IN THE SUPREME COURT OF THE STATE OF NEVADA

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 IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TIERRA JONES Respondents, and EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Real Parties in Interest.	**SUPREME COURT CASE NO.** DISTRICT COURT CASE NO.: A-16-738444-C *Consolidated with:* DISTRICT COURT CASE NO.: A-18-767242-C

PETITION FOR WRIT OF PROHIBITION or MANDAMUS

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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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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding under NRAP 17(a)(10) and (11) because the Edgeworths filed a direct appeal (No. 77678 consolidated with No. 78176) challenging the attorney lien adjudication. Thus, this petition is needed for the dispute to be fully heard; and, the petition should be consolidated with the appeal, which is currently pending before the Supreme Court.

I. Introduction

Attorney Daniel Simon (Simon) seeks relief from an order adjudicating an attorney lien. This petition for extraordinary relief is filed following the clients' (Edgeworths) direct appeal of the same order.

In April 2016, a premature fire sprinkler activation caused about $500,000 in property damage to a speculation home being built by the Edgeworths.[1] The Edgeworths turned to their family friend Simon for help. In May 2016, Simon agreed to help his friends without an express fee agreement.[2]

The seemingly straight forward property damage claim grew into a complex product liability and contract case. In December 2017/January 2018, because of an enormous amount of work by Simon, the case settled for $6,100,000.00. Renowned trial lawyer Will Kemp called the result "amazing", "phenomenal" and "fantastic".[3] The Court found that Simon's work led to an "impressive" and "phenomenal" result for the Edgeworths.[4] Brian Edgeworth agreed that Simon did an outstanding job.[5]

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[1] Plaintiffs are entities which are controlled by Angela and Brian Edgeworth. VII-WA01737
[2] III-WA00734:5-25; III-WA00802:20-WA00803:7
[3] VII-WA01508:24-WA01509:17
[4] IX-WA02052:19-20; IX-WA02054:9-11
[5] IV-WA00952

Historically, Simon does contingency fee work. During the 19-month long case, Simon advanced tens of thousands of dollars in costs. Simon also sent four incomplete hourly bills, at $550 an hour, to demonstrate damages under the attorney fees provision of the contract with the installer of the defective fire sprinkler. Brian Edgeworth knew the bills were incomplete, because the bills did not include entries for his hundreds of emails and phone calls. Brian Edgeworth was happy receiving lower bills.[6]

As the case progressed, there were unsuccessful efforts to reach an express fee agreement. Then, in late November 2017, when a potential $6,000,000.00 settlement with the manufacturer was being hammered out, the Edgeworths stopped speaking with Simon, then hired other counsel.

On November 29, 2017, the Edgeworths signed a fee agreement with Vannah & Vannah (Vannah) to represent them in the fire sprinkler case.[7] On November 30, Simon was informed of Vannah's hiring.[8]

On December 1, 2017, the Edgeworths, advised by Vannah, signed a release with the manufacturer for $6,000,000.00.[9]

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[6] V-WA01075
[7] IX-WA02038:9-11; IX- WA02043:17-22
[8] IX-WA02038:12-20
[9] IX-WA02042:25-WA02043:16

On December 1, 2017, Simon served an attorney lien.

On December 28, 2017, Simon and Vannah agreed to open and deposit settlement checks into a separate interest-bearing trust account that required both Vannah and Simon's signatures for a transaction, and with all interest going to the Edgeworths.[10]

On January 4, 2018, the Edgeworths sued Simon for conversion.

On January 8, 2018, settlement checks were endorsed and deposited into the joint Vannah/Simon trust account.

On January 9, 2018, the conversion complaint was served; and, Vannah sent an email threatening increased damage claims against Simon if Simon withdrew after being sued.[11]

On January 18, 2018, the Edgeworths received **$3,950,561.27** in undisputed funds.[12]The Edgeworths admit the 4-million-dollar recovery made them more than whole on their half million-dollar loss.[13]

Beginning on August 27, 2018, the District Court held a five-day evidentiary hearing to adjudicate the Simon lien. Simon asked for a reasonable fee under quantum meruit, based on the market rate.

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[10] IX-WA02064:6-19
[11] IX-WA02044:12-14
[12] I-WA00062
[13] VII-WA01739:15-24

Will Kemp testified as an expert on the reasonable fee of an attorney in a product case. Mr. Kemp opined the reasonable fee for Simon was $2,440,000.00.[14] Simon also submitted time sheets (called a superbill) documenting the hours worked. The superbill was not contemporaneous, instead each entry was based on a verifiable tangible event. The superbill listed hours worked not found on the four prior bills.

The Edgeworths' testified Simon expressly agreed to work for $550 an hour from the outset and that Simon was owed nothing, they later retreated from their owed nothing stance, but did not offer a number.

On October 11, 2018, the District Court issued its decision & order adjudicating the lien (Lien D&O).[15] The Court found there was no express fee contract, contrary to the Edgeworths' direct testimony. The Court found the four bills formed an implied hourly rate contract, which was then terminated by the Edgeworths on November 29, 2017. The Court denied fees through the last day covered by the prior bills, September 19, 2017, because it found the superbill to be inaccurate, the Court then impliedly found the superbill as accurate when the Court used the superbill to find hours worked from September 19 to November 29 and then applied the

[14] VII-WA01506:25-WA01507:4
[15] VIII-WA01866-WA01891

payment term of the terminated contract to grant hourly fees; and, used the *Brunzell* factors to reach the reasonable fee for the hours worked after November 29.

On October 31, 2018, Simon moved for relief under Rule 52. Two issues remain and are raised in this petition. First, Simon argued that, as a matter of law, because the Edgeworths terminated the implied contract on November 29, the Simon fee could not be set by enforcing the terminated/repudiated payment term. Second, if the Court decided to calculate the reasonable fee due under quantum meruit using an hourly rate, then the proper course was to pay Simon for all the hours worked on the superbill or to provide a valid reason why the Court did not.

On November 19, 2018, the Court issued an amended Lien D&O (Lien D&O (Nov.)). The Court made minor corrections but declined to provide the relief requested by Simon on the two points above.[16]

II. Relief Sought

Simon respectfully requests that this Court: (1) issue a writ of prohibition or mandamus; (2) vacate in part the November 11, 2018, Lien D&O; (3) instruct the District Court to calculate the fee due Simon under quantum meruit, instead of enforcing the payment term of the

[16] IX-WA002034-WA02056; IX-WA02023:5-14

terminated/repudiated contract; and, (4) instruct the District Court to treat the superbill as accurate or to articulate a reason why it did not.

III. Issues Presented

1. Having properly found that the Edgeworths terminated the implied fee contract on November 29, 2017, did the District Court err by enforcing the payment terms of the terminated contract to adjudicate fees due under the lien for hours worked before November 29?

2. Did the District Court err by finding the superbill was not accurate for hours worked before September 19 without providing a valid rational, when the superbill is based on verifiable tangible events, and when the Court treated the superbill as accurate for hours worked after September 19?

IV. Relevant Facts

Angela and Brian Edgeworth are both sophisticated international business owners and managers.[17] The Edgeworths are not lay clients.

Angela Edgeworth majored in Business Administration and Actuarial Science.[18] Angela has been an entrepreneur for more than 20 years. Angela founded, built up and sold a cosmetics company; Angela is the

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[17] *E.g.*, VII-WA01731
[18] VII-WA01572:11-14

co-founder and President of Pediped Footwear, a successful children's footwear company with an international footprint; and, Angela is active with the family business, American Grating.[19]

Brian Edgeworth has a business degree and an MBA from Harvard.[20] Brian Edgeworth traded commodity derivatives for Enron and was a floor trader on Wallstreet.[21] 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.[22]

Both Edgeworths have experience hiring and paying lawyers.[23]

Angela Edgeworth met Eleyna Simon when their children attended school together 15 years ago.[24] The families were close, they vacationed together, they helped each other through family crisis, and Angela thought of Eleyna as one of her closest friends.[25]

In April 2016, a premature fire sprinkler activation caused about $500,000 in property damage to a speculation home being built by the

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[19] VII-WA01572:15-WA01573:5
[20] VII-WA01641:8-18
[21] VII-WA01641:13-18
[22] IV-WA00998:16-21
[23] *E.g.*, V-WA01007:12-WA01009:18
[24] VII-WA01583:11-16; VII-WA02035:9-14
[25] *Ibid.*

Edgeworths.[26] The fire sprinkler was manufactured by Viking and was installed by Lange Plumbing.[27] The Edgeworths did not carry insurance for the loss, and Viking and Lange initially denied responsibility.[28]

The Edgeworths turned to their family friend, Daniel Simon, for help. On May 27, 2016, Simon agreed to help his friends as a favor without an express written or oral fee agreement.[29]

Simon's early efforts were not fruitful.[30] On June 14, 2016, Simon filed a complaint against Viking and Lange Plumbing.[31] The case was complex,[32] with multiple parties, with negligence, contract and product liability claims, and construction, manufacturing, and fraud issues.[33]

The Edgeworths' contract with Lange Plumbing obligated Lange to pursue claims against the manufacturer of a defective product which Lange installed.[34] Thus, the contract provided for attorney fees if Lange did not pursue a claim against Viking.[35] As a result, attorney fees incurred by the

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[26] IX-WA02035:16-22; IX-WA02035:27-WA02036:4
[27] *Ibid.*
[28] *Ibid.*
[29] IX-WA02035:9-14; IX-WA02039:7; IX-WA02040:15-16; IX-WA02041:11-12
[30] IX-WA02035:23-26
[31] IX-WA02035:27-WA02035:4
[32] IX-WA02035:15
[33] IX-WA02051:27-WA02052:8
[34] IX-WA02048:11-12
[35] *Ibid.*

Edgeworths was an element of damage in the case against Lange and would not be certain until the case against the manufacturer resolved.[36]

In October of 2016, an early case conference (ECC) was set for December. In preparation for the ECC Simon wanted to produce a bill in support of the case against Lange.[37] On December 2, 2016, the first Simon bill was sent to the Edgeworths, seven (7) months after retention.[38] Over the next 12 months of the 19-month litigation, Simon sent three more incomplete bills.[39] Simon advanced substantial costs throughout the case.

Simon aggressively pursued the case.[40] The District Court found that Simon did a "tremendous amount of work"[41], which was impressive in quality and quantity.[42] Michael Nunez, a defense attorney in the case, testified Simon's work was extremely impressive.[43] Mr. Kemp testified that Simon's work and results were exceptional.[44] Mr. Kemp also testified he

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[36] IX-WA02035:27-WA02036:4
[37] VI-WA01304:12-WA01306:23
[38] IX-WA02036:21-25
[39] IX-WA02036:26-WA02037:14
[40] IX-WA02052:7-10
[41] IX-WA02037:19-21
[42] IX-WA02052:3-5
[43] IX-WA02051:19-25
[44] *Ibid.*

would not have taken the case and the Edgeworths were lucky they had a friend like Simon.[45]

On August 9, 2017, Simon and Brian Edgeworth discussed a fee. On August 22, 2017, Brian Edgeworth sent an email in which Brian stated an express fee agreement was never formed.[46] Brian testified that as part of any fee negotiation, Brian wanted Simon *to pay the Edgeworths* enough money to pay off a $300,000.00 loan taken from Angela's mother.[47] Brian also believed the more work Simon did, the less Simon should get paid.[48] A fee agreement was not reached.[49]

In November/December of 2017 an evidentiary hearing to strike Defendants answer, several motions and a host of depositions were calendared, and a mediation took place.[50] The mediator, Floyd Hale, Esq., issued a mediator's proposal for Viking to settle for $6,000,000.00. Mr. Hale confirmed to Mr. Kemp that about $2,400,000.00 of the proposed settlement was intended for attorney fees.[51]

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[45] VII-WA01508:24-WA01509:17
[46] IX-WA02036:5-18; IX-WA02040:15-WA02041:21
[47] V-WA01074:17-WA01082:20; V-WA01150:15-WA01151:25
[48] V-WA01078
[49] IX-WA02036:5-18
[50] *See, e.g.*, VI-WA01316:19-WA01321:17
[51] VII-WA01521-WA01522

On November 15, 2017, Viking made a counter offer to the mediator's proposal which required confidentiality and a dismissal of Lange.[52]

On November 17, 2017, Simon met with the Edgeworths. Simon discussed the case including the counter offer, the claim against Lange, upcoming hearings, preparation for trial, and a reasonable fee.[53] The Edgeworths testified to a radically different meeting, which included physical intimidation by Simon (who is dwarfed in size by Brian) and a threat to harm the case. The District Court *did not find* the Edgeworth version of the meeting had occurred.[54] Quite the opposite, the Court found that Simon consistently and competently represented the Edgeworths; noting that "recognition is due to Mr. Simon" for promoting Edgeworth interests even after Vannah was hired.[55]

On November 25, 2017, the Edgeworths last spoke with Simon.[56] The Edgeworths asked Simon for a written fee proposal.[57]

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[52] IX-WA02037:19-21
[53] IX-WA02038:4-5
[54] IX-WA02034-WA02056; IX-WA02038:4-5
[55] IX-WA02052:19-WA02053:1
[56] IX-WA02038:9-11; IX-WA02043:17-22
[57] IX-WA02038:6-8

On November 27, 2017, Simon sent a written fee proposal.[58] Simon told the Edgeworths to talk to other attorneys about the fee proposal.[59]

On November 29, 2017, the Edgeworths hired Vannah "for representation on the Viking settlement agreement and the Lange claims."[60]

On November 30, 2017, Vannah faxed to Simon a letter signed by Edgeworth stating that Vannah had been hired to work on the Viking case.[61] On reading the letter, Simon believed that he had been fired.[62]

On November 30, 2017, Vannah sent Simon a written consent signed by the Edgeworths to settle with Lange.

Prior to December 1, 2017, Simon convinced Viking to drop confidentiality and a Lange release as settlement terms.[63] On December 1, 2017, the Edgeworths, based on advice from Vannah, signed a release with Viking for a promised payment of $6,000,000.00.[64]

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[58] IX-WA02038:6-8;IV-WA00879:2-5
[59] IX-WA02044:23-24
[60] IX-WA02038:9-11;IX-WA02042:10-24
[61] IX-WA02038:12-19
[62] VI-WA01339:10-15
[63] IX-WA02042:25-WA02043:16
[64] *Ibid.*

On December 1, 2017, Simon served an attorney lien.[65] Mr. Simon was owed for substantial work and about $68,000.00 in advanced costs.

On December 7, 2017, on advice from Vannah, the Edgeworths signed a consent to settle with Lange for $100,000.00.[66] Vannah's advice and the Edgeworths decision to settle at $100,000 ran against the advice of Simon, because Simon felt the case was worth substantially more.[67]

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.[68] Vannah later clarified that the accusation came only from the Edgeworths.

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.[69]

On January 4, 2018, an amended attorney lien was served.[70]

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[65] IX-WA02038:24-WA02039:1
[66] IX-WA02039:8-9
[67] IX-WA02043:17-WA02044:5
[68] IX-WA02044:6-9
[69] IX-WA02064:6-19
[70] I-WA00044-WA00050

On January 4, 2018, the Edgeworths sued Simon alleging Simon converted the settlement by filing an attorney lien.[71]

On January 8, 2018, the settlement checks were endorsed and deposited into the joint trust account.[72]

On January 9, 2018, the conversion complaint was served; and, Vannah threatened Simon not to withdraw.[73]

On January 18, 2018, the Edgeworths received $**3,950,561.27** in undisputed funds, which they agree made them more than whole.[74]

On January 24, 2018, Simon moved to adjudicate the attorney lien. The Edgeworths opposed adjudication claiming the conversion complaint blocked adjudication under NRS 18.015. The District Court granted the motion and held a five-day evidentiary hearing to adjudicate the lien.

Simon sought a reasonable fee based on the market rate under quantum meruit.[75] Will Kemp was recognized by the Court as an expert in determining a reasonable attorney fee in a product case. Mr. Kemp opined the reasonable fee due Simon was $2,440,000.00. Simon also introduced

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[71] IX-WA02039:10-12
[72] IX-WA02065:7-11
[73] IX-WA02044:6-14
[74] I-WA00062; and, VII-WA01739:15-24
[75] 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.")

the superbill which documented the hours worked on the case. The Edgeworths had a changing position, they went from denying money was owed, to agreeing money was owed but declining to provide the amount.

On October 11, 2018, the District Court issued its own decision and order on the motion to adjudicate lien.[76] The Court found there was no express fee contract, contrary to the Edgeworths' direct testimony. The Court found an implied hourly rate contract for $550/hour, which was terminated by the Edgeworths on November 29, 2017. The Court did not grant fees for hours worked listed on the superbill prior to September 19, 2017, granted fees for hours worked listed on the superbill for September 19 to November 29, and used the Brunzell factors to reach a reasonable fee for the work done after November 29.

Simon moved for relief under Rule 52. On November 19, 2018, the Court issued an amended Lien D&O (Lien D&O (Nov.)). The Court made corrections but declined to provide the relief requested by Simon on the two issues presented in this petition.[77]

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[76] VIII-WA01866-WA01891
[77] IX-WA02034-WA02056

A. The November Lien D&O in Detail

Examination in detail of the Lien D&O (Nov.) supports the petition. Also, it is impossible to ignore the Edgeworths' personal attacks against Simon, made throughout the lien proceeding, and in the Edgeworth opening brief in No. 77678 consolidated with No. 78176. In 1690, John Locke recognized that the tactic of personal insult, *argumentum ad hominem*, did not advance an argument toward finding truth.[78] The District Court's findings and conclusions expose the Edgeworths' personal attacks as nothing more than flawed argument.

1. Contract formation

In three different affidavits, Brian Edgeworth claimed that on May 27, 2016, an express oral agreement was formed with Simon to work for $550.00 an hour.[79] The avowal is repeated and is central to the conversion complaint against Simon.[80] When confronted at the evidentiary hearing with emails stating otherwise[81], Brian Edgeworth changed his testimony to claim the express oral agreement was later formed in June of 2016.[82] The District Court rejected Brian's stories and found that an express oral

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[78] John Locke, An Essay Concerning Human Understanding (1690)
[79] II-WA00491-WA00496; III-WA00624-WA00632; III-WA00667-WA00676
[80] I-WA00051-WA00060
[81] I-WA00001-WA00002;V-WA01009:1-14
[82] IV-WA00770:3-10; V-WA01059:3-10

agreement *was never* reached.[83] Thus, the attack on Simon is based on a set of facts rejected by the District Court.

2. The charging lien

The Edgeworths label the Simon charging lien as inflated or otherwise improper. However, *the District Court concluded that the Simon lien complied with the law.*[84] Further, Mr. Kemp testified that the value of services provided by Simon was greater than the amount claimed in the lien.[85] The Edgeworth narrative was rejected by the District Court.

3. Edgeworth claims of assistance

The Edgeworths claimed that no additional money was owed to Simon, in part, because Brian Edgeworth's work alone made the case valuable. The claim was flatly rejected by the District Court.[86]

4. Retention of Vannah

On November 27, 2017, Simon sent a proposed fee agreement to the Edgeworths, and advised them to consult with other counsel regarding the fee agreement. The District Court found that on November 29, 2017, Edgeworth retained Vannah for representation on the underlying case, and

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[83] IX-WA02040:15-16
[84] IX-WA02040:1-2
[85] VII-WA01550:19-WA01552:1
[86] IX-WA02052:10-17

not for consultation regarding the fee agreement.[87] The finding was based on substantial evidence, including the Vannah fee agreement, the release with Viking, Vannah correspondence and emails, and the conduct of those involved.[88] While the Edgeworths argue that hiring Vannah was incidental to Simon's representation, the District Court found otherwise.

5. Constructive discharge

The District Court found that the Edgeworths constructively discharged Simon when the Edgeworths hired Vannah, stopped communication with Simon, accused Simon of theft, then sued Simon for conversion.[89] The Edgeworths claim they did not fire Simon was rejected by the District Court.

6. The District Court recognized that a client discharge terminates a fee contract.

The District Court correctly concluded:

> 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 meruit. (Citations omitted.)[90]

The conclusion of law comports with NRS 18.015(2) and Nevada case law. Simon requests relief because having stated the law, the District

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[87] IX-WA02041:24-WA02046:8
[88] *Ibid.*
[89] *Ibid.*
[90] IX-WA02050:16-27

Court did not follow the law when it enforced the terminated payment term in setting the fee due. Simon respectfully submits that the District Court should have acted in accord with the law and set the fee due under quantum meruit, without enforcing the terminated contract.

7. The accuracy of the superbill

Historically, Simon does not bill by the hour. Simon documented the hours worked on the superbill for consideration by the District Court. The hours worked on the superbill were based on tangible events only. The superbill did not capture any hours worked that were not tied to a tangible and verifiable event.[91] This means hundreds of hours were lost and not included in the superbill.

The District Court erred when it found that the entire superbill was not accurate for every entry prior to September 19, 2017. The hours worked on the superbill were entered by reviewing the file for the date of a tangible event, and then using the tangible event date to landmark the date for the hours worked for the tangible event, even if all hours worked may not have occurred on the landmark date. As an example, the filing date of a motion was used, although work on the motion may have been spread out over several days prior to the filing date. The District Court incorrectly found that

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[91] V-WA01117:21-WA01119:23

because the billing date was not "exact" for some hours worked, the superbill was inaccurate and would not be considered.[92]

The District Court also found the superbill to be inaccurate for all hours worked prior to September 19, due to the lapse of time between the date of the tangible event and the submission of the superbill.[93] The District Court erred because the facts found do not support the conclusion that the superbill is not accurate. The unrefuted testimony was that the hours worked in the superbill were based on verifiable tangible events. Hours worked which were not based on a tangible verifiable event were not billed for (and hundreds of hours worked were lost as a result).[94] Therefore, use of the verifiable date of a tangible event to landmark the hours worked in the superbill does not reasonably support the conclusion that all hours worked in the superbill are inaccurate. Likewise, because the tangible event date used in the superbill is verifiable (using the register of actions, the date of a letter, or email, etc.), the lapse of time between the date of the tangible event and the date of submission of the superbill does not reasonably support the conclusion that the superbill is not accurate. The opposite is true, because every entry is verifiable.

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[92] IX-WA02047:19-WA02048:2
[93] IX-WA02048:3-9
[94] V-WA01117:21-WA01119:23

Lastly, the District Court accepted the superbill as accurate when reaching the fee due for the hours worked after September 19 through termination on November 29, 2017.[95] If tangible event billing can be trusted for hours worked after September 19, then it may be trusted for hours worked prior to September 19.

8. Unrebutted expert testimony.

Will Kemp is, rightly, predominately mentioned in the Lien D&O (Nov.). Mr. Kemp has a wealth of experience and knowledge determining attorney fees, which he has done many times for major national class actions, including the tobacco litigation.[96] The testimony of Mr. Kemp was unrebutted. The testimony of Mr. David Clark, former Bar Counsel, on the propriety of Simon's actions was also unrebutted.

V. Simon Satisfies the Burden for Consideration of the Petition for Extraordinary Writ

Consideration of a petition for extraordinary relief and issuance of a writ is solely within the discretion of the Court. *Mountainview Hospital v. Eighth Jud., Dist., Ct.*, --Nev--, 273 P.3d 861, 864 (2012). The petitioner bears the burden to establish that issuance of an extraordinary writ is warranted. *Pan v. Dist. Ct.* 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

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[95] IX-WA02049:15-WA02050:4
[96] VII-WA1504-WA1552

Usually, an extraordinary writ will only issue when there is no "plain, speedy and adequate remedy at law". *Ibid.* (quoting NRS 34.170 and NRS 34.330).

An attorney seeking appellate review of an attorney lien adjudication is usually not a party and likely does not have a right of direct appeal. *Albert D. Massi LTD., v. Bellmyre*, 111 Nev. 1520, 908 P.2d 705 (1995). Thus, an attorney seeking review of an adjudication must do so by a petition for extraordinary writ. *Ibid*; and, *A.W. Albany v. Arcata Associates, Inc.*, 106 Nev. 688, 799 P.2d 566 at n. 1 (1990). Simon is an attorney seeking review of an adjudication; so, an extraordinary writ is appropriate.

In addition, the Edgeworths filed a direct appeal (No. 77678 consolidated with No. 78176) challenging the attorney lien adjudication. Thus, this petition is needed for the dispute to be fully heard.

VI. Standards of Review

A ruling on attorney fees is generally reviewed under the abuse of discretion standard. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 127-28 (2006).

Questions of law, or questions of law mixed with questions of fact, are subject to *de novo* review. *Pressler v. City of Reno*, 118 Nev. 506, 609, 50 P.3d 1096, 1098 (2002).

VII. Summary of Arguments

The District Court properly found that the Edgeworths terminated the implied fee contract on November 29, 2017. It is well-settled law that when a client terminates a fee contract, the contract payment terms end and the attorney is due a reasonable fee under quantum meruit. Thus, the Court erred when it then applied the payment term of the terminated contract to set the fee due to Simon for work done before November 29, 2017.

Simon respectfully submits that the proper course to determine the reasonable fee due under the attorney lien for all hours worked is via quantum meruit by application of the *Brunzell* factors with due consideration of the expert opinion of Will Kemp regarding the going market rate for the legal services provided by Simon.

Time sheets do not have to be made at the time that the work is done. An attorney can base a bill on file review. The hours worked on the superbill were entered using only tangible verifiable events. As such, a minor difference between the date billed and date the work was done is immaterial to the overall accuracy of the superbill. And, because the superbill was based on verifiable tangible events, the lapse in time in authorship could not impact accuracy and it was error for the Court to find it did.

Therefore, when the District Court applies quantum meruit to find the reasonable fee due for work performed by November 29, the Court should consider all the hours worked listed on the superbill; whether the Court decides to use the market rate to reach a reasonable fee, an hourly rate or some other method. Alternatively, if this Court finds the District Court did not err in applying the terminated payment term for hours worked before November 29, then the District Court should compensate Simon for the hours worked before September 19 as listed on the superbill.

VIII. Argument

The client terminated the implied fee contract on November 29, 2017. Therefore, the District Court erred when the Court enforced the contract.

A. When a fee contract is terminated by the client, the fee due the attorney is determined by quantum meruit.

The District Court found that the implied fee contract was terminated by the Edgeworths on November 29, 2017. The attorney lien was served on December 1, 2017. The fee contract was terminated before the lien was served and before the claim settled. Accordingly, as a matter of law, the District Court erred when it enforced the payment term of the terminated contract.

The District Court properly concluded that 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*. *Golightly v. Gassner*, 281 P.3d 1176 (Nev. 2009) (unreported) (discharged contingency attorney paid by *quantum merit* rather than by contingency); *citing*, *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 agreement).[97]

The District Court found the Edgeworths terminated the implied contract with Simon, and the implied hourly rate, when they fired Simon and hired Vannah. Accordingly, the Court erred when it set part of the fee due under the lien as if the implied contract hourly rate was enforceable. The law calls for all of Simon's work to be compensated under quantum meruit-that is, a reasonable fee pursuant to the *Brunzell* factors.

The District Court cited *Rosenberg* in concluding the Edgeworths fired Simon. *Rosenberg v. Calderon Automation, Inc.*, 1986 Ohio App. LEXIS 5460 (1986). In *Rosenberg*, Calderon stopped all communication with his lawyer, Rosenberg, on the eve of a case settlement. Rosenberg later sought his fees in a separate action.

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[97] IX-WA02052:18-25

The court found that Rosenberg was constructively discharged when Calderon stopped speaking with the lawyer. On the question of compensation, the court stated that termination of a contract by a party after part performance of the other party, entitles the performing party to elect to recover the value of the labor performed irrespective of the contract price. *Id.*, at *19. Notably, Rosenberg did not keep time records. The court found Rosenberg's testimony based on an estimate of his time provided a foundation for the fee claim. *Id.* at *20.

The Edgeworths and Vannah know the law and did not formally fire Simon even after they stopped communication, then sued Simon for conversion, in a gambit to avoid a fair reasonable fee analysis. The law is clear that because Simon was fired on November 29, 2017, Simon's fee is set by quantum meruit, the reasonable value of services rendered.

B. The superbill is sufficiently accurate.

If this Court upholds the District Court's use of the terminated payment term in setting Simon's fee; or, if the decision is overturned and the District Court must reconsider the fee due, the superbill should be treated as sufficiently accurate to serve as a foundation for a fee award.

The undisputed evidence was that every entry in the superbill was for work that was performed, even if the work was not all done on the

landmark billing date. The dates for hours worked on the superbill were based on verifiable tangible events. In fact, because every entry was based on a tangible event, many hundreds of hours worked were lost, for lack of a verifiable event. As a result, the superbill can be objectively confirmed, is not speculative, and is lower than a typical hourly bill.

1. The superbill was supported by substantial evidence.

There is no requirement for an attorney to keep a contemporaneous time record. *See, e.g., Mardirossian & Associates v. Ersoff*, 153 Cal. App. 4th 257 (2007). In *Mardirossian*, attorney Mardirossian was fired on the eve of a $3.7 million-dollar settlement. Mardirossian then sued for a reasonable fee. Mardirossian did not keep contemporaneous time records. At trial Mardirossian and other firm lawyers gave estimates of hours worked. The estimates were not based on tangible events, they gave an estimated average per week. *Ibid.*

The jury awarded Mardirossian a large fee based, in part, on the time estimates. The foundation for the time estimates was repeatedly challenged at trial and on appeal. Mardirossian won at every turn because the testimony of a witness with knowledge, Mardirossian and the firm lawyers, constitutes substantial evidence. An attorney's testimony as to

hours worked is enough to award fee. *Id.*, at 269; *quoting, Steiny & Co., v. California Electric Supply*, 79 Cal. App. 4th 285, 293 (2000).

The law is the same in Nevada. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006). The witnesses' testimonies alone can constitute substantial evidence. Coru*Summit Vill., Inc., v. Hilltop Duplexes Homeowners Ass'n*, 2011 Nev. Unpub. LEXIS 873, *10-11 (Nev. April 27, 2011).

The evidence of hours worked by Simon is stronger than in *Mardirossian*. Simon provided the superbill and every entry is based on a verifiable tangible event. The Edgeworths also failed when they tried to show the superbill was not accurate. The District Court exposed one such attempt by Brian Edgeworth as itself inaccurate.[98] Thus, the District Court's ruling of inaccuracy rests on speculation and/or a much higher burden for proof of damages then Nevada law imposes.

The District Court should have awarded the full attorney's fees that were supported by substantial evidence. This Court has stated the trial court should "either ... award attorney's fees or ... state the reasons for

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[98] VII-WA01658:19-WA01660:9

refusing to do so." *Pandelis Const. v. Jones-Viking Assoc., 103 Nev. 129, 734 P. 2d 1239 (1987); also, Watson v. Rounds, 358 P.3d 228 (2015)*

2. Minimum billing entries are the norm.

Simon used valid minimum billing entries for e-filings. Minimum billing amounts are the norm, are accepted and are enforceable. *Manigault v. Daly & Sorenson*, 413 P.3d 1114 (Wyo. 2018) (the court found that minimum billing units benefit "both attorneys and clients" and are reasonable). The minimum billing entry of .3 for each of the 679 e-filings was reasonable considering the 120,000 pages in the filings.

3. The Edgeworths will be unjustly enriched if the all the hours worked are not considered in the fee determination.

Lien adjudication is a proceeding in equity to determine the fair value of an attorney's services, and the lawyer should be compensated for the work performed. In *Leventhal v. Black & LoBello*, 129 Nev. 472, 475, 305 P.3d 907, 909 (2013), the Supreme Court of the state of Nevada stated:

> "A charging lien "is not dependent on possession, as in the case of the general or retaining lien. It is based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it." 23 *Williston on Contracts* § 62:11 (4th ed. 2002)."

There is no rule or authority that supports a finding that work not contemporaneously billed cannot be recovered later. Excepting, of course, the statute of limitations, which does not apply in this case.

There is no evidence that the entries in the super bill were speculative or that the work was not performed. At the hearing, the Edgeworths conceded they could not contest the superbill entries. The Edgeworths also agree the four million dollars already received made them whole and that the claimed cash flow problem was caused by their own decision to use cash on hand to refurbish their brand new, 12,000 square foot, paid-for home, and finance the litigation through a high interest loan.

IX. Conclusion

Simon respectfully requests an extraordinary writ issue directing the District Court to consider compensation for Simon under the lien for all hours worked under quantum meruit, and with due regard for the going market rate for his services as testified to by Mr. Kemp.

Dated this 16th day of October 2019.

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
Attorney for Petitioner

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 Petition for Writ of Mandamus, 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.

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2019.

Notary Public in and for said County and State

DAWN CHRISTENSEN
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 94-3646-1
MY APPT. EXPIRES JUNE 09, 2022

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 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 Petition for Writ of Mandamus, 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 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 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 October, 2019.

JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 003861
601 S. 6th Street
Las Vegas, NV 89101
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of October, 2019, I served a copy of the foregoing PETITION FOR WRIT OF MANDAMUS on the following parties by depositing a true and correct copy thereof in the United States Mail, in Las Vegas, Nevada, postage prepaid, addressed to the following:

Via Hand Delivery
Honorable Judge Tierra Jones
Department X
Regional Justice Center
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