IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Appellants/Cross-Respondents,

vs.

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

Respondents/Cross-Appellants.

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC,

Appellants,

vs.

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

Respondents.

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

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 15 2020 02:04 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 77678

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

Consolidated with:
Supreme Court No. 78176

Consolidated with:
Supreme Court No. 79821

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

Respondents,

and

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC,

Real Parties in Interest.

ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL

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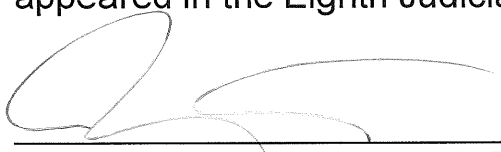
NRAP 26.1 DISCLOSURE

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

No such corporations involved.

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



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I. Introduction/Statement of the Case

Respondent/Cross Appellant, collectively referred to as Simon, responds to Appellants, collectively the Edgeworths, appeal of an order adjudicating an attorney lien; an order dismissing a claim precluded collateral action; and, and an order sanctioning the Edgeworths for filing and maintaining a frivolous conversion action (when the disputed funds are safekept in a joint account). In the cross appeal, Simon seeks relief from an order denying an Anti-SLAPP motion to dismiss as moot. Simon also seeks limited relief from the adjudication order in the consolidated writ proceeding as described in the writ petition.

This case is about an attorney client dispute over the amount of a reasonable fee; a dispute which was resolved by the District Court's adjudication of a statutory lien. On appeal, the role of this Court seems straightforward, confirmation that the adjudication findings of the District Court were within its discretion. Unfortunately, the opening brief burdened this Court with a shotgun approach to the issues; unsupported strident and reckless comments about the District Court and Simon; unsupported and inaccurate statements of law, fact and citations; a markedly incomplete appendix; and, odd briefing about Plan Zombie and the Simon Rule, which are classic straw man arguments mixed with an appeal to emotion.

Simon will not wholly ignore the approach used by the Edgeworths, however, the goal of this brief is to cut through the din and provide an accurate statement of facts and analysis of the issues presented on appeal.

II. Statement of Issues

A. The District Court acted within its discretion when it found the Simon attorney lien was perfected and enforceable. Simon followed the lien statute; and, because the Edgeworths did not contest perfection of the lien below, they cannot contest the lien on appeal.

B. The District Court acted within its discretion by holding an evidentiary hearing to adjudicate the attorney lien. The lien statute mandates adjudication by the District Court, NRCP 43(c) permits a court to hold an evidentiary hearing, and the Edgeworths do not argue on appeal that the Court erred by adjudicating the Simon lien.

C. The District Court acted within its discretion when it entered findings on the existence of a fee contract and on whether Simon was constructively discharged. The lien statute contemplates judicial consideration of an enforceable fee contract.

D. The District Court acted within its discretion when it found that Simon and the Edgeworths *did not have an express oral fee contract*. The finding was supported by substantial evidence, including contemporaneous

writings by Brain Edgeworth and Simon, the oral testimony of Simon and the lack of credibility of the Edgeworths' testimony.

E. The District Court acted within its discretion when it found an implied fee contract between Simon and the Edgeworths. The finding was supported by substantial evidence, the four partial Simon bills that were sent and paid over the 19-month long representation.

F. The District Court acted within its discretion when it found that Simon had been constructively discharged by the Edgeworths. The finding was supported by substantial evidence that the attorney client relationship had broken down, including the Edgeworths cutting off communication, hiring other counsel, accusing Simon of extortion, intimidation and theft, and suing Simon for conversion.

G. The District Court acted within its discretion when it found $200,000.00 was a reasonable fee for work done after November 29, 2017. The Court wrote a four-page *Brunzell* analysis in reaching the fee under quantum meruit which was supported by substantial evidence including that Simon had obtained a "phenomenal result for the Edgeworths" and that Simon protected the interests of his clients by obtaining a higher settlement amount from Lange even after Simon had been constructively discharged by the Edgeworths.

H. The District Court acted within its discretion under NRCP 12(d) when matters outside of the pleadings were considered in dismissing the Edgeworth complaint. Because the District Court properly found that there was no express oral fee contract, that the Edgeworths were not due the full settlement, and that Simon did not convert any funds, the Court correctly precluded the Edgeworths' second bid for a different outcome.

I. The District Court correctly found that there was no good faith basis to bring a claim of conversion against Simon. The Edgeworths did not provide cogent argument to the District Court in support of the conversion claim and do not do so on appeal. The District Court found the Simon lien was enforceable, that the Edgeworths owed Simon money, and that the disputed money is safekept in a joint account opened under an agreement of the parties. The conversion claim was frivolous and called for a sanction.

J. The District Court acted within its discretion when it used the $5,000.00 cost of expert David Clark as a measure of the sanction. Former Bar Counsel David Clark opined that Simon's use of the statutory lien was ethical and did not convert disputed funds.

K. The District Court could have followed a better course by referencing the *Brunzell* analysis submitted by Simon in support of the

sanction fee award, but it is not reversible error. However, to the extent that the course followed by the Court could be held as error, the error was not preserved for an appeal because the Edgeworths did not alert the District Court to the existence of the purported mistake under NRCP 52.

L. The District Court abused its discretion when it denied the Simon Anti-SLAPP motion as moot. The Anti-SLAPP motion is made on different grounds and has different consequences from the Simon motion to dismiss, therefore, under the law, the motion was not mooted by the granting of the motion to dismiss.

III. Statement of Facts

Angela and Brian Edgeworth are both sophisticated international business owners and managers.[1] The Edgeworths have experience hiring and paying lawyers.[2] The Edgeworths are not typical lay clients.

Angela Edgeworth majored in Business Administration and Actuarial Science.[3] Angela has been an entrepreneur for over 20 years. Angela started, built up and sold a cosmetics company; Angela is the co-founder and President of Pediped Footwear, a successful children's footwear

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[1] *E.g.*, VIII-AA01891
[2] *E.g.*, V-AA01167:12-AA01169:18
[3] VII-AA01732:11-14

company with an international footprint; and, Angela is active with the family business, American Grating.[4]

Brian Edgeworth has a Harvard MBA.[5] Brian Edgeworth traded commodity derivatives for Enron and has worked as a Wallstreet trader.[6] Brian Edgeworth helps run Pediped, manages American Grating, which is a fiberglass reinforced plastic manufacturer with an international footprint, and works in a crypto currency operation.[7]

Angela Edgeworth met Eleyna Simon when their children attended school together some 15 years ago.[8] The families were close, they vacationed together, they helped each other through family crises, including the death of a loved one, and Angela thought of Eleyna as one of her closest friends.[9]

In April 2016, a premature fire sprinkler activation caused about $500,000.00 in property damage to a speculation home being built by the Edgeworths.[10] The fire sprinkler was manufactured by Viking and was

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[4] VII-AA01732:15-AA01733:5
[5] V-AA01157:13-18
[6] V-AA01157:13-18
[7] V-AA01158:16-21
[8] VII-AA01743:11-16; IX-AA02175:9-14
[9] *Ibid*
[10] IX-AA02175:16-22; IX-AA02175:27-AA02176:4

installed by Lange Plumbing.[11] The Edgeworths did not carry insurance for the loss, and Viking and Lange denied responsibility.[12]

The Edgeworths turned for help to their family friend, Daniel Simon. The Edgeworths turned to Simon because other lawyers had asked for as much as a $50,000.00 retainer to work on the claim.[13] On May 27, 2016, Brian Edgeworth emailed that he did not want to pay a high attorney's fee so Simon agreed to help his close friends as a favor and send a few letters without an express fee agreement.[14] Simon agreed to help because he treated the Edgeworths like family.[15] Simon never asked for a retainer.[16]

Historically, Simon does contingency fee work.[17] Simon's expectation of a fee was always based on reasonableness. When Simon's role was to send a few letters, the anticipated reasonable fee was dinner on the Edgeworths.[18] Later, after thousands of hours of effective representation, the reasonable fee increased.

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[11] *Ibid*
[12] *Ibid*
[13] V-AA01020:13-14
[14] IX-AA02175:9-14; IX-AA02179:7; IX-AA02180:15-16; IX-AA02184:11-12
[15] VI-AA01464:15-20
[16] V-AA01021:24-1022:11
[17] V-AA01069:24-AA01070:4
[18] VI-AA01464:12-20

On June 5, 2016, Brian Edgeworth began arranging hard money loan(s) from friends and family.[19] The Edgeworths are wealthy and did not need a loan, but Brian thought it was a prudent business decision to take out high interest loan(s) which could be added to the claim.[20]

On June 5 & 10, 2016, Simon and Brian Edgeworth exchanged emails about the claim. There was no mention of fees.[21]

Simon's letters were not fruitful. On June 14, 2016, Simon filed a complaint against Viking and Lange Plumbing.[22] The case was complex,[23] with multiple parties, with negligence, contract and product liability claims, and construction, manufacturing, and fraud issues.[24]

The early case conference (ECC) was set in December 2016. Brian Edgeworth wanted to produce an attorney's bill to bolster the case against Lange.[25] Brian Edgeworth understood the contract with Lange obligated Lange to pursue a claim for a loss caused by a defective product which Lange installed.[26] Because of which, the contract provided for attorney's

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[19] I-AA00003-AA00004
[20] IV-AA000996-AA001000; V-AA001001-AA001004
[21] I-AA00003-AA00004
[22] IX-AA02175:25-AA02176:4
[23] IX-AA02175:15
[24] IX-AA02191:27-AA02192:8
[25] V-AA01011-AA01020
[26] IX-AA-02188:11-12

fees if Lange did not pursue a claim against Viking.[27] Thus, Edgeworth attorney's fees were an element of damage in the case against Lange and would not be fully known until the case against Viking resolved.[28]

On December 2, 2016, Simon sent a bill to the Edgeworths, half a year after retention.[29] The bill is not well crafted, dates are missing, time is not itemized, and the bill did not capture many day and night emails and calls from Brian Edgeworth.[30] Over the 19-month litigation, Simon sent three more incomplete bills.[31] It is a fair inference Brian Edgeworth knew the Simon bills were incomplete, because the bills did not include entries for his hundreds of emails and phone calls. As it was, Brian Edgeworth was happy receiving lower bills.[32] Simon also fronted substantial costs throughout the case.[33]

Simon aggressively worked the file.[34] The District Court found that Simon did a "tremendous amount of work"[35], which was impressive in

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[27] *Ibid*
[28] IX-AA02175:27-AA02176:4
[29] IX-AA02176:21-25
[30] I-AA00005-AA00008; V-AA01043-AA01044
[31] IX-AA02176:26-AA02177:14
[32] V-AA01235
[33] *See, e.g.*, V-AA01021:24-1022:11 & IXAA02190
[34] IX-AA02192:7-10
[35] IX-AA02177:19-21

quality and quantity.[36] Michael Nunez, a defense attorney in the case, testified Simon's work was extremely impressive.[37] Mr. Will Kemp, the renowned trial lawyer, reviewed the case file and testified that Simon's work and results were exceptional.[38] Mr. Kemp said he would not have taken the case and the Edgeworths were lucky Simon was their friend.[39]

On August 9, 2017, Simon and Brian Edgeworth discussed attorney's fees. Brian Edgeworth testified that as part of an attorney fee agreement, Brian wanted Simon *to give the Edgeworths* enough money to pay off a $300,000.00 loan taken from Angela's mother.[40] Brian also believed the more work Simon did, the less Simon should get paid.[41]

On August 22, 2017, Brian Edgeworth sent an email which read "contingency" in the topic line. In the body of the email Brian acknowledges there was no express fee contract and discussed as fee options a contingency, a hybrid, or an "hourly for the whole case".[42]

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[36] IX-AA02192:3-5
[37] IX-AA02191:19-25
[38] *Ibid*
[39] VII-AA01668:24-AA01669:17
[40] V-AA01234:17-AA01242:20; VI-AA01310:15-AA01311:25
[41] V-AA01238
[42] IX-AA-02176:5-18; IX-AA02180:15-AA02181:21

On August 23, 2017, Brian Edgeworth sent an email in which he bemoaned the fact that the defense had not made an offer and despaired of the likelihood of receiving a meaningful offer in the future.[43]

On August 29, 2017, Brian Edgeworth had to remind Simon to deposit an Edgeworth payment.[44]

On September 29, 2017, Brian Edgeworth was deposed by Viking and Lange.[45] During the deposition, Simon offered that all the attorney bills had been produced and Brian Edgeworth testified that fees were continuing to accrue.[46] Later, the Edgeworths would argue that Simon's comment meant that Simon had been paid in full and was owed nothing — while omitting Brian's testimony.[47]

On October 10, 2017, a mediation was held. The defense made a nominal offer.[48] Shortly after the mediation, Simon secured the exclusion of Viking's liability expert, an evidentiary hearing was set to resolve Simon's motion to strike Defendants' answers for discovery abuse, and depositions and dispositive motions were set.

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[43] V-AA01043-AA01044
[44] 1-AA000029
[45] 1-AA00115:12-23
[46] 1-AA00115:12-23
[47] *See, e.g.*, 1-AA000115; 1-AA000118
[48] V-AA01050

On November 10, 2017, a second mediation occurred after which mediator Floyd Hale issued a mediator's proposal for Viking to settle for $6,000,000.00.[49] Mr. Hale confirmed to Mr. Kemp that about $2,400,000.00 of the Viking proposed settlement was intended for attorney's fees.[50]

On November 15, 2017, Viking made a counter offer to the mediator's proposal which required confidentiality and a dismissal of Lange.[51] In the days following, Simon convinced Viking to drop both conditions.[52]

On November 17, 2017, Simon met with the Edgeworths. Simon discussed the case including the counter offer, the claim against Lange, upcoming hearings, the upcoming evidentiary hearing on discovery abuse, preparation for trial, and a reasonable fee.[53] The Edgeworths testified to a radically different meeting, which included intimidation by Simon (who is dwarfed in size by Brian who stands 6'4" and weights 280 lbs.[54]) and a threat to harm the case. The District Court *did not find* the Edgeworth version of the meeting had occurred.[55] Instead, the Court found Simon had

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[49] I-AA000042
[50] VII-AA-01681-AA01682
[51] IX-AA02177:22-24
[52] IX-AA02182:25-AA02183:16
[53] VI-AA01469:12-1480:3
[54] V-AA01056
[55] IX-AA02174-AA02196; IX-AA02178:4-5

always competently represented the Edgeworths; noting that "recognition is due to Mr. Simon" for protecting Edgeworth interests even after Vannah was hired.[56]

On November 17, 22, 23 & 25, Angela Edgeworth and Eleyna Simon exchanged friendly text messages, holiday greetings and discussed the case. There is no hint of a mention or anguish over the alleged extortion, bullying and threats of Simon.[57] Brian Edgeworth did not mention bad behavior by Simon either.[58]

On about November 21, 2017, Brian Edgeworth "insisted" Simon provide a written fee proposal.[59] Shortly following, the Edgeworths stopped all communication with Simon.[60]

On November 27, 2017, Simon provided a written fee proposal.[61] Simon advised the Edgeworths to talk to other attorneys about the fee proposal.[62]

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[56] IX-AA02192:19-AA02193:1
[57] I-AA000043-48; 1-AA000056-58
[58] V-AA01056; V-AA01142-AA01143
[59] IV-AA000983; V-AA01059
[60] IX-AA02178:10-11
[61] IX-AA02178:6-8; V-AA01244:2-5
[62] IX-AA02184:23-24

On November 29, 2017, the Edgeworths hired Vannah "for representation on the Viking settlement agreement and the Lange claims."[63]

On November 30, 2017, Vannah faxed Simon a letter signed by Edgeworth stating that Vannah had been hired to work on the Viking case.[64] On reading the letter, Simon believed that he had been fired.[65]

On November 30, 2017, Vannah instructed Simon to settle with Lange for $25,000.00.[66] Simon knew the Lange case was worth substantially more. Despite being terminated, Simon protected his former clients and was able to obtain a $100,000.00 offer from Lange.[67]

On December 1, 2017, the Edgeworths, advised by Vannah, signed a release with Viking for a promised payment of $6,000,000.00[68] The release listed Vannah as attorney for the Edgeworths.[69]

On December 1, 2017, Simon served an attorney lien for outstanding costs and a reasonable fee.[70]

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[63] IX-AA02178:9-11; IX-AA02182:10-24
[64] IX-AA02178:12-19
[65] VI-AA01499:10-15
[66] VII-AA01571:11-15
[67] IX-AA02179:8-9
[68] I-AA00071-AA00079
[69] I-AA00071-AA00079
[70] IX-AA02178:24-AA02179:1

On December 7, 2017, advised by Vannah, the Edgeworths signed a consent to settle with Lange for $100,000.00[71] Vanna's advice and the Edgeworths' decision to settle at $100,000.00 ran against the advice of Simon, because Simon knew the case was worth much more.[72]

On December 23, 2017, while trying to arrange endorsement and deposit of Viking settlement checks, Vannah sent an email accusing Simon of an intent to steal the settlement.[73] Vannah later clarified that the accusation came from the Edgeworths.[74]

On December 28, 2017, Simon and Vannah agreed to deposit settlement checks into a joint interest-bearing trust account, which required both Vannah and Simon's signatures for a transaction, and with all interest going to the Edgeworths.[75] Vannah later described the settlement funds agreement to the District Court as follows:

> MR. VANNAH: In other words, he chose a number that—in other words we both agreed that, look, here's the deal. Odds you can't take and keep the client's money, which is about 4 million. So I asked Mr. Simon to come up with a number that would be the largest number that he would be asking for. That money is still in the trust account.[76]

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[71] IX-AA02179:8-9
[72] IX-AA02183:17-AA02184:5
[73] IX-AA02184:6-9
[74] I-AA00099
[75] IX-AA02203:6-19
[76] VIII-AA01874-AA01875

On January 2, 2018, Simon e-served an amended attorney lien with the largest number he would be asking for.[77]

On January 4, 2018, the Edgeworths sued Simon alleging Simon converted the Viking settlement by using an attorney lien.[78] *Angela Edgeworth testified that the Edgeworths chose to sue Simon for conversion, before the settlement was even deposited, to "punish him".*[79] Brian Edgeworth testified they sued because Simon used an attorney lien.[80]

The complaint alleges:

- An express oral fee contract was formed at the "outset of the attorney client relationship".[81]
- That Simon had been paid in full.[82]
- That the Edgeworths are due all the settlement money.[83]

The Edgeworths sought declaratory relief in the second cause of action and requested a judgment from the District Court that:

> [T]he CONTRACT has been fully satisfied by PLAINTIFFS, that SIMON is in material breach of the CONTRACT, and that PLAINTIFFS are due the full amount of the settlement proceeds.[84]

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[77] I-AA000104-AA000110
[78] IX-AA02179:10-12
[79] VIII-AA01873:10-21
[80] V-AA01121-AA01122
[81] I-AA000113:16-19
[82] *See e.g.* I-AA000118:1-8; I-AA000119:3-9
[83] *See e.g.* I-AA000115:26-AA000116:3; I-AA000117:1-3; I-AA000118:9-17; I-AA000119:1-9
[84] I-AA000118:9-17

In stark contrast to the complaint, Brian Edgeworth testified he always knew Simon was owed money;[85] further, Vannah told the District Court that it has always been the Edgeworth position that they owed Simon money and, "We owe him money; we're going to have you make that decision".[86]

On January 4, 2018, Vannah sent a letter to Bank of Nevada explaining that Simon and the Edgeworths had agreed to deposit the settlement monies in a joint account pending resolution of the Simon lien.[87]

On January 8, 2018, the settlement checks were endorsed at the bank and deposited into the joint account.[88]

On January 9, 2018, the conversion complaint was served; and, Vannah threatened Simon not to withdraw.[89]

On January 18, 2018, the Edgeworths received $**3,950,561.27** in undisputed funds, which they agree made them more than whole on their $500,000.00 property loss claim.[90]

On January 24, 2018, Simon moved to adjudicate the attorney lien. The Edgeworths opposed adjudication claiming the conversion complaint

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[85] V-AA01057
[86] V-AA01120-AA01121
[87] I-AA000121
[88] IX-AA02203:15-19
[89] IX-AA02184:6-14
[90] I-AA000125; VIII-AA01899:15-24

blocked adjudication. The District Court granted the motion and held a five-day evidentiary hearing to adjudicate the lien.

On August 27, 2018 the evidentiary hearing began. Simon sought a reasonable fee based on the market rate under quantum meruit.[91] Will Kemp was recognized by the Court as an expert in calculation of a reasonable attorney's fee in a product case. Mr. Kemp opined the total reasonable fee due Simon was $2,440,000.00 based on the *Brunzell* factors and the market rate.[92]

For the hearing, Simon demonstrated the massive size of the file[93] and provided what was called the superbill which documented the hours worked on the case. Simon (and his counsel) submitted the superbill because they understood while Courts have wide discretion in the method of calculation of a fee, Courts can consult hours worked when examining reasonableness.[94] While extensive, the superbill conservatively demonstrated hours, Simon does not keep contemporaneous hours so the

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[91] NRS 18.015(2) ("In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.")
[92] IIIAA00546-553 & AA01664-1712
[93] AAVI01485-1486
[94] *See, e.g., Golightly v. Gassner*, 125 Nev. 1039, 281 P.3d 1176 (2009) (unpublished). *Golightly* is not cited as authority; the case is cited only in support of the premise that a District Court may want to see hours when adjudicating an attorney lien.

hours worked was based on file review and only verifiable tangible events were logged.[95]

On October 11, 2018, the District Court issued findings granting a Simon motion to dismiss the conversion complaint, denied the Simon Anti-SLAPP motion to dismiss as moot, and issued its own findings, decision and order adjudicating the lien.[96]

On October 29, 2018, Simon moved for relief under Rule 52.[97] The Edgeworths opposed the motion and did not request their own relief.

On November 19, 2018, the Court issued amended findings adjudicating the lien.[98] Importantly, the Court found:

- There was no express fee contract, contrary to the Edgeworths' direct testimony.[99]
- The Edgeworths constructively discharged Simon on November 29, 2017.[100]
- The Simon lien was valid and enforceable.[101]
- The Edgeworths owed Simon money for fees and costs.[102]

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95 VI-AA01375;15-AA01376:8; VI-AA01452:14-AA01454:11
96 IX-AA02026-AA02051
97 IX-AA02071-AA02142
98 IX-AA-2174-AA02196
99 IX-AA02180:15-AA02181:12
100 IX-AA02182:6-7
101 IX-AA02180:1-7
102 IX-AA02186:7-8

On November 19, the Court issued amended findings dismissing the conversion complaint.[103] The Court made extensive findings of fact based on evidence adduced at the evidentiary hearing, and then dismissed the complaint based on the factual findings as permitted by NRCP 12(d).

On December 7, 2018, Simon moved for fees and costs because the Edgeworth conversion complaint was not well grounded in fact or law.[104] On February 8, 2018, the motion was granted, and the Court levied a sanction of $50,000.00 in fees and $5,000.00 in costs.[105]

IV. Standard of Review

Findings of fact are reviewed for an abuse of discretion. *NOLM, LLC v. County of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660-661 (2004). A finding must be upheld if it is based on substantial evidence or is not clearly erroneous. *Gibellini v. Klindt*, 110 Nev. 201, 1204, 885 P.2d 540, 542 (1994). Substantial evidence is evidence such that "a reasonable mind might accept as adequate to support a conclusion." *State, Emp. Security Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

Adjudication of an attorney lien is reviewed for an abuse of discretion. *Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 80 n.21, 157

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[103] IX-AA02197-AA02206
[104] IX-AA02207-AA02250; X-AA02251-AA02366
[105] X-AA0469-AA02470; X-AA02471-AA02474

P.3d 704, 709 n.21 (2007). A District Court decision must be upheld unless it is based on a clearly erroneous factual finding, *NOLM*, 120 Nev. at 739, 100 P.3d at 660-61, or ignores controlling law. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

An award of attorney's fees is reviewed for an abuse of discretion. *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 1214, 197 P.3d 1051, 1215 (2008).

When matters outside the pleadings are considered in ruling on a motion to dismiss, then the motion is treated as one for summary judgment. NRCP 12(d). A summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Under *de novo* review the District Court's conclusions are not given deference. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

An attorney's fee sanction is reviewed for an abuse of discretion. *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018).

A finding on an Anti-SLAPP motion is reviewed for an abuse of discretion. *Shapiro v. Welt*, 389 P.3d 262, 266, (2017).

V. Summary of Argument

Simon did fantastic work for his friends and obtained a striking result; then the issue of money intruded, and the attorney client relationship

disintegrated. Because Simon was owed fees and costs, Simon followed the law and served an attorney lien, for which he was sued for conversion.

The District Court had the jurisdiction and the statutory mandate to adjudicate Simon's lien. The Court's adjudication findings are based on substantial evidence garnered during a five-day evidentiary hearing and must be upheld. The fact that the Court did not believe the Edgeworths and the findings favor Simon is not grounds for an appeal.

The adjudication findings gut the factual allegations made in the Edgeworth conversion complaint and compel its dismissal. The District Court was not obligated to ignore its own findings when considering the motion to dismiss the conversion complaint. The Court acted according to law, NRCP 12(d), when it based dismissal on its own findings.

The law and the findings also tear away any pretense of a good faith basis for filing, or maintaining, a conversion action. There is no question that the Simon lien complied with the statute, that Simon was owed fees and costs, and that the disputed funds were safekept: How can these facts possibly be viewed as satisfying the elements for conversion?

Lastly, while there are similarities, the Anti-SLAPP statute is different enough to require a substantive ruling on the Simon Anti-SLAPP motion under the mootness doctrine.

VI. Argument

A. The District Court acted within its discretion when it found the Simon attorney lien was perfected and enforceable.

The Edgeworths label the perfected lien as "Simon's fugitive lien".[106] However, the District Court found the attorney lien was properly served pursuant to NRS 18.015(1)(a), that the lien was perfected before settlement monies were deposited, and that the lien "complies with NRS 18.015(a)(a), and was "enforceable in form".[107] The findings were based on substantial evidence including oral testimony and the certified mailing returns.[108] Also, the Edgeworths did not contest perfection of the lien before the District Court, and there is no citation to the record in support of the fugitive label.

The Edgeworths also claim that the Simon lien must be for an "*agreed upon*" (italics in original) amount and cite subsection (2) of the lien statute.[109] However, subsection (2) allows a lien to be for a reasonable fee "in the absence of an agreement", which is the theory Simon presented.[110]

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[106] Opening Brief at p.17
[107] IX-AA02180:1-7
[108] I-AA 00068-70 & 108-110
[109] Opening Brief at p.17
[110] NRS 18.015(2). A lien pursuant to subsection 1 is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.

The District Court did not err in finding the Simon attorney lien was perfected and enforceable.

B. The District Court acted within its discretion by holding an evidentiary hearing to adjudicate the attorney lien.

The District Court found it had jurisdiction over the Simon lien and was obligated to adjudicate the lien pursuant to NRS 18.015.[111] In order to adjudicate the lien, the District Court set an evidentiary hearing. The Edgeworths objected to the evidentiary hearing below, but the Edgeworths do not raise the objection on appeal. Accordingly, there is no question that the evidentiary hearing was properly held pursuant to NRCP 43(c).[112]

C. The District Court acted within its discretion when it entered findings on the existence of a fee contract and on whether Simon was constructively discharged.

The District Court was within its discretion when the Court heard evidence and issued findings on the existence of a fee contract and whether Simon was discharged. Pursuant to NRS 18.015(2), the terms of a fee contract and whether a fee contract was terminated by the client's discharge of the lawyer are matters of interest. The Edgeworths impliedly agree, because they do not argue that entering findings on the existence of

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[111] IX-AA02180:8-12

[112] NRCP 43(c): When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

a fee contract and/or constructive discharge of Simon was error, they merely disagree with the result.

D. The District Court acted within its discretion when it found that Simon and the Edgeworths *did not have an express oral fee contract.*

The Edgeworths appeal the District Court's finding that an oral contract was not formed in May or June of 2017. The Edgeworths' appendix is markedly inadequate on this issue; the appendix is closely edited to only provide excerpts of the hearing transcript which support the Edgeworth narrative. Under NRAP 30(g)(2)[113], the appendix must include the record which supports the Court's findings and Simon's arguments.

An express oral contract may only be formed when all material terms are agreed upon. *Loma Linda Univ., v. Eckenweiler*, 86 Nev. 381, 384, 469 P.2d 54, 56 (1970).

When sitting as a fact finder, it is the job of the District Court to choose between conflicting evidence. *Savini Const., v. A&K Earthmovers*, 88 Nev. 5, 492 P2d 125 (1972). It is also the District Court's prerogative to

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[113] NRAP 30(g)(2) If an appellant's appendix is so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix, or without the court's independent examination of portions of the original record which should have been in the appellant's appendix, the court may impose monetary sanctions.

assess credibility. *Beverly Enterprises v. Globe Land, Corp.*, 90 Nev. 363, 526 P.2d 1179 (1974). The Supreme Court does not reassess conflicting evidence or credibility. *Sierra Clark Ranch v. J.I. Case*, 97 Nev. 457, 634 P.2d 458 (1981).

The finding of no express oral fee contract was supported by substantial evidence and must be upheld. The District Court quoted Brian Edgeworth's own words in his contingency email of August 22, 2017, as evidence for finding that an express oral fee contract was not formed[114], as well as, uncertain testimony about contract formation. The contingency email, and Simon's email of May 27, 2016,[115] are substantial evidence that an express oral fee contract was not formed in May or June of 2016.

Credibility is also at play. The Edgeworth complaints and Brian Edgeworth's affidavits allege an oral contract was formed at the outset of the attorney client relationship.[116] When faced with the May 27 Simon email deferring on a fee discussion at the outset of the relationship, Brian Edgeworth changed the story and testified that the oral contract was

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[114] IX-AA02180:26-AA02181:8
[115] I-AA00001-AA00002
[116] I-AA-00113 at ¶9, III-AA-00658 at ¶6, 678 at ¶6 & 690 at ¶9.

formed on June 10. Brian Edgeworth agreed there were no emails or documents supporting his changed testimony.[117]

The Edgeworth brief forthrightly concedes, six times, that the District Court did not believe the Edgeworths.[118] Disbelieving the Edgeworths and believing Simon is the right of the District Court; and, the disbelief must stand because the disbelief is based on substantial evidence.

There was substantial evidence that the June 10th testimony was not believable. For example:

- The June 10th phone call oral contract formation claim was not made in three earlier affidavits or the complaints — or in the Edgeworth evidentiary hearing opening statement.[119]
- Despite the hundreds of emails between Simon and Brian Edgeworth, the alleged oral contract formed June 10 is not mentioned once, including emails exchanged on June 10th.[120]
- The contingency email in August 2017 does not comment on the alleged express oral contract.[121]

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[117] IV-AA00959-964 & V-AA01110-1117
[118] Opening Brief at pp. 11,12,15,18, & 28
[119] IV-AA00964:11-16
[120] I-AA00004
[121] I-AA00027

In general, the Edgeworths were not believable. For example:

- The Edgeworths sued Simon alleging Simon was not owed money, when Brian Edgeworth and Vannah both told the Court Simon was owed costs and fees.[122]
- The Edgeworths allege Simon converted the settlement, when the disputed funds are safekept in a joint account earning the Edgeworths interest.
- The Edgeworths allege Simon is still their attorney,[123] even after suing Simon for conversion and seeking punitive damages.[124]
- In affidavits to the Court, Brian Edgeworth inflated what he paid Simon in fees by about two hundred thousand dollars.[125]
- In his first affidavit to the Court, Brian Edgeworth was not truthful about when settlement offers were received relative to when the contingency email was sent.[126]

On appeal, the Edgeworths contest the District Court's findings by repeating their own narrative. However, the Edgeworth story is irrelevant, what matters is whether the District Court's finding was based on

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[122] *Compare, e.g.*, I-AA000118:9-17, with V-AA01057 & V-AA01120-AA01121
[123] IV-AA00917
[124] I-AA00011-AA000120; III-AA000688-AA000699
[125] IV-AA000979-AA000982

substantial evidence. Because the finding that no express oral contract was formed between Simon and the Edgeworths is based on substantial evidence, such as Brian Edgeworth's own emails and lack of credibility, the finding cannot be overturned on appeal.

E. The District Court acted within its discretion when it found an implied fee contract between Simon and the Edgeworths.

The District Court found an implied contract with a payment term of $550.00 an hour for Simon. On appeal, Simon acknowledges that the bills sent, the first being mailed on December 2, 2016, some 6 months after retention, may serve as substantial evidence of an implied contract such that the finding cannot be overturned on appeal. However, because the Edgeworths discharged Simon, the implied contract does not control the question of a reasonable fee. In the absence of a contract the fee is left to quantum meruit. NRS 18.015(2).

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[126] V-AA01007-AA01010; V-AA01044

F. The District Court acted within its discretion when it found that Simon had been constructively discharged by the Edgeworths.

The Edgeworths argue the District Court erred when it found that the Edgeworths constructively discharged Simon on November 29, 2017. The Edgeworths' appendix is inadequate on this issue as well.

Constructive discharge of an attorney occurs when the client stops communication. In *Rosenberg v. Calderon Automation*, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986), a lawyer worked on a case without a contract. As the case neared settlement, the client stopped all communication with the lawyer. The Ohio Appellate Court found that the client's refusal to communicate was a constructive discharge; and, that the lawyer was due a fee under quantum merit.

Constructive discharge can occur in other ways. In *McNair v. Commonwealth*, 37 Va. App. 687, 697-98 (Va. 2002), the court found constructive discharge of a lawyer when the client placed "counsel in a position that precluded effective representation and thereby constructively discharged his counsel or (2) through his obstructionist behavior, dilatory conduct, or bad faith, the defendant de facto waived counsel."

Failure to pay an attorney can be constructive discharge. *See e.g.*, *Christian v. All Persons Claiming Any Right*, 962 F. Supp. 676 (U.S. Dist.

V.I. 1997) ("Further, the court considers Sewer's failure to pay attorneys' fees as a constructive termination of the attorney-client relationship between Sewer and D'Anna.").

Suit by a principal against an agent is constructive discharge. See *Tao v. Probate Court for the Northeast Dist.* #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). See also *Maples v. Thomas*, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and *Guerrero v. State*, 2017 Nev. Unpub. LEXIS 472.

There was substantial evidence of constructive discharge.

- The Edgeworths stopped communication with Simon.[127]
- The Edgeworths stopped taking Simon's advice.[128]
- The Edgeworths hired other counsel to wrap up the Viking settlement and to pursue Lange.[129]
- The Edgeworths accused Simon of intimidation and extortion.[130]
- The Edgeworths accused Simon of an intent to steal $6,000,000.00.[131]

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[127] IX-AA02178:9-11
[128] IX-AA02183:17-aa02184:5
[129] IX-AA02182:10-22
[130] VIII-AA01855:24-AA01856:15; VIII-AA01861:5-15
[131] IX-AA02184:6-9; 1-AA00084-AA00087

- The Edgeworths sued Simon for conversion.[132]
- The Edgeworths sued Simon to punish him.[133]

On appeal, the Edgeworths argue, "[u]nder no logic or reason whatsoever could Simon's and Appellants' relationship be viewed as having "broken down" ..."[134] When a client stops talking to their attorney, hires other counsel, then sues the attorney to punish him, the relationship is broken. The finding of constructive discharge is based on substantial evidence and must stand.

G. The District Court acted within its discretion when it found $200,000.00 was a reasonable fee for work done after November 29, 2017.

In a single paragraph, the Edgeworths argue that the four-page *Brunzell* analysis conducted by the District Court in support of the $200,000.00 quantum meruit finding was an abuse of discretion.[135] The argument is conclusory and inappropriately implicates the Court in giving a baseless gift to Simon.[136]

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[132] I-AA00111-AA00120; III-AA00688-AA00699
[133] VIII-AA01873:10-21
[134] Opening Brief at p.26
[135] Opening Brief at p.27
[136] Opening Brief at p.27

When a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract but is paid based on *quantum merit*. *Gordon v. Stewart*, 324 P.3d 234 (1958) (attorney paid in *quantum merit* after client breach of agreement); and, *Cooke v. Gove*, 114 P.2d 87 (Nev. 1941) (fees awarded in *quantum merit* when there was no contingency agreement).

When there is no express contract, an attorney is due a reasonable fee under the Nevada attorney lien statute, NRS 18.015(2). A court has wide discretion on the method of calculation of the attorney's fee. *Albios v. Horizon Communities, Inc.,* 132 P.3d 1022, 1034 (Nev. 2006). Whatever the calculation, the amount of the attorney's fee must be reasonable under the *Brunzell* factors. *Ibid.* The court should enter written findings of the reasonableness of the fee under the *Brunzell* factors. *Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish*, 216 P.3d 779, at fn2 (Nev. 2009).

The District Court's findings address the *Brunzell* factors and bases the $200,000.00 fee on undisputed facts such as the phenomenal result obtained by Simon and that Simon increased the Lange offer even after the

Edgeworths constructively discharged him.[137] Further, the fee amount is supported by the uncontested testimony of Will Kemp.

The Simon Rule strawman argument does not really apply to any issue on appeal but will be addressed here. The straw argument is false rhetoric meant to raise emotions. The District Court found against every factual premise of the so-called rule, the Court found the lien was perfected and enforceable, there was no express oral contract, and that Simon was owed reasonable fees and $68,000.00 in costs. Plan Zombie (whatever that may be) and the inchoate unclean hands argument are much the same factually baseless arguments meant only to unfairly smear Simon. In addition, the equitable defense of unclean hands cannot be argued by the Edgeworths because it was first raised on appeal.

The Edgeworth practice of challenging a finding with its own narrative bolstered by name calling is unavailing. The District Court finding is supported by substantial evidence and must stand.

H. The District Court acted within its discretion under NRCP 12(d) when matters outside of the pleadings were considered in dismissing the Edgeworth complaint.

The Edgeworths appeal the use of "external evidence" when the District Court dismissed the Edgeworths' collateral conversion complaint.

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[137] IX-AA02191-AA02194

External evidence is assumed to refer to matters outside of the pleadings. The Edgeworths attack the consideration of matters outside of the pleadings without a citation to authority.[138]

The Edgeworth position is flat wrong. NRCP 12(d) explicitly allows consideration of matters outside of pleadings when ruling on a motion to dismiss.[139] The consideration of such matters is discretionary. The District Court did not act capriciously or when it considered its own findings.

The Edgeworth proposition that the Court must allow the fictional allegation of an oral contract or conversion to stand, when the Court has already ruled otherwise, is absurd. When a District Court has found against a party on a factual assertion or claim, the Court is not obligated to ignore its own findings and allow the party a second chance to prevail on the same assertion or claim. Whether one consults the public policy promoting judicial economy, the law of claim preclusion and its goal of finality (*Five Star Capital Corp., v. Ruby*, 124 Nev. 1048, 194 P.3d 709

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[138] Opening Brief at p.23

[139] NRCP 12(d) states: (d) **Result of Presenting Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(5) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(2008)), or other expressions of *res judicata,* the bottom line is that a party gets one shot at a proving a fact or claim.

There is no basis to ignore NRCP 12(d) and the public policy promoting judicial economy and finality to allow the Edgeworths a second chance to prove an oral contract was formed or that a conversion occurred. While it might serve the Edgeworths intent of punishing Simon by extending litigation, the venture would be an existential waste of judicial resources.

To drive the point home, the Edgeworths' complaint alleged an express oral contract was formed on or about May 1, 2016[140], which was then breached. Because the Court found there was no express oral contract, there is no genuine issue regarding a breach.[141]

The second cause of action asks for a declaratory judgment regarding the terms of an express oral contract that was found not to exist; and, a declaration that the Edgeworths are due the entire settlement — when there is no genuine issue because the Edgeworths admit, and the Court found, that Simon is owed fees and costs.

The third cause of action is for conversion, the keystone of which is the Edgeworth assertion that they are due the full settlement. Which is, again, a proposition on which there is no genuine issue because the Court

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[140] III-AA00690:13-19

found fees and costs were owed to which the Edgeworths agree. In addition, the District Court also found that the settlement was safekept in a joint trust account, and that Simon acted appropriately under the law, citing the uncontested ethics opinion of former State Bar Counsel David Clark.[142]

The last three causes of action are all predicated on the existence of the oral contract and the claim that the Edgeworths are due the entire settlement, which is clearly incorrect. There is no laudatory purpose to allowing a complaint to proceed on these claims when the issues have already been decided. There was no error.

I. The District Court correctly found that there was no good faith basis to bring a claim of conversion against Simon.

The Edgeworths argue the sanction for filing and maintaining the conversion claim against Simon was an abuse of discretion. The Edgeworth appendix does not include Simon's reply in support of the motion, motion exhibits or the hearing transcript.

As this Court reaffirmed in *Capanna,* 134 Nev. 888, 432 P.3d 726, if on the whole of the evidence a party pursued a claim without a good faith basis, the District Court has discretion to assess fees and costs.

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[141] IX-AA02202:17-21
[142] I-AA00126-AA00136

Here, the Edgeworths sued Simon for conversion before the settlement checks were deposited, when the money was safekept in a joint account over which their lawyer had control pursuant to their proposal, when they agree Simon was owed money for fees (even if they disagreed about the amount) and when Simon complied with the lien statute. In addition, the Edgeworths have yet to explain how the facts satisfy the elements of conversion (*Evans v. Dean Witter Reynolds*, 116 Nev. 598, 5 P.3d 1043 (2000)), in particular how the Edgeworths satisfy exclusivity (*M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd.*, 193 P.3d 536, 543 (2008)), or establish that acting in conformity with the attorney lien statute is wrongful.

Angela Edgeworth spoke the truth when she testified the conversion complaint was filed to punish Simon. The sanction was well deserved.

J. The District Court acted within its discretion when it used the $5,000.00 cost of expert David Clark as a measure of the sanction.

The Edgeworths contest the grant of the $5,000.00 cost of expert David Clark incurred in defense of the conversion case. The cost grant was not an abuse of discretion. The Court specifically mentioned the uncontested opinion of Mr. Clark in its dismissal of the conversion cause of

action,[143] an action which the Court later found was filed and maintained without a good faith basis.[144] Simon is due his costs as a prevailing party and/or as a sanction. Either way, the cost is reasonable and related.

K. The District Court could have followed a better course by referencing the *Brunzell* analysis submitted by Simon in support of the sanction fee award, but it is not reversible error.

A detailed *Brunzell* analysis supporting the sanction would have been the better practice. However, such an analysis was submitted to the Court[145], and the Edgeworths did not bring the absence of an analysis to the attention of the District Court when there was an opportunity to cure the perceived error under NRCP 52. Accordingly, the Edgeworths waived the issue on appeal. Further, the Edgeworths cannot establish undue prejudice, about $250,000.00 in fees and costs were sought, and the Court awarded about 20%, a more detailed analysis might increase the amount.

L. The District Court abused its discretion when it denied the Simon Anti-SLAPP motion as moot.

The District Court abused its discretion when the Court denied the Anti-SLAPP motion as moot.

Mootness is a question of the existence of an actual controversy or

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[143] IX-AA02203-10:14
[144] X-AA02472:16-AA02473:4
[145] IX-AA02191-AA02194

justiciability. *Personhood Nevada v. Bristol,* 126 Nev 599, 602, 245 P.3d 572, 574 (2010).

An actual controversy remained with the Anti-SLAPP motion after the motion to dismiss was granted because of the fee provision in the Anti-SLAPP statute and the right to a separate action, NRS 41.670(1)[146], which do not exist in Rule 12 or 56. Thus, the controversy presented by the Anti-SLAPP motion was not mooted by the NRCP 12/56 dismissal.

VII. Conclusion

Simon submits the Edgeworths should be denied relief. Without addressing the writ petition, in this appeal, Simon requests that the case be remanded, and the District Court advised to substantively rule on the Anti-SLAPP motion to dismiss, only.

Dated this 15th day of January 2020.

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
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[146] NRS 41.670(1) If the court grants a special motion to dismiss... (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought... (b) The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the person against whom the action was brought. (c) The person against whom the action is brought may bring a separate action to recover: 1) Compensatory damages; 2) Punitive damages; and 3) Attorney's fees and costs of bringing the separate action.

VERIFICATION

STATE OF NEVADA)
) :ss
COUNTY OF CLARK)

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

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

1/15/20

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CERTIFICATE OF COMPLIANCE

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

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

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

DATED this 15th day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of January, 2020, I served a copy of the foregoing Answering Brief on Appeal and Opening Brief on Cross-Appeal and Appendix Volume I – XI on the following parties by electronic service pursuant to Nevada Rules of Appellate Procedure:

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