IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of:

JAY KVAM,

Appellant,

vs.

BRIAN MINEAU; and LEGION INVESTMENTS, LLC,

Respondents.

Supreme Court Case No. 81422

District Court Case No. CV18-00764

APPELLANT'S REPLY BRIEF

APPEAL FROM AN ORDER GRANTING PARTIAL SUMMARY JUDGMENT, INCLUDING SUMMARY JUDGMENT ON APPELLANT'S SEVENTH CAUSE OF ACTION FOR INJUNCTIVE RELIEF IN THE SECOND JUDICIAL COURT, WASHOE COUNTY, THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Appellant Jay Kvam is an individual and currently represented by the undersigned counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska.

2. Respondent Brian Mineau is an individual, and based on information and belief, is the sole member/manager of Legion Investments, LLC. Brian Mineau and Legion Investments, LLC are represented by the Gunderson Law Firm, Austin K. Sweet, Esq.

3. 7747 S. May Street is an unincorporated joint venture that was entered into between Jay Kvam, Brian Mineau and Michael Spinola who is not a party to these proceedings. 7747 S. May Street is a nominal defendant that was included for the derivative action and does not have separate representation in these proceedings.

Dated this 10th day of March, 2021.

Michael L. Matuska

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Mineau/Legion's *Answering Brief* does not conform to NRAP 28(b) which sets forth the format for Respondent's Brief. The required and permitted sections are: jurisdictional statement, routing statement, statement of the issues, statement of the case, statement of the facts, and statement of the standard of review; however, these various statements are only required to the extent the Respondent is dissatisfied with the corresponding statement in Appellant's Brief. Mineau/Legion commence their *Answering Brief* with a section called "Introduction" in which they take great liberties with various assertions of fact which lack any citations to the record in violation of NRAP 28(e). In these assertions of fact, Mineau/Legion do not so much respond to Kvam's *Opening Brief* as interject their facts and theories, none of which are correct or have any legal relevance. Although Mineau/Legion's Introduction can be ignored entirely, their Introduction nevertheless encapsulates and summarizes their terribly incorrect and misleading theory of the case.

1. Reply to Mineau/Legion's Introduction

Mineau/Legion assert in their Introduction that "the parties purchased the Property for $45,000 and hired a contractor to perform the renovation." *Answering Brief* p. 1. This statement is not supported by any citation to the record. The record submitted with Kvam's *Opening Brief* demonstrates that the property was purchased by Legion Investments, LLC for $44,000 [10 JA 1292 ¶7; 1317-19, 1321-24; 1326-30], Mineau prepared the Contractor Agreement with TNT [10 JA 1338] and signed

the agreement on March 20, 2017 [7 JA 1054-67; 10 JA 1293 ¶11, 1340].

Mineau/Legion assert that they "contributed $27,090.31 to the partnership . . ." Answering Brief p. 1-2. This statement is not supported by any citation to the record and is the subject of Kvam's charge of perjury against Mineau/Legion as discussed at length in Part E and F of Kvam's *Opening Brief* at pages 22-28. Nonetheless, this statement is important because Mineau/Legion affirm the characterization of this investment as a partnership (actually, a joint venture) which invokes Mineau's fiduciary duties to Kvam that should inform this Court's decision. Mineau, as a fiduciary, cannot deflect his liability off on Kvam, the injured party and claimant herein, or on third parties such as the contractor. Yet, Mineau/Legion's entire *Motion for Summary Judgment* in the court below and their *Answering Brief* in this Court are dedicated to an attempt to blame Kvam and the contractor.

Mineau and Legion assert that "The contractor even came to Reno to meet with Mineau and Kvam, discussed the project at length with Mineau and Kvam, and even stayed at Kvam's house during the trip." Answering Brief at 2. This statement is not supported by any citation to the record and has no legal relevance. Mineau/Legion made no effort to explain why Kvam's discussions with the contractor (actually, about the potential of future projects) defeat Kvam's various causes of action for breach of contract and fraud against Mineau/Legion.

Mineau/Legion assert that "Unfortunately, the contractor breached its contract

and failed to complete the renovation." *Answering Brief* at p. 2. Kvam specifically addressed this allegation at pp. 35-36 of his *Opening Brief* in his discussion of Judge Simons' Finding of Fact No. 65. Finding of Fact No. 65 merely restates the allegations from paragraph 11 of Mineau/Legion's counterclaims and has no legal relevance to Kvam's various causes of action for breach of contract and fraud against Mineau/Legion. Kvam explained in his *Opening Brief* as follows:

> To the extent Judge Simons is attempting to advocate for an affirmative defense of a supervening cause, that affirmative defense does not appear in any of the Mineau/Legion's pleadings or briefs. Moreover, the question of supervening cause creates an issue of fact and would not offer Mineau a defense in this case.
>
> > [W]here an unforeseeable supervening cause intervenes between a defendant's negligence and a plaintiff's injury, the defendant is relieved of liability. However, where a third party's intervening intentional act is reasonably foreseeable, a negligent defendant is not relieved of liability. Further, the question of foreseeability is generally one for the jury.
>
> *Dakis v. Scheffer*, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) citing *El Dorado Hotel v. Brown*, 100 Nev. 622, 628-29, 691 P.2d 436, 441 (1984) (citations omitted), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.,* 115 Nev. 243, 245, 984 P.2d 750, 752 (1999). As such, the defense of a supervening cause is only a defense to a negligence cause of action. Moreover, any wrongdoing by the contractor was foreseeable in light of Mineau's failure to segregate the project funds and failure to supervise the Project.
>
> (*Opening Brief* at 35-36).

Mineau/Legion did not respond to Kvam's argument regarding supervening cause. Moreover, the record developed to date indicates that the contractor

continued to work on Mineau's other projects and that funds were likely diverted from the subject Project at 7747 S. May Street to Mineau's other projects.

As explained in the declaration that Kvam submitted with his opposition to Mineau/Legion's *Motion for Summary Judgment*, Mineau misrepresented that he had success with flip projects in Chicago (past tense) and concealed that he had ongoing projects that would divert the contractor's time. [10 JA 1291-92 ¶3]. Mineau misrepresented that the funds for 7747 May Street would be wired to a separate account and concealed that the funds were being commingled with the funds for his other projects. [10 JA ¶9, 1334]. Discovery Commissioner Wesley Ayers focused on the co-mingling of project funds in his January 10, 2020 *Recommendation for Order*. He understood the developing case on fraud and RICO and explained that:

> Plaintiff has therefor presented evidence that apart from the funds ostensibly used to purchase the May St. property and associated closing costs, $69,000 was transferred into account 1855 to fund renovation work that was supposed to cost $80,000. But the only work done on that project was worth less than $40,000, leaving at least $29,000 unaccounted for. Significantly, the entire $69,000 was transferred to an account that was also receiving and transferring funds used on <u>other</u> TNT projects – all of these funds were commingled. A reasonable possibility exists that a substantial portion of the $69,000 was used in connection with one or more of those other TNT projects.
>
> [9 App 1229-30] (emphasis in original)

Judge Simons never ruled on Commissioner Ayers' *Report and Recommendation*. These same facts of commingling and likely diverting project

funds and having the contractor prioritize Mineau's other ongoing projects over the subject Project at 7747 S. May Street also constitute a breach of the various fiduciary duties Mineau owed to Kvam including the duty of loyalty and the duties to disclose, to exercise due care and to account (*See* NRS 87.4336; *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 and n.3 (D. Nev. 1995) quoting *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634, 855 P.2d 549, 553 (1993)). Mineau/Legion failed to address these statutes or cases; instead they elected to submit an alternative theory of the case based on their irrelevant and inchoate arguments regarding supervening cause and Kvam's communications with the contractor, most of which came after the underlying fraud and Mineau's misrepresentations had already occurred.

Mineau did not address his failure to supervise the project. Based on the amount of money paid, the project should have been nearly finished. As late as November 19, 2017, Mineau was still falsely reporting to Kvam that the project was almost completed: "... he [Cole] said they will be done in 14-17 days from tomorrow, ..." and: "... I plan on having an agent come to the property to list no later than the 8th of December and he said it would be done." [10 JA 1296 ¶23; 11 JA 1385]. These representations were false.

2. <u>Reply to Mineau/Legion's Statement of the Case</u>

Mineau/Legion assert that the December 3, 2018 *Order Granting Temporary*

Restraining Order [3 JA 251-255] and the December 12, 2018 *Stipulation to Deposit Funds; Order* [3 JA 256-258] "authorized" Legion to deposit the proceeds of sale with the Court. In fact, the *Stipulation to Deposit Funds; Order* ordered Mineau/Legion to deposit the funds with the Court. Mineau/Legion then reference another proposed stipulation to deposit an additional amount of $1,864.14. The proposed stipulation does not appear in the record. The funds should have been paid to Kvam immediately and there was no reason for Mineau/Legion to hold any proceeds or deposit them with the Court. The Terms of Agreement upon which Mineau/Legion rely require that the proceeds be paid first to Kvam, who is identified as the "initial funder." [10 JA 1332].

Mineau/Legion devote much of their Statement of the Case to a discussion about the effect of their counterclaim for declaratory relief. These issues are addressed below.

3. Reply to Mineau/Legion's Statement of Facts

Mineau/Legion claim that "The Factual Background section of Kvam's *Opening Brief* omits several material facts upon which the district court's order was based." *Answering Brief* at p. 7. Mineau/Legion failed to identify any missing facts. Rather, Mineau/Legion simply recite the unsupported allegations from Mineau's declaration in support of their *Motion for Summary Judgment* which alleges, in summary, that Kvam had communications with the contractor and the contractor

abandoned the project. Mineau/Legion have never explained why Kvam's communications with the contractor would defeat his causes of action against them. As explained at length in Kvam's *Opening Brief*, most of the communications occurred after Mineau had already fraudulently induced Kvam to fund the Project.

Likewise, Mineau/Legion failed to provide any legal argument to support an affirmative defense that the contractor's conduct was a supervening cause. The affirmative defense of supervening cause does not appear in any of Mineau/Legion's pleadings or briefs. Moreover, the question of supervening cause creates an issue of fact and would not offer Mineau/Legion a defense in this case.

> [W]here an unforeseeable supervening cause intervenes between a defendant's negligence and a plaintiff's injury, the defendant is relieved of liability. However, where a third party's intervening intentional act is reasonably foreseeable, a negligent defendant is not relieved of liability. Further, the question of foreseeability is generally one for the jury.

Dakis v. Scheffer, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) citing *El Dorado Hotel v. Brown*, 100 Nev. 622, 628-29, 691 P.2d 436, 441 (1984) (citations omitted), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.,* 115 Nev. 243, 245, 984 P.2d 750, 752 (1999). As such, the defense of a supervening cause is only a defense to a negligence cause of action. Moreover, any wrongdoing by the contractor was foreseeable in light of Mineau/Legion's failure to segregate the project funds, failure to supervise the Project and likely diversion of project funds to Mineau's other projects upon which the contractor was working. The affirmative

defense of supervening cause does not apply to the facts presented in this case and does not apply at all to Kvam's various causes of action for Declaration of Joint Venture; Rescission or Reformation of Agreement; Breach of Contract – Loan; Breach of Contract and Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing – Joint Venture Agreement; Accounting; Court Supervision of Dissolution and Winding Up, and Appointment of Receiver; Temporary and Permanent Injunction; Fraud, Fraudulent Inducement and Concealment; Conversion; Rico; and Derivative Claim (on behalf of the unincorporated joint venture referred to as 7747 S. May Street).

Mineau/Legion's Statement of Facts also contain numerous references to offers of compromise, both before and after Kvam filed his *Complaint*. Those various offers of compromise are not admissible and are the subject of Kvam's *First Motion In Limine* which is still pending in the District Court. [12 JA 1609].

4. Reply to Mineau/Legion's Summary of the Argument

Mineau/Legion assert that: "The core of Kvam's claim throughout this lawsuit appear to arise from a belief that his investment carried no risk and, therefore, the mere fact that the real estate project failed evidences that Legion or Mineau have engaged in some fraud or actionable misconduct." *Answering Brief* at pp. 17-18. Kvam's claims are adequately set forth in his *Second Amended Complaint* [5 JA 756] and Mineau/Legion should not be allowed to misstate and recast those

allegations into some theory about real estate risk. Mineau/Legion seem to misstate Kvam's allegations in order to set up another inchoate affirmative defense of assumption of risk. As with their other theories of the case, Mineau/Legion never provided any points and authorities regarding assumption of risk.

Of course, there is always the risk that real estate prices will go up and down. But Kvam never assumed the risk that Mineau would fail to supervise the project, fail to provide his required funding, allow the contractor to commingle funds, possibly divert funds to other projects, repeatedly provide false status reports and have Kvam pay for work that was not performed. Kvam did not assume the risk that Mineau/Legion would fail to complete the Project and sell the Property with the interior demolished, or that they would fail to pay the meager proceeds of sale to Kvam. These problems have nothing to do with any perceived inherent risk in the real estate market. These facts were all substantiated in Kvam's *Opposition to Defendant's Motion for Summary Judgment; and Cross Motion for Partial Summary Judgment* in the court below and explained again in Kvam's *Opening Brief.* [See *Opening Brief* at p. 6: "The following facts are set forth in the *Declaration of Jay Kvam in Support of Opposition to Defendants' Motion for Summary Judgment; and Cross-Motion for Partial Summary Judgment* [10 JA 1290-98]"].

5. <u>Reply to Mineau/Legion's Argument</u>

Kvam addressed the pertinent legal issues in his *Opening Brief* and need not

repeat them herein. The only new material in Mineau/Legion's *Answering Brief* that requires a response is the discussion at pp. 19-22 about Judge Simons' approach to summary judgment based on DA (deemed admitted) facts and the effect of Mineau/Legion's *First Amended Counterclaim* ("FACC").

Mineau/Legion's argument that a defendant need not restate a counterclaim is based on a series of unreported cases and has not been adopted in Nevada. Mineau/Legion cited only one (1) reported case for their argument. That case, *Ground Zero Museum Workshop v. Wilson*, 813 F.Supp. 2d 678 (D. Md. 2011) acknowledged an equally viable line of cases, including a case that same year from the same district court, which ruled that counterclaims are waived if not restated in a subsequent answer. *See id.* at 706 citing *Settlement Capital Corp. v. Pagan,* 649 F.Supp.2d 545, 562 (N.D. Tex. 2009) (finding that counterclaims not reasserted in defendant's amended answer were abandoned); *Bremer Bank v. John Hancock Life Ins. Co.,* 2009 WL 702009, at *12 (D. Minn. Mar. 13, 2009) (determining that defendant's failure to replead the counterclaims, coupled with nearly two years passing without discovery or any action on the counterclaims and their lack of merit as a matter of law, warranted their dismissal); *cf. Doe v. Williston Northampton Sch.,* 766 F.Supp.2d 310, 313–14 (D. Mass. 2011) (granting motion to dismiss counterclaims for failure to prosecute pursuant to Rule 41(b) where the

counterclaims were not reasserted in response to amended complaints). *Doe v. Williston Northampton Sch.* is particularly appropriate.

> An amended pleading takes precedence over an earlier pleading. *See* Wright, *et al.,* Fed. Prac. & Proc. § 1476 (3d ed. 2010) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified."). Because Defendant Ryan failed to reassert any counterclaims in his answers to the first and second amended complaints, it would be possible to conclude that the counterclaims have simply vanished from the currently operative pleadings, and no need therefore exists to dismiss them.
>
> To ensure no uncertainty, however, Plaintiffs' motion to dismiss will be allowed. Thus, whether by failure to re-plead, or by operation of the court's dismissal, no counterclaims remain in this case.
>
> [766 F.Supp.2d 313-14]

This Court need not decide which approach to adopt in Nevada because the argument is simply inapplicable to this case for three (3) reasons: (i) Mineau/Legion's counterclaims were dismissed, except for the counterclaim for declaratory relief; (ii) Mineau/Legion never pursued their remaining counterclaim in the court below and waived this argument; and (iii) Judge Simons' Order is tantamount to a default, when in fact no default was ever entered and could not be entered against a plaintiff that had prosecuted its case to the eve of trial.[1]

//

[1] To the extent this Court chooses to address the question, Kvam advocates in favor of the rule that counterclaims that are not restated in a subsequent answer are waived. This is a bright line rule that is easy to apply, in contrast to the counter-argument which simply creates a trap for the unwary, especially where a subsequent answer might restate some, but not all, of the previous counterclaims.

i. Mineau/Legion's Counterclaims Were Dismissed

Mineau/Legion filed an *Answer and Counterclaim* on June 5, 2018 in which they denied the characterization of the Project as a joint venture that is governed by NRS Chapter 87 and asserted 11 counterclaims [1 JA 10]. There is no charitable way to describe the counterclaims. They included ridiculous allegations and theories such as Kvam committed trespass or abuse of process when the process server served Legion at Mineau's house, which is the address Mineau uses as the registered address; that Kvam somehow caused damage to the Property (alleged as trespass and conversion) even though he never went to Chicago to view the Property; and that Kvam was guilty of fraud and deceptive trade practices.

Kvam filed a *Motion to Dismiss Counterclaim, or Alternatively, for a More Definite Statement* on June 25, 2018 [1 JA 24]. Judge Polaha dismissed the counterclaims for conversion and trespass to chattels and various other claims about an unrelated entity, Atlas Investors Southside LLC. Judge Polaha ordered a more definite statement regarding counterclaims five (deceptive trade practices), ten (fraud) and eleven (negligence). [1 JA 107, 112].

Mineau/Legion filed a document entitled *First Amended Counterclaim* on October 5, 2018 [2 JA 114]. The document was not a more definite statement nor was it part of an answer; therefore, it was not a recognized pleading. Regardless, Kvam filed a *Motion to Dismiss Counterclaim and for Summary Judgment* on

October 25, 2018 [2 JA 128]. On January 1, 2019, Judge Polaha entered an *Order* which dismissed all of Mineau/Legion's remaining counterclaims except for the third counterclaim for declaratory relief [3 JA 299]. As such, Judge Simons committed reversible error when she largely ignored the declaration and evidence submitted by Kvam in opposition to Mineau/Legion's *Motion for Summary Judgment* and instead adopted the general allegations in a series of counterclaims, most of which had been dismissed, as the Findings of Fact in her *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* (the "Order") [14 JA 1948]. Doing so was a reversible error, regardless of whether the counterclaim is technically still pending or not.

ii. Mineau/Legion Never Pursued Their Remaining Counterclaim in the Court Below and Waived This Argument

Mineau/Legion omit several important procedural differences between *Ground Zero Museum Workshop v. Wilson*, 813 F.Supp.2d 678 and the case at hand. In *Ground Zero Museum Workshop v. Wilson*, the defendant answered the complaint and pled counterclaims. The defendant did not reallege counterclaims in response to the first amended complaint or the second amended complaint; however, the defendant moved for leave to file two new counterclaims shortly after answering the seconded amended complaint. The plaintiff opposed the motion and further argued

that all counterclaims had been waived. *Id.* at 705.

The district court in *Ground Zero Museum Workshop v. Wilson* ruled that the counterclaims had not been waived on the basis that plaintiff's motion to dismiss the original counterclaims was denied (*Id.*), the parties "proceeded with discovery throughout the remainder of the Fall" (*Id.*), the counterclaims "were indisputably at issue for the majority of the discovery period and Wilson repeatedly took actions to indicate his intent to pursue the counterclaims" (*Id.*), and "Wilson has not failed to prosecute them or otherwise waived his right to pursue them." *Id.* at 706. The court further granted leave to file the new counterclaims "to conform them to evidence first learned in the course of discovery." *Id.* at 707.

In contrast, the record in this case contains no reference to Mineau/Legion's counterclaims following Judge Polaha's January 1, 2019 *Order* until Judge Simons *sua sponte* resuscitated the counterclaim for declaratory relief five (5) days before trial at the hearing on Thursday, February 27, 2020. At that time, Judge Simons purported to invoke NRCP 56(f) when she stated: "I am, pursuant to Rule 56(f), advising all parties that I intend to grant summary judgment on defendant's third claim – counterclaim for relief on declaratory judgment." [Transcript 15 JA 2199:13-16]. She proceeded to give Kvam's counsel until the next morning to file a response [*Id.* at lines 20-21]. Mineau/Legion did not move for summary judgment on any counterclaims and did not even mention the counterclaim in their *Trial Statement*

[10 JA 1660]. The absence of any reference to the counterclaim in Mineau/Legions briefs and *Trial Statement* should be sufficient evidence that they did not believe that any counterclaims were left and did not prosecute any remaining counterclaims.

iii. Judge Simons' Order is Tantamount to a Default

Judge Simons' Order is tantamount to a default, when in fact no default was ever entered and could not be entered against a plaintiff that had prosecuted its case to the eve of trial. Mineau/Legion never took Kvam's default and they could not do so without notice to Kvam's counsel. RPC 3.5A.[2] They never requested an answer to the FACC and cannot now claim the benefits of a default against a plaintiff that was actively prosecuting his case. By all accounts, as explained above, all parties believed that no counterclaims were pending.

A February 22, 2021 case from the 10th Circuit Court of Appeals discussed *Ground Zero Museum Workshop v. Wilson* and similar cases and applied a "prejudice" based approach:

> We find Hughes and Davis persuasive because the Federal Rules do not speak clearly about whether counterclaims must be repleaded in subsequent answers, counterclaims are distinct from other parts of an answer, and an inflexible rule would not serve the interests of justice. Hughes and Davis allowed a defendant that failed to replead a

[2] **Rule 3.5A. Relations With Opposing Counsel.** When a lawyer knows or reasonably should know the identity of a lawyer representing an opposing party, he or she should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.
[Added; effective May 1, 2006.]

> counterclaim in subsequent answers to continue to assert that counterclaim unless the plaintiff could show he would suffer prejudice. A key consideration is whether the plaintiff had notice that the defendant intended to continue pursuing the counterclaim.

Sinclair Wyo. Ref. Co. v. A & B Builders, Ltd. 2021 WL 672247, 2021 U.S. App. LEXIS 5014 (10th Cir. Feb. 22, 2021). In the present case, there can be no dispute that Kvam suffered prejudice when the counterclaim was not mentioned for over one (1) year until Judge Simons sua sponte raised the counterclaim approximately five (5) days before trial and then used the counterclaim to justify her DA theory of summary judgment.

6. Mineau's Declaration

Mineau/Legion argue that: "The district court did not commit reversible error by relying upon the undisputed facts set forth in Mineau's declaration." *Answering Brief* at p. 22. Mineau/Legion have the argument backward. They failed to rebut the undisputed facts set forth in Kvam's declaration or the declaration of Benjamin Charles Steele, CPA, in which Mr. Steele explained that bank records confirm that the contractor (TNT) was working on other projects for Mineau/Legion at the same time including 8744 Bishop, 8754 S. Michigan, 9919 Forest and 1404 and 1408 Wyoming [11 JA 1443].

Moreover, Mineau/Legion failed to identify any undisputed facts set forth in Mineau's declaration. Their discussion only addresses the perjured allegation at Par. 25 of Mineau's declaration that "I now recall that I borrowed the $20,000 from

Bradley Tammen . . . . In exchange for the short-term loan of $20,000, I agreed to repay Mr. Tammen a flat amount of $28,000 (which has since been repaid in full)." [7 JA 1036-37]. There are no documents to rebut this statement because it is not true and contradicts Mineau's prior sworn statements. This type of an affidavit, which raises dubious allegations for the first time after the close of discovery, is a "sham" affidavit that can be ignored by the district court.[3] "When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence . . . When written documents are relied on, they must be exhibited in full." *Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 38, 482 P.2d 814, 818 (1971). Kvam should be allowed to complete his discovery into Mineau's financial records which will either prove or disprove this assertion.

Mineau's declaration is simply not credible in light of the evidentiary record compiled to date. The $20,000 payment that Mineau is referring to in his declaration was provided as Exhibit 19 to Mineau/Legion's *Motion for Summary Judgment.* That wire transfer was made by Criterion NV LLC, a company owned by Michael Spinola [8 JA 1144]. There is no reference to Bradley Tammen in connection with

[3] "[T]he court can find an affidavit to be a sham if it contains assertions that directly contradict other assertions previously made by that same witness during discovery and the contradiction cannot otherwise legitimately be reconciled as anything but manufactured." (unpublished) *Pickett v. McCarran*, No. 77124-COA, 12-13 WL7410795 (Nev. Ct.App. Dec. 31, 2019), Tao, J. concurring, citing *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 294-95, 257 P.3d 966, 976-77 (Ct. App. 2015). The "sham" affidavit discussed in *Pickett v. McCarran* involved the same attorney and the same judge involved in this appeal.

that payment, and no indication that the funds were repaid with interest. Moreover, although the wire transfer references May Street, Kvam's expert witness CPA explained that the payment from Criterion NV LLC was commingled with the funds for Mineau's other projects and there is no way to confirm that the payment was used on the May Street project [See Report of Benjamin Charles Steele, 11 JA 1444] ("I could not determine the expenses paid for the 7747 May Street Project. The funds were deposited in the general account that was used for TNT's multiple projects and checks issued.") As explained above, the Discovery Commissioner reviewed this same evidence and the corresponding bank records and concluded as follows:

> An additional $20,000 construction draw was funded by Criterion NV, LLC in May 2017 (fn. 7 Criterion NV, LLC was a company controlled by Michael Spinola, who was one of Legion's three members (along with Plaintiff and Defendant Mineau)).
>
> [9 App 1228]
>
> - all of these funds were commingled. A reasonable possibility exists that a substantial portion of the $69,000 was used in connection with one or more of those other TNT projects.
>
> [9 App 1230]

There simply is no evidence of a loan from Bradley Tammen in the record, there is no evidence that such loan was repaid, and due to the commingling of funds there is no way to confirm that the $20,000 referenced in Mineau's declaration was actually used on the May Street Project. The Discovery Commissioner's January 10, 2020 *Report and Recommendation* recommended that Kvam should be allowed

additional discovery that will likely prove that funds were diverted away from the May Street Project to Mineau's other projects.

7. Conclusion

Mineau/Legion ask this Court to affirm summary judgment based on a theory of DA (deemed admitted) allegations in a series of counterclaims, most of which had been dismissed and which no party thought were pending. That is tantamount to entering default, without notice, to a plaintiff who had diligently prosecuted his case to the eve of trial.

Mineau/Legion's repetitious statement that "Kvam failed to specifically identify a shred of evidence to meaningfully substantiate his claims" (*See e.g. Answering Brief* at p. 47) asks this Court to ignore the 48 exhibits submitted with Kvam's *Opposition to Defendants' Motion for Summary Judgment; and Cross-Motion for Partial Summary Judgment* [10 JA 1251] which exhibits include declarations from Jay Kvam and Benjamin Charles Steele, CPA, and further asks the court to adopt Brian Mineau's perjured declaration instead.

In fact, Mineau/Legion did not rebut Kvam's evidence, at all, especially the evidence that the contractor continued to work on Mineau's other projects. Rather, Mineau/Legion raise a series of inchoate (and largely unpled) affirmative defenses, including (i) Kvam had communications with the contractor; (ii) the contractor's conduct constitutes a supervening cause; and (iii) there is an inherent risk in the real

estate market. Although Mineau/Legion keep raising these issues in their factual statements, they have never provided any points and authorities on the relevancy of these issues, did not move for summary judgment on their affirmative defenses and Judge Simons did not grant summary judgment on any affirmative defenses. Kvam has repeatedly refuted all of these inchoate affirmative defenses in the trial court and again in this appeal.

Moreover, Mineau/Legion's affirmative defenses are irrelevant as a matter of law. It does not matter that Kvam had communications with the contractor, most of which came after the underlying fraud had occurred. As a matter of law, the affirmative defense of supervening cause may be a defense to a negligence cause of action, but it is not a defense against the claims alleged by Kvam in this case. The losses Kvam suffered were not inflicted by uncertainty in the real estate market. Rather, Brian Mineau was a fiduciary who had a duty to supervise the project and owed a duty of care and loyalty to the joint venture. Mineau breached these duties when he failed to supervise the project, allowed project funds to be commingled and misrepresented the status of the Project while the contractor was actually working on Mineau's other projects.

The problems created by Judge Simons' unlawful deemed admitted theory, reliance on a non-existent counterclaim, disregard for Kvam's declaration and adoption of Mineau/Legion's inchoate and irrelevant affirmative defenses so

permeate her Order that the entire Order must be set aside.

Kvam should also be allowed to continue his discovery in the District Court and Mineau should be required to prove that he borrowed $20,000 from Bradley Tammen which has been repaid with interest or suffer the consequence of his perjured declaration.

Wherefore, Appellant Jay Kvam respectfully requests an order reversing the June 5, 2020 *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* [14 JA 1948] in its entirety, and for such other and further relief consistent with the foregoing.

Respectfully submitted this 10th day of March, 2021.

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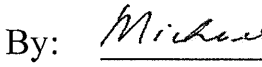
By: 

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using Word Times New Roman 14-point font size.

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of March 2021.

MATUSKA LAW OFFICES, LTD.

By: Michael L. Matuska

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CERTIFICATE OF SERVICE

I certify that **APPELLANT'S REPLY BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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Dated this 10th day of March 2021.

/s/ SUZETTE TURLEY
Suzette Turley, an employee of
Matuska Law Offices, Ltd.