id.*

Like all General Improvement Districts in Nevada, the KGID is charged with maintaining roads in that community. In the winter, snowplowing is a major issue of concern. Because the manner in which the snow is plowed and the safety of neighborhoods and homes is of concern to residents, comments regarding snowplowing are relevant.

Spencer cites no authority that the public comment portion of these quasi-judicial proceedings are exempt from absolute privilege. Applying the broad relevancy test in *Circus Circus*, the comments made to the KGID and Douglas County Planning Commission were relevant and are entitled to absolute privilege.

2. Kinion's Letter to the District Attorney is Privileged

To be actionable, any letters or statements made by Kinion to the Douglas County Sheriff Department or the Douglas County District Attorney's office would have to be either knowingly false or made with reckless disregard for their veracity in order for them to be actionable. However, other than citing to his acquittal of the

criminal charges, Spencer has provided no evidence which would suggest the statements made by Kinion to police or district attorney are knowingly false.

Kinion's letter to the District Attorney is entitled to privilege. In *Pope v. Motel 6,* 121 Nev. 307 (2005), the court clarified its holding in *K-Mart Corp v. Washington,* 109 Nev. 1180, by finding that a qualified privilege satisfied the balance between safeguarding reputations and encouraging full disclosure by citizens "in order to discharge public duties and protect individual rights." *Id.* at 316-317. *Pope* held a qualified privilege existed so crime victims could report what they perceived as a commission of a crime and not to be subject to "frivolous lawsuits." *Id.*

3. Statements made in Court are Privileged

Spencer states that his defamation claims against Kinion are based upon a letter that she wrote to the Douglas County District Attorney and her testimony at Spencer's criminal trial. However, there is a long-standing common law rule that "communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983); s*ee Drummond v. Stahl*, 127 Ariz. 122, 618 P.2d 616 (App.1980), cert. denied, 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981); Prosser, Handbook of the Law of Torts, § 114 at 777–79 (4th ed. 1971). The absolute privilege precludes

liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff. *Id.*

### C. The District Court did not err in finding that absolute privilege applied to malicious prosecution.

#### 1. Mary Ellen Kinion

The district court originally granted summary judgment for Kinion on malicious prosecution after determining that there was probable cause to bring the criminal charges, and that the District Attorney was not unduly influenced by Kinion when bringing these charges. 3 AA 520-524. The order granting summary judgment on the malicious prosecution claim did not rely on absolute privilege, but instead, relied on the fact that there was probable cause to bring the original charge against Spencer, and that Spencer did not provide any evidence to support a claim for malicious prosecution. *Id.* As explained in Section A, the district court applied the correct standard for malicious prosecution.

Since the district court did not rely on absolute privilege for malicious prosecution for Kinion, Spencer cannot appeal this issue in relation to Mary Ellen Kinion.

#### 2. Elfriede Klementi

The district court applied the factors set forth in *Harrison v. Roitman*, 131 Nev. Adv. Op. 92, 393 P.3d 1338 (2015) to determine that Elfriede had absolute immunity from malicious prosecution. 7 AA 1495. This Court has recently found that absolute

immunity protects witnesses from tort liability in general and that this privilege does not just apply to defamation cases. *Harrison* at 1143. The *Harrison* court followed the "functional test" set out by the Supreme Court to determine when absolute privilege applied: (1) whether the immunity seeker performed functions sufficiently comparable to those afforded immunity at common law, (2) whether harassment or intimidation by personal liability is sufficient to interfere with the person's performance of their duties, and (3) whether procedural safeguards adequately protected against illegitimate conduct. *Id.* at 1140-42.

In large part, like he did at the district court level, Spencer's brief seeks to hold Elfriede accountable for statements and actions of Egon. However, Egon passed away and the claims against him were dismissed. That dismissal is not being challenged on appeal.

Here, the district court properly analyzed and applied the function approach test to determine that Elfriede had absolute immunity for her own statements. The district court found that Elfriede was a witness in a judicial proceeding and enjoys absolute immunity from her testimony because there were procedural safeguards by the way of cross-examination. 7 AA 1495-1496. Spencer never objected to or disagreed with the application of these factors or provided any authority against the application of these factors. 6 AA 1215-1249.

Spencer failed to meet his burden on summary judgement to come forward with any evidence that Elfriede initiated, procured, or actively participated in the continuation of Spencer's criminal proceedings. *Lester v. Buchanen*, 112 Nev. 1426, 1429, 929 P.2d 910, 912 (1996). The district court did not err in apply the "function analysist test" under *Harrison* in this case, in addition to finding that Spencer failed to meet his burden of proof for summary judgement. The judgment should be affirmed.

### D. The District Court did not err as a matter of law by granting attorney's fees based on a finding that Spencer's claims were frivolous

#### 1. The District Court did not err in granting Kinion's first set of attorney's fees as Spencer's Claims were Frivolous

This court reviews district court orders on attorney fees for an abuse of discretion. *Baldonado v. Wynn Las Vegas*, LLC, 124 Nev. 951, 967, 194 P.3d 96, 106 (2008). The decision to award attorney's fees is within the sound discretion of the trial court. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). A district court's award of attorney's fees will not be disturbed on appeal absent a manifest abuse of discretion. *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139–40 (1994). In *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993), the court explained that for purposes of an award of attorney's fees pursuant to NRS 18.010(2)(b), "[a] claim is groundless if 'the allegations in the complaint ... are not supported by any credible evidence at trial.' " (quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo.1984)). "For purposes of NRS 18.010(2)(b),

a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, LLC, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

Nevada Revised Statue 18.010(2)(b) provides that the court may make an allowance of attorney's fees to a prevailing party:

> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

The relevant question is whether Spencer "brought or maintained a claim without reasonable grounds." *Rodriguez v. Primadonna Co.*, LLC., 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). The District Court found that Spencer's claim for malicious prosecution was brought and maintained without reasonable grounds. Not only did the facts not support such a claim as delineated within the written order granting summary judgement, but there was plain and obvious probable cause to initiate the prior criminal proceeding, which eliminated a necessary element for the malicious prosecution claim.

As explained above the Nevada Supreme Court has given extensive guidance on what is and what is not probable cause. *See Dutt v. Kremp*, 111 Nev. 567, 572, 894 P.2d 354, 358 (1995) . The question of probable cause is the distinction between a merely unsuccessful and a legally untenable claim. *Id.* Under this test, the court must determine whether, on the basis of the facts known to the attorney, a reasonable attorney would have believed that the institution of the prior action was legally tenable. *Id.* "It is firmly established . . . that the finding of probable cause may be based on slight, even marginal, evidence." *Sheriff v. Badillo*, 95 Nev. 593, 600 P.2d 221 (1970). "The state need only present enough evidence to create a reasonable inference that the accused committed the offense with which he or she is charged." *LaPena v. Sheriff*, 91 Nev. 692, 541 P.2d 907 (1975).

The district court determined that there was not a legally tenable claim, because there was probable cause for the underlying criminal action. With no basis to factually or legally bring the claim, the district court concluded that Spencer's claim for malicious prosecution was alleged without a reasonable basis. Since this is an objective standard of a reasonable attorney, the district court did not err in finding this suit frivolous and granting attorney's fees and costs under NRS 18.010(b)(2).

2. The Plaintiff cannot appeal the second set of attorney's fees, because he did not oppose the motions for attorney's fees.

In the Appellant's Opening Brief, Spencer states in the statement of the case about the second set of attorney's fees that "Based on the district court's directive that

it would grant any motion for fees made, Spencer did not oppose the motions as such opposition would have been futile." *AOB* pp. 6. Spencer fails to provide any citation for this statement. The district court during the July 12, 2018 hearing stated, "I am inviting attorney's fees... What I'm saying is if there's any attorney's fees, that should be about the same amount, around the same amount that I granted to Mr. Pintar." (6 AA 1453). Spencer maintains that this was the district court saying that it would grant any motion made for fees and any opposition would have been futile. However, this is not what the district court stated. Rather, this was only an invitation by the Judge to the prevailing parties to file a Motion for Attorney's Fees if they deemed it appropriate and that the Court would permit the Motion. The district court never stated that he was automatically granting any motion for attorney's fees; instead, he would consider motions for attorney's fees so long as they were reasonable. Due to the fact that there was no opposition, the district court granted the motions. (7 AA 1701).

In *Schuck v. Signature Flight Support of Nevada, Inc.*, Schuck did not make the arguments he was raising in his appeal when he opposed summary judgement in district court. 126 Nev. 434, 436, 245 P.3d 542, 544 (2010). While this court gives de novo review to a district court's decision to grant summary judgment, *Wood*, 121 Nev. at 729, 121 P.3d at 1029, a de novo standard of review does not trump the general rule that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old*

*Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see Larsen v. City of Beloit*, 130 F.3d 1278, 1284 (7th Cir.1997) (a party may not ordinarily obtain reversal of an order granting summary judgment based on an argument not made in the district court); *see also Walch v. State*, 112 Nev. 25, 34, 909 P.2d 1184, 1189 (1996) (When an appellant fails to raise an issue below and the asserted error is neither plain nor constitutional in magnitude, this court need not consider it on appeal); *see also Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record).

In this case, Spencer did not object to the second set of motions for attorney's fees and costs, and therefore, he waives his right to bring his opposition to them now on appeal. Spencer claims that it was futile to bring an opposition, because the district court stated he was automatically granting any attorneys fee and costs. However, as shown above, the district court never said that, nor implied that. He just said he was "inviting" them. Inviting does not mean granting any motion. Inviting just means the Judge was just open to receiving them in this case. Spencer did not object during the trial to these motions, and he cannot object to them now. Moreover, as explained above, the granting of attorney's fees was appropriate after defeating the baseless allegations brought by Spencer.

## IX. CONCLUSION

Based on the above, Respondents, Mary Ellen Kinion and Elfriede Klementi, respectfully request that this Court affirm the decision of the district court in granting summary judgment.

Dated this 5th day of August, 2019

By: */s/* Michael A. Pintar

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## X. CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2010 in 14 point Times New Roman font. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(f), it does not exceed 30 pages.

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 Attorney 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 a reference to the 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 sanction in the

event that the accompanying brief is not in conformity with the requirements of Nevada Attorney Rules of Appellate Procedure.

Dated this 5th day of August, 2019

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## XI. CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2019, a true and correct copy of this completed **RESPONDENT'S BRIEF** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By */s/* Jennifer Heston
Jennifer Heston, an Employee of
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