

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; AND
AMERICAN GRATING, LLC,

Appellants
vs.

DANIEL S. SIMON; AND THE LAW
OFFICE OF DANIEL S. SIMON, A
PROFESSIONAL CORPORATION

Respondents.

THE LAW OFFICE OF DANIEL
S. SIMON,

Petitioner

vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK;
AND THE HONORABLE TIERRA
DANIELLE JONES, DISTRICT JUDGE,

Respondents,

NO. 77678

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And

EDGEWORTH FAMILY TRUST; AND
AMERICAN GRATING, LLC,
Real Parties in Interest.

**BRIEF OF AMICUS CURIAE OF THE NATIONAL TRIAL LAWYERS IN
SUPPORT OF DANIEL S. SIMON AND THE LAW OFFICE OF DANIEL S.
SIMON; AND, IN SUPPORT OF AFFIRMANCE OF THE DISMISSAL OF
THE CONVERSION CLAIM**

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I. Issue Addressed by Amicus

Amicus addresses the following question:

Does an attorney convert settlement funds when the attorney secures their fees and costs by use of a statutory attorney charging lien pursuant to NRS 18.015?

Or, more broadly, can a conversion occur when funds are safekept in a trust account? In the case below, a former client sued their attorney for conversion because the attorney used an attorney charging lien pursuant to NRS 18.015¹ to resolve a billing dispute, while safekeeping the disputed

¹ NRS 18.015 states:

1. An attorney at law shall have a lien:

(a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

(b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.

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.

3. An attorney perfects a lien described in subsection 1 by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

4. A lien pursuant to:

(a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action; and

(b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including,

fund in a trust account. The District Court dismissed the conversion complaint. Amicus supports the dismissal of the conversion complaint, because when an attorney uses a lawful charging lien, a conversion does not occur. Rather, the use of a statutory charging lien to resolve a billing dispute is authorized by the law and is good policy. Further, if use of an attorney charging lien is held to fulfill the elements of conversion, then the charging lien statute will have been nullified and clients, attorneys and the judiciary will be deprived of a fast and fair method to resolve fee disputes. This will also have a chilling effect on the practice of law and deprive many clients of legal services who are in need of representation. This will undermine the fair and effective representation of clients.

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without limitation, copies of the attorney's file if the original documents received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6, E from the time of service of the notices required by this section.

5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.

6. On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.

II. The Identity, Interest and Authority of Amicus

Amicus, the National Trial Lawyers, is a nationwide network of elite trial attorneys that promotes a fair and effective justice system and promotes the fair and effective representation of clients. In order to promote the standards of practice and to effectively represent clients, an attorney charging lien is a necessary tool and effective process to allow lawyers to effectively do their job without the fear of a disgruntled client attempting to compromise the work performed by filing a collateral action.

The National Trial Lawyers has a significant interest in preserving the spirit and intent of the charging lien statutes and case law in order to protect the fair and effective representation of clients.

History and Mission of The National Trial Lawyers

This attorney charging lien dispute addresses the use and preservation of judicial resources, the attorney client relationship and one of the most common areas of friction between a client and counsel, payment of the lawyer. Because The National Trial Lawyers is comprised of trial lawyers that are considered the top lawyers in their field, upholding the standards of practice to facilitate quality representation is of utmost

7. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

importance and our esteemed members are involved in those areas of law and most likely to be involved with use and resolution of an attorney charging lien.

The National Trial Lawyers and its members have a significant interest in promoting the use of an attorney charging lien to resolve billing disputes; such a fast and fair process to protect scarce judicial resources, which improves access to justice and provides a fast and fair method to resolve a billing dispute, which mutually benefits clients and counsel. It also promotes the representation of clients in need to avoid the chilling effect of lawyers being sued for doing their job and consequently will otherwise be reluctant to represent clients with difficult cases.

A fast and fair attorney charging lien resolution process is a win-win-win for the courts, clients and counsel. In contrast, a finding that a claim for conversion may lie against a lawyer who followed an attorney lien statute and promptly moved for adjudication of a charging lien is bad policy; poses a threat to judicial resources; and, poses a threat to the best interests of client and counsel, all of which, is what the National Trial Lawyers and its members are committed to prevent. Accordingly, the National Trial Lawyers has a significant interest in this case.

NRAP 29(a) provides the authority for the National Trial Lawyers to seek leave to file this amicus brief. The National Trial Lawyers has filed a motion for leave pursuant to NRAP 29.

III. Argument

The National Trial Lawyers addresses the scenario of when an attorney asserts a statutory charging lien according to law. In such a case, a claim for conversion cannot be maintained against the attorney. The elements of conversion are not met, in any sense, when a lawyer asserts a statutory attorney lien. Further, it would be bad public policy to allow a claim for conversion under such circumstances.

The National Trial Lawyers does not need to address what happens when there is an unauthorized trust account withdrawal by a lawyer for personal use, because those facts are not presented in the case *sub judice*.

The modern tort of conversion has a long history dating back to the 18th century, and in turn having arisen from the common law claim of trover which began in the 16th century.² While a concrete definition of conversion is difficult to express, Dean Prosser observed that there is a “tacit

² William L. Prosser, *Nature of Conversion*, 42 Cornell L. Rev. 168 (1957).

agreement” about the basics.³ Nevada follows a common definition. “Conversion is “a distinct act of dominion wrongfully exerted over another’s personal property in denial of, or inconsistent with this title or right therein or in derogation, exclusion, or defiance of such title or rights.””⁴

Examination of the basics establishes that conversion cannot be found when a statutory attorney charging lien is used to resolve a fee dispute, while funds are safekept. First, to allege conversion, the plaintiff must hold an unconditional right to immediate possession of the property. Such a right does not match with what a client is due to recover from a settlement or judgment after attorney fees and costs are paid, and any lien or other claims are satisfied. At best, the client has a conditional right to recover a portion of the fund created by the fruits of the labor of the attorney.

Nevada discussed the unconditional right or “exclusivity” to possession of the chattel as an element of conversion in *M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd.*, 193 P.3d 536, 543 (2008). In *MC Multi-Family* the Nevada Supreme Court, citing California

³ *Id.*, at 168.

⁴ *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000); *quoting, Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958).

law, recognized the right to “exclusivity” of the chattel as an element of conversion. A client cannot establish an exclusive right to a settlement or judgement in any State which allows an attorney charging lien. Just so, in Nevada the client’s right to possession of the fund created by the work of the lawyer is subject to a statutory attorney charging lien. Likewise, a client would not satisfy the exclusivity element to find a conversion claim against an attorney when settlement or judgment funds are withheld to satisfy a contractual assignment to a medical provider, a statutory hospital lien, or for repayment to a health insurer-public or private.

Further, the client’s claim to a share of a settlement is based in contract.⁵ And, an alleged contract right to possession is not exclusive enough, without more, to support a conversion claim:

“A mere contractual right of payment, without more, will not suffice” to bring a conversion claim.⁶

Finding exclusivity before resolution of the fee dispute, puts the cart in front of the horse.

Second, safekeeping a disputed fund in a trust account, which is akin to interpleading a disputed fund with the court⁷, while a court resolves the

⁵ See, e.g., *May v. Anderson*, 121 Nev. 668, 119 P.3d 1254 (2005).

⁶ *Plummer v. Day/Eisenberg*, 184 Cal.App.4th 38, 45 (Cal. CA, 4th Dist. 2010). See, Restatement (Second) of Torts §237 (1965), comment d.

dispute pursuant to a statutory process, does not come close to approaching the level of interference with chattel or taking required to allege a conversion. Thus, no conversion can be established when the funds remain in a protected trust account, which is conceded in this case.

The idea of conversion involves the complete and total denial of the chattel to its exclusive owner. Nothing makes this clearer than the damages remedy for conversion, which is the full value of the chattel.⁸ Dean Prosser likened the remedy to a forced sale.⁹ The mere delay in disbursement that results from holding disputed funds in a trust account pending judicial resolution of a statutory charging lien does not call for the remedy of a forced sale. Quite the opposite, statutory attorney charging liens provide a suitable remedy, fast and fair adjudication followed by disbursement of the funds pursuant to final judicial determination. There can be no conversion when the amounts owed to any party having an interest in the proceeds is in dispute pending a final judicial determination.

The interference element of a conversion claim leads to the third issue which is legal justification. Conversion cannot be established when

⁷ *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 373 P.3d 103, 106 (Nev. 2016).

⁸ Restatement (Second) of Torts §222A (1965).

an attorney follows a process recognized by case law (as in California) or by statute (as in Nevada). The Restatement (Second) of Torts §237 (1965) refers to a refusal to tender chattel “without proper qualification”. When an attorney acts according to law and funds are safekept in a trust account pending judicial resolution of a charging lien, there is proper qualification for delaying disbursement, an essential element of conversion is missing, and a conversion has not occurred.

Legal justification to assert a lien is not new. Statutory and common-law liens are well recognized under the law.¹⁰ It is also true that a Legislature may properly create and define a statutory lien.¹¹ The court, the client and an attorney may rely upon a lien statute without fear of a claim based on the observance of the statute. It should be axiomatic that a person does not convert when they follow the law. When an attorney charging lien is used properly, all elements of conversion cannot be met as a matter of law.

Lastly, permitting conversion to be alleged when an attorney follows the statutory process to adjudicate a charging lien is bad policy. Moving

⁹ William L. Prosser, *Nature of Conversion*, 42 Cornell L. Rev. 168, 170 (1957).

¹⁰ See, e.g., 51 Am. Jur. 2d Liens §52.

¹¹ See, e.g., 51 Am. Jur. 2d Liens §53.

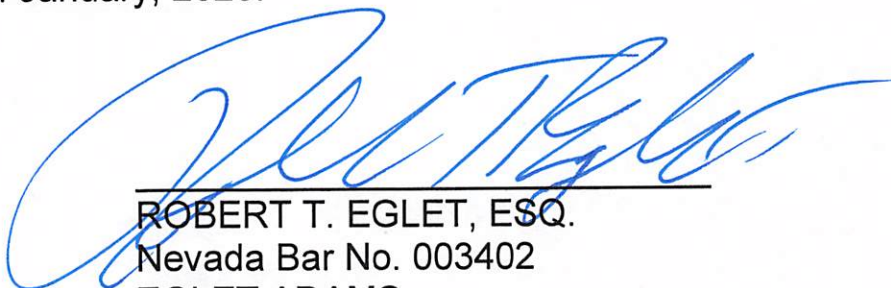
beyond the fact that the Judiciary likely cannot find an act permitted by the Legislature to be a tort, the whole point of an attorney lien statute creating a process to resolve a charging lien, is to provide a fast and fair resolution to an attorney-client fee dispute, not to create more litigation. If a client may elect to sue a lawyer for conversion when a charging lien is lawfully used, then the attorney lien statute has been nullified, and the law regarding the attorney-client relationship will have to be re-written. This undermines the fair and effective representation of clients and the public policy to preserve judicial resources.

IV. Conclusion

An attorney does not convert safekept funds when the attorney uses a statutory charging lien process to resolve a fee dispute. Finding otherwise would nullify the charging lien statute and would cause a marked increase in litigation over fee disputes, wasted judicial resources, a delay in resolution of fee disputes and resulting in harm to the judiciary, clients and counsel.

The National Trial Lawyers support affirmance of the District Court
decision dismissing the conversion claim.

Dated this 16th day of January, 2020.



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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Amicus Curiae of the National Trial Lawyers in Support of Daniel S. Simon and The Law Office of Daniel S. Simon; and, Supporting Affirmance of the Dismissal of the Conversion Claim 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 Perfect 11 in 14 point Times New Roman font. I further certify that this brief complies with the page or type volume limitation of NRAP 32(a)(7) because, excluding the parties of the brief exempted by NRAP 32(a)(7)(C) it does not exceed 30 pages.

I hereby certify that I have read this Brief of Amicus Curiae of the National Trial Lawyers in Support of Daniel S. Simon and The Law Office of Daniel S. Simon; and, Supporting Affirmance of the Dismissal of the Conversion Claim, 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 filed in conjunction with the Answering Brief of Law Office of Daniel S. Simon and the Petition for Writ of Mandamus complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding

matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I certify that I have been a member of the National Trial Lawyers Executive Committee for 12 years and will be inducted as President-Elect of the National Trial Lawyers on January 19, 2020 at our National Trial Lawyers Executive Committee Meeting at the National Trial Lawyers Summit held annually in Miami, FL. I further certify that I have authority to file this motion and the brief of Amicus Curiae on behalf of the National Trial Lawyers.

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 16th day of January, 2020.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of January, 2020, I served a copy of the foregoing Brief of Amicus Curiae of the National Trial Lawyers in Support of Daniel S. Simon and The Law Office of Daniel S. Simon; and, Supporting Affirmance of the Dismissal of the Conversion Claim electronically to all registered parties.

A handwritten signature in blue ink, appearing to read "Makaula Pao", is written over a horizontal line.

an employee of EGLET ADAMS