IN THE SUPREME COURT OF THE STATE OF NEVADA

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EDGEWORTH FAMILY TRUST; AND AMERICAN GRATING, LLC,

Appellants/Cross Respondents.

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive,

Respondents/Cross-Appellants.

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC,

Appellants,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive,

Respondents.

Supreme Court Case

No. 77678 consolidated with No. 78176

APPEAL FROM FINAL JUDGMENTS ENTERED FOLLOWING

EVIDENTIARY HEARING

THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

THE HONORABLE TIERRA JONES, DISTRICT COURT JUDGE

*****

APPELLANTS' OPENING BRIEF

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AND, AMERICAN GRATING, LLC

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ROUTING STATEMENT

This matter is not presumptively assigned to the Supreme Court as set forth in NRAP 17(a), or presumptively assigned to the Court of Appeals as set forth in NRAP 17(b).

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

Whether the District Court erred, as a matter of law, when it:

A. Ruled that the Edgeworth Family Trust and American Grating, LLC ("Appellants") constructively discharged Daniel S. Simon (Simon) and The Law Office of Daniel S. Simon, A Professional Corporation (Respondents, referred to hereafter as "Simon") on November 29, 2017;

B. Found that Simon was entitled to quantum meruit compensation of $200,000, versus his hourly rate of $550, for services rendered for Appellants between November 30, 2017, and January 8, 2018;

C. Dismissed Appellants' Amended Complaint pursuant to NRCP 12(b)(5);

D. Found the Appellants' conversion claim was not brought or maintained on reasonable grounds; and,

E. Awarded Simon $50,000 in attorney's fees and $5,000 in costs with no explanation.

II. STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

This is an appeal from a final judgment entered before the Eighth Judicial District Court (hereinafter "District Court") and Order Adjudicating Simon's Attorney's Lien entered November 19, 2018; Order Dismissing the Appellants' Amended Complaint entered November 19, 2018; and, Order awarding Simon $50,000 in attorney's fees and $5,000 in costs entered February 8, 2019.

Appellants filed their Notice of Appeal of the District Court's Order Adjudicating Simon's Attorney's Lien and Amended Decision and Order on Motion to Dismiss NRCP 12(b)(5) on December 7, 2018, and filed their Notice of Appeal of the District Court's Decision and Order Granting in Part and Denying in Part Simon's Motion for Attorney's Fees and Costs on February 15, 2019.

B. PUBLIC POLICY IMPLICATIONS OF THE SO-CALLED "SIMON RULE"

This appeal concerns issues involving great public importance: specifically, attorney's liens and fees, but more generally, when greed and coercion can cripple client trust and soil society's expectations of attorney transparency. Unfortunately, throughout the years, the legal profession has amassed a public perception of dishonesty, untowardness, and avarice. Sissela Bok, "Can Lawyers Be Trusted," Univ. of Penn. L. Rev. Vol. 138:913-933 (1990). When the behavior of attorneys

becomes marred by opportunism, dishonesty, and abuse, there is a real risk that society's distrust of lawyers will continue to worsen.

This appeal is about Simon, a Nevada attorney, and the conduct he foisted on Appellants as their attorney. Simon's conduct is called "The Simon Rule." Here it is: 1.) Agreed to represent Appellants for an hourly fee of $550, but then, in contravention of NRPC 1.5(b), failed to ever reduce the fee agreement to writing. *Appellants' Appendix (AA), Vol. 2 000278-000304; 000354-000374.* 2.) Billed and collected over $367,000 in fees for eighteen months by sending periodic invoices to Appellants at that agreed upon rate of $550/hour. *Id., 000278-000304.* 3.) When it was certain that the value of the case increased (from a property damage case worth $500,000 to a products liability matter valued over $6,000,000), demanded more money from Appellants. *Id.* 4.) Couple the demand with threats that caused Appellants to believe that if they didn't acquiesce, he would stop working on their case. *Id.* 5.) When Appellants would not acquiesce and modify the hourly fee agreement to a contingency fee/bonus, used his failure to reduce the fee agreement to writing as a basis to get more money from Appellants via the equitable remedy of quantum meruit and its plus one, a "charging lien. *Id.*

This Court needs to stop The Simon Rule dead in its tracks and prevent all lawyers from behaving this way then, now, and in the future. The Simon Rule incentivizes lawyers to act in a manner that lacks transparency and encourages

practices in direct violation of NRPC 1.5(b) & (c). It also leaves clients with two awful options: acquiesce or litigate. Neither the facts, nor the law, nor practical nor common sense, support The Simon Rule, or the rulings of the District Court that would allow it to either exist or flourish.

III. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW:

A. The Simon Invoices:

Appellants retained Simon to represent their interests following a flood at a residence they owned. *AA, Vol. 2 page 000296, lines 10 through 14; 000298:10-12; 000354-000355.* The representation began on May 27, 2016. *AA, Vol. 2 000278:18-20; 000298:10-12; 000354.* Simon billed Appellants $550 per hour for his work from that first date to his last entry on January 8, 2018. *AA, Vols 1 and* 2 *000053-000267; 000296-000297; 000365-000369.* Damage from the flood caused in excess of $500,000 of property damage, and litigation was filed in the 8th Judicial District Court as Case Number A-16-738444-C. *AA, Vol. 2 000296.* Appellants brought suit against entities responsible for defective plumbing on their property: Lange Plumbing, LLC, The Viking Corporation, and Supply Network, Inc. (Lange and Viking). *AA, Vol. 2 000278:24-27; 000354.*

The District Court held an evidentiary hearing to adjudicate Simon's attorney's lien over five days from August 27, 2018, through August 30, 2018, and

concluded on September 18, 2018. *AA, Vol. 2* 000353-000375. The Court found that Simon and Appellants had an implied agreement for attorney's fees. *Id., at, 000365-000366;000374.* However, Appellants asserted that an oral fee agreement existed between Simon and Appellants for $550/hour for work performed by Simon. *AA, Vols. 2 & 3 000277-301; 000499:13-19; 000502:18-23; 506:1-17; 511:25, 512:1-20.*

Simon admitted that he never reduced the hourly fee agreement to writing. *AA, Vol. 3 000515-1:8-25.* Regardless, Simon and Appellants performed the understood terms of the fee agreement with exactness. *AA, Vol. 2 000297:3-9; AA, Vol. 3 000499:13-19; 000502:18-23; 506:1-17; 511:25, 512:1-20.* How so? Simon sent four invoices to Appellants over time with very detailed invoicing, billing $486,453.09 in fees and costs, from May 27, 2016, through September 19, 2017. *AA, Vols. 1 & 2 000053-000084; 000356:15-17; 000499:13-19; 000502:18-23; 506:1-17; 511:25, 512:1-20.*

Simon always billed for his time at the hourly rate of $550 per hour ($275 per hour for associates). *AA, Vols. 1 & 2 000053-000267; 000374.* It is undisputed Appellants paid the invoices in full, and Simon deposited the checks without returning any money. *AA, Vol. 2 000356:14-16.* And Simon did not express any interest in taking the property damage claim on a contingency basis with a value of $500,000. *AA, Vol. 2 000297:1-5.*

Simon believed that his attorney's fees would be recoverable as damages in the underlying flood litigation. *AA, Vol. 2 000365-000366.* To that end, he provided computations of damages pursuant to NRCP 16.1, listing how much in fees he'd charged. *Id., 000365:24-26.* At the deposition of Brian Edgeworth on September 29, 2017, Simon voluntarily admitted that "[the fees have] all been disclosed to you" and "have been disclosed to you long ago." *AA, Vol. 2 000300:3-16; 000302-000304; 000365:27, 000366:1.* Those were hourly fees spoken of and produced by Simon. *Id., 000365:24-27, 000366:1.* Thus we see that through Simon's words and deeds he clearly knew and understood that his fee agreement with Appellants was for $550 per hour...until he wanted more. *Id.*

B. Simon's Inflated Attorney's ("Charging") Lien

Despite having and benefiting from an hourly fee agreement, Simon wanted more and devised a plan to get it. *Id., 000271-000304.* In late Fall of 2017, and only after the value of the flood case skyrocketed past $500,000 to over $6,000,000, Simon demanded that Appellants modify the hourly fee contract so that he could recover a contingency fee dressed poorly as a bonus. *AA, Vol. 2 000298:3-17.*

Simon scheduled a meeting with Appellants in mid-November of 2107. At that meeting, Simon told Appellants he wanted to be paid far more than $550.00 per hour and the $367,606.25 in fees he'd already received from Appellants. *Id.*

Simon said he was losing money and that Appellants should agree to pay him more, like 40% of the $6 million settlement with Viking. *AA, Vols. 2 & 3* 000299:13-22; *000270; 000275*; *000515-1*. Simon then invited Appellants to contact another attorney and verify that "this was the way things work." *AA, Vol. 3 000000515-1, 000515-2, 000516:1-7, 000517:13-25.*

Appellants refused to bow to Simon's pressure or demands. *AA, Vol. 2 000300:16-23*. Simon then refused to release the full amount of the settlement proceeds to Appellants. *Id.* Instead, Simon served two attorney's liens on the case: one on November 30, 2017, and an Amended Lien on January 2, 2018. *Id; AA, Vol. 1 000001; 000006*. Simon's Amended Lien was for a net sum of $1,977,843.80. *Id.* This amount was on top of the $486,453.09 in fees and costs Appellants already paid in full to Simon for all his services and time from May 27, 2016, through September 19, 2017. *AA, Vol. 2 000301:12-13.*

C. Simon's Transparent Attempt to Circumvent NRPC 1.5(b) and NRPC 1.5(c):

Appellants accepted Simon's invitation to consult other attorneys and contacted Robert D. Vannah, Esq. *AA, Vol. 3 000515-2:22-25, 516:1-7.* Thereafter, Mr. Vannah contacted Simon and explained that since the settlement with Viking was essentially completed, it would not be expeditious for Mr. Vannah to substitute into the case or to associate with Simon. *AA, Vol. 3 000490-000491.*

Mr. Vannah told Simon that he was to continue on the case until the

settlement details were all ironed out. *Id.* And those details were clearly minimal, as the lion's share of rigorous and time-consuming work had already been completed: a successful mediation with Floyd Hale, Esq.; an offer from Viking of $6 million to resolve those claims (*Id)*; and, an offer from Lange to settle for $25,000, to which Appellants had consented to accept both no later than November 30, 2017. *AA, Vol. 2 000357:22-23*. The only tasks remaining on the case were ministerial, i.e., signing releases and obtaining dismissals of claims. *Id., 000517:13-25, 000518.*

At the evidentiary hearing, Simon finally admitted that he could not charge a 40% contingency fee because he had not obtained a written contingency fee agreement. *AA, Vol. 3 000515-1*. Regardless, Simon pushed the District Court to adopt The Simon Rule, arguing that since he, the lawyer, didn't reduce the fee agreement to writing, let alone a written contingency fee agreement as required by NRPC 1.5(c), he could get a 40% fee via the equitable remedy of quantum meruit because 40% is the normal charge if a contingent fee agreement existed. *AA, Vol. 1 000045*.

Rather than own up to his mistakes and invited errors in failing to comply with NRPC 1.5(b) by not reducing the fee agreement with Appellants to writing, Simon turned on the spin cycle and blamed Appellants. *Carstarphen v. M*ilsner, 270 P.3d 1251, 128 Nev. 55 (2012). This Court should not reward Simon's invited

errors with an equitable windfall of a $200,000 fee/bonus. *Id.*

D. The Purported Constructive Discharge:

The District Court held that Appellants constructively discharged Simon on November 29, 2017. *AA, Vol. 2 000369:22-25.* The basis was a purported "breakdown in attorney-client relationship," and the lack of communication with regard to the pending legal issues, i.e., the Lange and Viking Settlements. *Id.*, 000361-000364.

Yet, it was Simon who: 1.) Demanded that Appellants change the terms of the fee agreement from hourly to contingent when the case value increased; 2.) Told Appellants he couldn't afford to continue working on their case at $550 per hour; 3.) Threatened to stop working on Appellants' case if they didn't agree to modify the fee agreement; 4.) Encouraged Appellants to seek independent legal counsel; 5.) Sought legal counsel, as well; 6.) Continued to work on Appellants' case through its conclusion with Viking and Lange; and, 7.) Billed Appellants for all of his time from November 30, 2017 (the date after the alleged constructive discharge), through January 8, 2018 (the conclusion of the underlying case). *AA, Vols. 1, 2, & 3 000298:13-24; 0000159-000163, 000263-000265; 000515-2:22-125, 000516:1-7.*

The District Court determined the appropriate method to award attorney fees after November 30, 2017, would be via quantum meruit. *AA, Vol. 2 000369:16-27.*

The District Court further decided Simon was "entitled to a reasonable fee in the amount of $200,000." *AA, Vol. 2, 000370-000373.* Appellants contest the District Court's constructive discharge determination and appeal the its determination of the $200,000 amount. Why?

Neither the facts nor the law supports a finding of any sort of discharge of Simon by Appellants, constructive or otherwise. Appellants needed him to complete his work on their settlements, and he continued to work and to bill. *AA, Vols. 1 & 2 000301:4-11; 000159-163, 000263-000265.* Plus, the amount of the awarded fees doesn't have a nexus to reality or the facts. Could there be a better barometer of truth of the reasonable value of Simon's work in wrapping up the ministerial tasks of the Viking and Lange cases for those five weeks than the work he actually performed? No.

When it became clear to him that his Plan A of a contingency fee wasn't allowed per NRPC 1.5(c), Simon adopted Plan Zombie ("Z") by creating a "super bill" that he spent weeks preparing that contains every entry for every item of work that he allegedly performed from May 27, 2016 (plus do-overs; add-ons; mistakes; etc.), through January 8, 2018. *AA, Vols 1 & 2 000053-000267.* It also contains some doozies, like a 23-hour day billing marathon, etc. *Id., Vols 1 & 2 000159-000163; 000263-000265* All of the itemized tasks billed by Simon and Ms. Ferrel (at $550/$275 per hour, respectively) for that slim slot of time total **$33,811.25.** *Id.*

How is it less than an abuse of discretion to morph $33,811.25 into $200,000 for five weeks of nothing more than mop up work on these facts?

E. The District Court's Dismissal of Appellants' Amended Complaint

Settlements in favor of Appellants for substantial amounts of money were reached with the two flood defendants on November 30 and December 7, 2017. *AA, Vol 3 000518-3:22-25, 000518-4:1-6.* But Simon wrongfully continued to lay claim to nearly $1,977,843 of Appellants' property, and he refused to release the full amount of the settlement proceeds to Appellants. *AA, Vols. 1 & 2 000006; 000300.* When Simon refused to release the full amount of the settlement proceeds to Appellants, litigation was filed and served. *AA, Vols. 1 & 2 000014; 000358:10-12.*

Appellants filed an Amended Complaint on March 15, 2018, asserting Breach of Contract, Declaratory Relief, Conversion, and for Breach of the Implied Covenant of Good Faith and Fair Dealing. *AA, Vol. 2 000305.* Eight months later, the District Court dismissed Appellants' Amended Complaint. *Id., 000384:1-4.* In doing so, the District Court ignored the standard of reviewing such motions by disbelieving Appellants and adopting the arguments of Simon. Therefore, Appellants appeal the District Court's decision to dismiss their Amended Complaint. *AA, Vol. 2 000425-000426.*

F. The District Court's Award of $50,000 in Attorney's Fees and $5,000 in Costs

After Simon filed a Motion for Attorney's Fees and Costs, the District Court awarded Simon $50,000 in attorney's fees and $5,000 in costs. *AA, Vol. 2 000484:1-2.* The District Court again ignored the standard of review, believed Simon over Appellants, and held that the conversion claims brought against Simon were maintained in bad faith. *AA, Vol 2 000482:16-23.* The District Court awarded these fees and costs without providing any justification or rationale as to the amounts awarded. *Id., at 000484.* Appellants appealed the District Court's decision to award $50,000 attorney's fees and $5,000 costs. *AA, Vol 2 000485-000486.*

G. The Amounts in Controversy

Appellants have no disagreement with the District Court's review of all of Simon's invoices from May 27, 2016, through January 8, 2018. Specifically, it reviewed Simon's bills and determined that the reasonable value of his services from May 27, 2016, through September 19, 2017, was $367,606.25. *AA, Vol 2000353-000374.* Appellants paid this sum in full. *Id., 000356.* It also determined that the reasonable value of Simon's services from September 20, 2017, through November 29, 2017, was $284,982.50. *Id., 000366-000369.* Appellants do not dispute this award, either. In reaching that conclusion and award, the District Court

reviewed all, and rejected many, of Simon's billing entries on his "super bill" for a variety of excellent reasons. *Id., 000366-000369; 000374.*

Appellants do, however, dispute the award of a bonus in the guise of fees of $200,000 to Simon from November 30, 2017, through January 8, 2018. In using the same fee analysis the District Court applied above, Simon would be entitled to an additional **$33,811.25**, which reflects the work he actually admits he performed, for a difference of $166,188.75. *AA Vols. 1 & 2 000373-000374; 000159-163; 000263-000265.* Appellants also dispute the $50,000 in fees and $5,000 in costs awarded to Simon when the District Court wrongfully dismissed Appellants' Amended Complaint, etc.

Finally, Appellants assert that once Simon's lien was adjudicated in the amount of $484,982.50, with Simon still holding claim to $1,492,861.30, he is wrongfully retaining an interest in $1,007,878.80 of Appellants funds. *AA, Vol. 2 000415-000424.* That's an unconstitutional pre-judgment writ of attachment. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969).

IV. PROCEDURAL OVERVIEW:

Simon filed a Motion to Adjudicate his $1,977,843.80 lien on January 24, 2018. *AA, Vols. 1 & 2 000025-000276.* Appellants opposed that Motion. *AA, Vol. 2 000277-000304.* The District Court set an evidentiary hearing over five days on this lien adjudication issue. *AA, Vol. 3* 000488. Appellants argued there was no

basis in fact or law for Simon's fugitive attorney's liens, or his Motion to Adjudicate Attorney's Lien, and that the amount of Simon's lien was unjustified under NRS 18.015(2). *AA, Vol. 2 000284: 21-27.* Appellants further argued that there was in fact an oral contract for fees between Simon and Appellants consisting of $550/hr for Simon's services that was proved through the testimony of Brian Edgeworth and through the course of consistent performance between the parties from the first billing entry to the last. *Id., 000284-000292.*

The District Court found that Simon asserted a valid charging lien under NRS 18.015. *AA, Vol. 2 000358: 18-28.* The District Court also determined that November 29, 2017, was the date Appellants constructively discharged Simon. *Id.* As a result, the District Court found that Simon was entitled to quantum meruit compensation from November 30, 2017, to January 8, 2018, in the amount of $200,000. *Id., 000373-000374.*

A. Simon's Motion to Dismiss Amended Complaint Under NRS 12(B)(5)

Simon filed a Motion to Dismiss Appellants' Amended Complaint pursuant to NRCP 12(b)(5). Appellants opposed Simon's Motion and argued that the claims against Simon were soundly based in fact and law. *AA, Vol. 2 000344-000351.* Appellants also stressed that Nevada is a notice-pleading jurisdiction, which the Amended Complaint had clearly met the procedural requirement of asserting "a

short and plain statement of the claim showing that the pleader is entitled to relief...." *NRCP 8(a)(1). AA, Vol. 2 000343.*

However, the District Court chose to believe Simon and dismissed Appellants' Amended Complaint in its entirety. *AA, Vol. 2 000384.* The District Court noted that after the Evidentiary Hearing and in its Order Adjudicating Attorney's Lien, no express contract was formed, only an implied contract existed, and Appellants were not entitled to the full amount of their settlement proceeds. *Id.* Yet, whose responsibility was it to prepare and present the fee agreement to the clients—Appellants—for signature? Simon's. Whose fault—invited error—was it that it wasn't? Simon's, of course, as he's the lawyer in the relationship. *NRPC 1.5(b).* Regardless, the District Court dismissed Appellants' Amended Complaint. *AA, Vol. 2 000384.* It did so without allowing any discovery and barely eight months after it was filed. *AA, Vol. 2 000381, 000384.*

B. Simon's Motion for Attorney's Fees and Costs

Simon filed a Motion for Attorney's Fees and Costs on December 7, 2018. Appellants opposed Simon's Motion, arguing their claims against Simon were maintained in good faith. *AA, Vol. 2 000437-000438.* They further argued it would be an abuse of discretion for the District Court to award Simon attorney's fees when such fees were substantially incurred as a result of the evidentiary hearing to adjudicate Simon's own lien and conduct, namely his exorbitant $1,977,843.80

attorney's lien. *AA, Vol. 2 000432-000435.* The District Court awarded Simon $50,000 in fees under NRS 18.010 (2)(b), and $5,000 in costs, but providing no explanation in its Order as to the amount of the award. *Id.*

V. STANDARD OF REVIEW:

A. Adjudicating Attorney's Liens - *Abuse of Discretion*:

A district court's decision on attorney's lien adjudications is reviewed for abuse of discretion standard. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1215 (2008). An abuse of discretion occurs when the court bases its decision on a clearly erroneous factual determination or it disregards controlling law. *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004) (holding that relying on factual findings that are "clearly erroneous or not supported by substantial evidence" can be an abuse of discretion (internal quotations omitted)). *MB Am., Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (2016).

B. Motions to Dismiss – *de novo* Review

An order on a motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). De novo review requires a matter be considered anew, as if it had not been heard before and as if no decision had been rendered previously. *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir.1988).

C. Motions for Attorney's Fees and Costs – *Abuse of Discretion*

A district court's decision on an award of fees and costs is reviewed for an abuse of discretion. *Gunderson v. D.R. Norton, Inc.*, 130 Nev. 67, 319 P.3d 606, 615 (2014); *LVMPD v. Yeghiazarian*, 129 Nev 760, 766, 312 P.3d 503, 508 (2013). An abuse of discretion occurs when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law. *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004) (holding that relying on factual findings that are "clearly erroneous or not supported by substantial evidence" can be an abuse of discretion (internal quotations omitted)). *MB Am., Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (2016).

VI. SUMMARY OF ARGUMENTS:

There was no basis in fact or law for the content of Simon's fugitive lien, as its amount was never *agreed upon* by the attorney and the client under NRS 18.015(2). *Id.* In fact, there was a clear fee agreement between Appellants and Simon whereby Simon was to represent Appellants in the flood lawsuit in exchange for an hourly fee of $550. *Id.* Upon settlement of the underlying case, when Simon refused to hand over Appellants' settlement funds post lien-adjudication, effectively retaining $1,492,861.30 of Appellants' undisputed funds, a conversion of Appellants' settlement funds had taken place. And still does today.

Reviewing the District Court's Order Dismissing Appellants' Amended Complaint *de novo*, it is clear the District Court committed reversible legal error when it: 1.) Used the wrong legal standard when analyzing the Amended Complaint; 2.) Failed to accept all of Appellants factual allegations in the complaint as true; and, 3.) Failed to draw all inferences in favor of Appellants. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Rather than follow the law, the District Court did just the opposite here by ignoring the law, believing Simon's story, and drawing all inference in favor of Simon. That can't be allowed to stand.

To make the abuse of discretionary matters worse, when Simon moved for attorney's fees and costs on December 7, 2018, the District Court wrongfully awarded Simon another $50,000 pursuant to NRS 18.010(2)(b), and $5,000 in costs. *AA, Vol. 2 000484:1-2.* The $50,000 award was a manifest abuse of discretion, as it was predicated on the District Court's: 1.) Abuse of discretion by dismissing Appellants' Amended Complaint in the first place by applying the exact opposite standard of ignoring Appellants' allegations and inferences and believing Simon; 2.) Inaccurately finding that Appellants' conversion claim was maintained in bad faith; and, 3.) Failure to consider the *Brunzell* factors. *Hornwood v. Smith's Food King No. 1,* 807 P2d 209 (1991) And in its Order awarding $50,000 in fees

and $5,000 in costs, the District Court provided absolutely no reason or justification for awarding those amounts. *AA, Vol. 2 000481-000484.*

The District Court's finding that there was a constructive discharge was inapposite of the record, ignored material facts, was based on clearly erroneous factual determinations, and was unsupported by substantial evidence. *MB Am., Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (2016). The District Court's $200,000 quantum meruit award of attorney's fees was also an abuse of discretion as it was based on an erroneous finding of constructive discharge: there was a clear contract between Simon and Appellants and no one was discharged. *Golightly v. Gassner,* 125 Nev. 1039 (2009). *AA, Vol. 2 000277-000304.* To the contrary, Simon continued to represent Appellants and bill them handsomely for his time. *Id.*

Further, there was no connection between the District Court's $200,000 award and any of the labor Simon actually did or any value he added after the date of the purported constructive discharge. *AA, Vol.* 2 *000369-000373.* As Appellants' Opposition to Simon's Motion for Fees and Simon's "super bill" clearly shows, Simon's (and Ms. Ferrel's) actual work performed for Appellants from November 30, 2017, through January 8, 2018, added up to **$33,811.25**. *AA, Vols. 1 & 2 000159-000163; 000263-000265; 000428-000438.*

Finally, quantum meruit is an equitable remedy that requires clean hands to obtain its benefits. *In re De Laurentis Entertainment Group*, 983 F.3d 1269, 1272

(1992); *Truck Ins. Exchange v. Palmer*, 124 Nev. 59 (2008). Here, Simon's hands are anything but clean. *AA Vol. 2 000277-000303*. He, the lawyer, is the one who agreed to represent Appellants at the rate of $550 per hour yet failed to reduce the terms of the fee agreement to writing. *AA, Vol. 2 000290:3-18;000296-000301; 000359:15.* He's the one who billed Appellants $550 per hour for nearly 18 months and collected over $367,606 in fees over that time. *Id., at 000290:3-18; 000296-000301*. He's the one who wanted a higher fee, or a bonus, when the value of the case went up. *Id.*

He's the one who pressured Appellants to agree to a higher fee, or bonus. *Id.* He's the one who told Appellants that he was losing money on their case and couldn't afford to keep working, thus causing deep concern with Appellants that he would, in essence, quit their case before it had concluded. *Id.* He's the one who encouraged Appellants to seek the advice of independent counsel. *AA, Vol. 3 000515-2:22-25; 516:1-7.* He's the one who, despite not having a written contingency fee agreement, served an amended attorney's lien in an amount that's awfully close to 40% (aka a contingency fee) of the Viking settlement.

He's also the one who had weeks to prepare and submit a "super bill" in an amount that measured up to the amount of his lien, yet the amount of his "super bill" ($692,120) fell far short of that lien ($1,977,843.80). *AA, Vols. 1 & 2 000159-000163; 000263-000265*. Despite knowing that he can't have a contingency fee,

and despite the fact that the amount of his "super bill" had come up WAY short, it was Simon who refused, and continues to refuse, to release Appellants' money, even after his lien was adjudicated. With his egregious conduct, with his invited errors, (*see Carstarphen,* 270 P.3d 1251, 128 Nev. 55, 66 (2012)), and with his unclean hands, (*see In re De Laurentis Entertainment Group*, 983 F.3d 1269, 1272 (1992); *Truck Ins. Exchange v. Palmer*, 124 Nev. 59 (2008)), Simon is not entitled to the equitable remedy of quantum meruit, let alone a huge bonus.

VII. ARGUMENTS:

A. The District Court Erred When It Dismissed Appellants' Amended Complaint

A district court's order granting a motion to dismiss for failure to state a claim upon which relief can be granted faces a rigorous standard of review on appeal because the Appellate Court must construe the pleadings liberally, accept all factual allegations in the complaint as true, and draw all inferences in its favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 14 P.3d 1275 (2000), citing Nev. Rules Civ. Proc. Rule 12(b)(5). Further, the complaint should be dismissed "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *Pankopf v.*

Peterson, 124 Nev. 43, 175 P.3d 910 (2008). As set forth in NRCP 8(a)(1), Nevada is a notice-pleading jurisdiction that merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief."

Upon reviewing the District Court's decision to dismiss *de novo,* this Court should reverse the District Court's ruling, as the District Court clearly applied the wrong standard when analyzing Appellants' Amended Complaint. In their Amended Complaint, Appellants included twenty (20) detailed paragraphs outlining Simon's words and deeds supporting each of their claims for relief. *AA, Vol. 2 000305-000316.* Appellants left no doubt as to the basis for their claims, who and what they're against, and why they are making them. Certainly, there could have been no reasonable dispute that Appellants met that minimum standard.

The Amended Complaint alleged that a fee agreement was reached between the parties at the beginning of the attorney/client relationship; that the agreement provided for Simon to be paid $550 per hour for his services; that Simon billed $550 per hour in four invoices for his services; that the Edgeworth's paid Simon's four invoices in full; that Simon demanded far more from the Edgeworth's than the $550 per hour that the contract provided for; and, that Simon breached the contract when he demanded a bonus from the Edgeworth's that totaled close to 40% of a financial settlement, then liened the file when the Edgeworth's wouldn't agree to modify the contract. *Id.*

The District Court erred when it failed to take the Amended Complaint on its face, failed to take the allegations therein as true, and instead relied on external evidence in adopting Simon's version of the facts. *AA, Vol. 2 000376-000384*. The District Court's misuse of the proper standard and this external proof and evidence contravened Nevada law. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 14 P.3d 1275 (2000), citing Nev. Rules Civ. Proc. Rule 12(b)(5). As such, Appellants respectfully ask this Court to reverse the District Court's dismissal of the Amended Complaint.

B. The District Court Abused Its Discretion When It Awarded $50,000 in Attorney's Fees and $5,000 in Costs

Pursuant to NRS 18.010, district courts are to interpret the provisions of the statute to award fees "in all appropriate situations,"—that is, *appropriate* situations. NRS 18.010(2)(b). Fees under this section are limited to where a district 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..." NRS 18.010(2)(b). And the district court's award of fees is to be tempered by "reason and fairness." *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006); *Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 864-865 (2005); *University of Nevada v. Tarkanian,* 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994). District courts are further

limited: when determining the reasonable value of an attorney's services, the court is to consider the factors under *Brunzell v. Golden Gate National Bank*, 455 P.2d 31, 33-34 (1969). *Hornwood v. Smith's Food King No. 1,* 807 P2d 209 (1991); *Schouweiler v. Yancey Co.*, 101 Nev. 827, 834 (1985).

In fact, this Court has held that it is an abuse of discretion when district courts fail to consider the *Brunzell* factors when awarding fees. *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 427-28, (2006) (Finding that a district court's mere observation of certain *Brunzell* elements and mention of the factors is insufficient: the district court must actually consider the *Brunzell* factors when determining the amount of fees to award under NRS 40.655). Further, a district court's award of costs *must* be reasonable. NRS 18.005; *U.S. Design & Const. Corp. v. International Broth. of Elec. Workers*, 118 Nev. 458, 463(2002).

Here, the District Court's $50,000 award of fees was an abuse of discretion as it was predicated on a clearly errant finding that the Appellants' conversion claim was not maintained on reasonable grounds, was unreasonable, and was made without consideration of the *Brunzell* factors. Further, the District Court's award of $5,000 in Costs was unreasonable, as it was made with absolutely no explanation or justification for the amount awarded. As such, this Court should reverse the District Court's $50,000 fee award and $5,000 in costs.

C. The District Court Abused Its Discretion When It Awarded $200,000 in Attorney's Fees Under Quantum Meruit

A district court's determination of the amount of attorney's fees is to be tempered by "reason and fairness." *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006); *Shuette v. Beazer Homes Holdings Corp.,* 121 Nev. 837, 864-865 (2005); *University of Nevada v. Tarkanian,* 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994). Here, the District Court's award of $200,000 in attorney's fee based on quantum meruit was predicated on the clearly erroneous determination that Appellants constructively discharged Simon. *AA, Vol. 2 000360:23-28, 361-364:1-2.* That finding was improper and an abuse of discretion, as the District Court based its determination on a clearly erroneous factual determination which was unsupported by substantial evidence. *MB Am., Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (2016).

For example, Simon conceded that: 1.) He never withdrew from representing Appellants; 2.) Simon *himself* encouraged Appellants to speak with other attorneys; 3.) Simon spoke with an attorney either before or after he met with Appellants on November 17, 2017; 4.) Mr. Vannah instructed Simon that Appellants needed Simon to continue working on the case through its conclusion; and, 5.) Simon continued to work on behalf of Appellants and billed them an additional $33,811.25 in fees from November 30, 2017, through January 8, 2018. *AA Vols 1 & 2 000159-000163; 000263-000265.*

Under no logic or reason whatsoever could Simon's and Appellants' relationship be viewed as having "broken down" to the point where Simon was "prevented from effectively representing" them. *See Rosenberg v. Calderon Automation, Inc.*, 1986 WL 1290 (Court of Appeals, Ohio 6th Dist. 1986). He DID continue to represent Appellants effectively and billed them accordingly and handsomely...at $550 per hour. *AA Vols. 1 & 2 000373-000374; 000159-163; 000263-000265.* The District Court's quantum meruit analysis, which stemmed from an erroneous finding of constructive discharge, was unwarranted, an abuse of discretion, and should be reversed.

An award of fees must also be tempered by "reason and fairness." *University of Nevada v. Tarkanian,* 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994). This $200,000 award is not fair or reasonable under any circumstances. The District Court had already twice looked to Simon's invoices and utilized $550 per hour to determine Simon's reasonable fee (the four original invoices and from September 20 to November 29, 2017). *AA Vol. 2 000353-000374.* For the adjudication for any fee from November 30, 2017, through January 8, 2018, the only fair and proper analysis would consistently focus on the *actual work performed and billed* by Simon (and Ms. Ferrel). Yet, as one can clearly see, the District Court didn't even glance in that direction. *Id., 000353-000374.*

The District Court was also silent on the *timing* of Simon's labor. *AA Vol. 2 000370-000372.* The District Court must describe the work Simon performed following the alleged discharge, and that didn't happen. *AA Vol. 2 000371.* Rather, the "ultimate result" referenced (the litigation and settlements) had already been completed, or either agreed to in principle, before any alleged constructive discharge, or merely required ministerial tasks to complete. *Id., 000356:22-24, 000357:12-24.*

In the section of the Order labelled "Quantum Meruit," there is also no evidence offered or reasonable basis given that Simon did anything of value for the case after November 29, 2017, to justify an additional $200,000 "fee" for five weeks of work. Clearly, the District Court's award of fees was not tempered by "reason and fairness." Instead, it was a gift to one with unclean hands.

The fair, reasonable, and appropriate amount of Simon's attorney's lien in this case from November 30, 2017, through January 8, 2018, should be calculated in a consistent manner ($550 per hour worked/billed) as previously found from May 27, 2016, through November 29, 2017. *Id., 000353-000374.* Instead, the District Court came up with the $200,000 number seemingly out of nowhere, rather than awarding the $33,811.25 in fees for the actual work performed during that time frame. *AA Vols. 1 & 2 000373-000374; 000159-163; 000263-000265.* Therefore, this Court should reverse the $200,000 fee/bonus award.

VIII. CONCLUSION/ RELIEF SOUGHT:

The District Court committed clear and reversible error when it applied the wrong standard in considering Simon's Motion to Dismiss. When it should have considered all of Appellants' allegations and inferences as true, the District Court did just the opposite and believed Simon.

The District Court also committed clear and reversible error and abused its discretion in awarding Simon an additional $50,000 in fees and $5,000 in costs while dismissing Appellants' Amended Complaint, a pleading that never should have been dismissed to begin with. Even so, these fees were awarded without the requisite analysis that Nevada law requires.

The District Court also committed clear and reversible error and abused its discretion in awarding Simon an additional $200,000 in fees under the guise of the equitable remedy of quantum meruit and its plus one, an attorney's "charging" lien. The facts are clear that Simon was never discharged and never acted as such, at least through the conclusion of the flood litigation. Instead, he continued to work the case through January 8, 2018, continued to represent Appellants, completed the ministerial work to close out the flood case, and billed for all his efforts.

Plus, quantum meruit is an equitable remedy and equity requires clean hands. *In re De Laurentis Entertainment Group*, 983 F.3d 1269, 1272 (1992);

Truck Ins. Exchange v. Palmer, 124 Nev. 59 (2008). As argued throughout, Simon's hands are filthy, as The Simon Rule (and conduct) clearly demonstrates.

Appellants respectfully request this Court to: 1.) REVERSE the District Court's decisions to Dismiss Appellants' Amended Complaint issued on November 19, 2018, and allow Appellants to move on with discovery and jury trial; 2.) REVERSE the District Court's award of $50,000 in fees and $5,000 in costs in its Decision and Order Granting in Part and Denying in Part Simon's Motion for Attorney's Fees and Costs from February 8, 2019; and, 3.) REVERSE the District Court's award of fees of $200,000 in its Decision and Order on Motion to Adjudicate Attorney's Lien on November 19, 2018.

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 Word 2019, in 14 point Times New Roman font; and, complies with NRAP 32(a)(7)(c), in not exceeding 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 Rules of Appellate Procedure, and in particular NRAP 28(e), which

requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the reporter's 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 this 8th day of August, 2019.

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CERTIFICATE OF SERVICE

Pursuant to the provisions of NRAP, I certify that on the 8th day of August, 2019, I served **APPELLANTS' OPENING BRIEF** on all parties to this action, electronically, as follows:

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