IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC; BRIAN EDGEWORTH AND ANGELA EDGEWORTH, INDIVIDUALLY, HUSBAND AND WIFE; ROBERT DARBY VANNAH, ESQ.; JOHN BUCHANAN GREENE, ESQ.; and, ROBERT D. VANNAH, CHTD., d/b/a VANNAH & VANNAH, Appellants, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION, Respondents.	Case No. 82058

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APPEAL
from a decision in favor of Respondents
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Jim Crockett, District Court Judge
District Court Case No. A-19-807433-C

APPELLANTS' OPENING BRIEF

Docket 82058 Document 2021-16559

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

<u>Statutes</u>:

Rules:

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the justices of this court may evaluate possible disqualification or recusal. Appellants Robert Darby Vannah, Esq., John Buchanan Greene, Esq., and Robert D. Vannah, Chtd, dba Vannah & Vannah, are individuals residing in the State of Nevada, and/or a Nevada company, there is no parent corporation or publicly held company that owns 10% or more of any stock of the Firm. Appellants have been represented throughout the litigation and appeal by Patricia A. Marr, Esq., of PATRICIA A. MARR, LLC. No other law firms are expected to appear on behalf of Appellants in this appeal.

JURISDICTIONAL STATEMENT

On December 23, 2019, Daniel S. Simon and the Law Office of Daniel S. Simon, a Professional Corporation (SIMON) filed a Complaint (SLAPP) against Robert Darby Vannah, Esq., John Buchanan Greene, Esq., Robert D. Vannah, Chtd. (collectively referred to as VANNAH), and Edgeworth Family Trust, American Grating, LLC, Brian Edgeworth, and Angela Edgeworth (collectively referred to as the Edgeworths). APPELLANTS' JOINT APPENDIX (AA) 000038-56. On May 15, 2020, VANNAH filed a Special Motion to Dismiss: Anti-SLAPP seeking dismissal pursuant to Nevada's Anti-SLAPP law found in NRS 41.660. AA 000828-

923. The Edgeworths filed a similar Special Motion (AA000924-937), of which VANNAH filed a Joinder on June 8, 2020. AA000993-994.

On May 29, 2020, SIMON filed an Opposition to VANNAH'S Special Motion. AA001840-2197. Prior to that filing, SIMON filed an Amended Complaint (SLAPP) against VANNAH and the Edgeworths. AA000995-1022. Of its eight (8) counts/claims, five (5) are directed towards VANNAH. Id. These include Counts/claims for 1.) Wrongful Use of Civil Proceedings; 2.) Intentional Interference with Prospective Economic Advantage; 3.) Abuse of Process; 4.) Negligent Hiring, Supervision, and Retention; and, 5.) Civil Conspiracy. Id.

On May 29, 2020, VANNAH filed a Special Motion to Dismiss Plaintiffs' Amended Complaint: Anti-SLAPP, seeking dismissal pursuant to Nevada's Anti-SLAPP law found in NRS 41.660. AA002198-2302. On July 15, 2020, SIMON filed an Opposition to VANNAH'S anti-SLAPP Motion. AA002550-2572. The hearing was thereafter continued to October 1, 2020.

On August 25, 2020, VANNAH filed an anti-SLAPP Motion pursuant to the order of the district court. AA002879-2982. On September 10, 2020, SIMON filed an Opposition. AA003585-3611. On September 24, 2020, VANNAH filed a Reply (AA004103-4175), and a Joinder to the Reply of the Edgeworth's on September 25, 2020. AA004176-4177.

On October 1, 2020, the district court heard oral argument on the anti-SLAPP

Motion, at the end of which the district court orally announced that it would issue an order denying the Motion. AA004184-4231. On October 26, 2020, the district court issued its written order, with notice of entry of the order filed the next day. AA004241-4279. On November 2, 2020, VANNAH filed their Notice of Appeal. AA004250-4251.

ROUTING STATEMENT

This appeal should be presumptively retained by the Supreme Court pursuant to NRS 41.670(4), which states: "If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court." Since the adoption of NRS 41.670(4), the Court of Appeals has been created and rules adopted to regulate the assignment of cases. This case should be retained by the Supreme Court pursuant to NRAP 17(a)(12) as it addresses an issue of statewide public importance. There isn't a great deal of law quite yet on Nevada's anti-SLAPP statute and the trial courts are in need of guidance so that the statute's purpose of protecting the free speech of citizens unable to afford to defend against abusive lawsuits can be achieved.

INTRODUCTION

SIMON'S SLAPP seeks to punish VANNAH, in their role as lawyers, and their mutual clients, the Edgeworths, for filing a lawsuit, for filing papers and pleadings, for making arguments in court, and for filing briefs before the Nevada

Supreme Court. AA000038-56; AA000995-1022. All that SIMON has alleged in his SLAPP suits against VANNAH is protected speech pursuant to NRS 41.637(3). Id. For all practical purposes, NRS 41.637(3) is a codified litigation privilege, making VANNAH immune from any civil liability under NRS 41.650.

The Edgeworths' Amended Complaint referenced above brought claims against SIMON for breach of contract, declaratory relief, breach of the implied covenant of good faith and fair dealing, and conversion. AA000886-1897. The Edgeworths' Amended Complaint was filed by VANNAH and was based, in part, on the acts of SIMON asserting a lien in an amount that constituted a contingency fee when he had an hourly fee agreement with the Edgeworths, then holding the Edgeworths' funds and refusing the return their funds to them for what now amounts to over three and one half years. Id.; *see also*, AA000065-764; AA000860-884.

Let this be clear: if the Appellants had not filed the Amended Complaint against SIMON in the underlying matter, SIMON never would have filed his SLAPP in this matter. AA000860-884; AA002879-2982. Since SIMON'S SLAPP was brought in response to the legal use of the courts by VANNAH on behalf of mutual clients to redress wrongs, SIMON'S Complaint and Amended Complaint are SLAPP suits which must be dismissed under Nevada's anti-SLAPP law. Permitting this case to go forward would not only be counter to the plain terms of the anti-SLAPP statute and the First Amendment, it would incentivize precisely the type of litigation that

the anti-SLAPP statute is meant to discourage.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court erroneously decided Appellant VANNAH'S Special Motion to Dismiss which was filed pursuant to NRS 41.660.

STATEMENT OF THE CASE

SIMON has not made one allegation in his SLAPP, or made even one argument in the several Oppositions he filed, that either Mr. Vannah or Mr. Greene said anything to anyone about SIMON outside of court papers or proceedings. AA000038-56; 000995-1022; 002879-2982; 003585-3611. And all of SIMON'S Counts/claims are centered solely on the claim for conversion brought against him, a claim that was simply filed, with no discovery allowed whatsoever prior to its dismissal by the district court. Id.

As the declarations of Mr. Vannah and Mr. Greene state, the Amended Complaint that was prepared and filed against SIMON and his law firm was based in part on the amount of his asserted attorney's liens. AA000860-884. These acts constituted conversion under Nevada law that had been at that time on the books for over six decades, as well as a breach of contract and breach of the covenant of good faith and fair dealing. Id. In doing just that and only that, VANNAH, in their sole role as lawyers for mutual clients of SIMON, are all being sued for making written and oral communications in judicial proceedings, and only judicial

proceedings, on behalf of the Edgeworths. AA000038-56; 000860-884; 000995-1022; 002879-2982; 003585-3611. NRS 41.637(3). Therefore, these clearly are protected communications under Nevada's anti-SLAPP laws.

Furthermore, every allegation, Count, and claim that SIMON has made against VANNAH is barred by the absolute litigation privilege, making VANNAH immune from all civil liability. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). Not only does the absolute litigation privilege protect VANNAH from any legal repercussions from all of the communications as alleged by SIMON (Id.), this also means that SIMON can't and didn't meet his burden under the law. NRS 41.665(2).

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

This all began when SIMON was retained by the Edgeworths to represent their interests following a flood that occurred on April 10, 2016, in a home they owned, which was under construction. AA000071; 000528-556. SIMON undertook this assignment on May 27, 2016. Id. He then began billing the Edgeworths $550 per hour for his work from that date to his last entry on January 8, 2018. AA000067-000764. Damage from the flood caused in excess of $500,000 of property damage, and litigation was filed in the Eighth Judicial District Court as Case Number A-16-738444-C. Id.

In that action, the Edgeworths brought suit against entities responsible for defective plumbing on their property: Lange Plumbing, LLC, The Viking Corporation, and Supply Network, Inc. Id. Judge Tierra Jones conducted an evidentiary hearing over five days from August 27, 2018, through August 30, 2018, and concluded on September 18, 2018, to adjudicate SIMON'S attorney's lien. AA000528-556. The Court found that SIMON and the Edgeworths had an implied agreement for attorney's fees. Id.

However, the Edgeworths vigorously asserted that an oral fee agreement existed between SIMON and the Edgeworths for $550/hour for work performed by SIMON. AA000461-466. In addition to the Edgeworths' testimony, SIMON'S invoices from May 27, 2016, through January 8, 2018, were all billed at $550 per hour for his time. AA000071; 000528-556.

SIMON admitted that he *never* reduced the hourly fee agreement to writing; rather, the first written fee agreement he ever presented to the Edgeworths was on November 27, 2017—which was *days after* obtaining a settlement in principle for $6 million. AA000067-000764. Regardless, SIMON and the Edgeworths performed the understood terms of the original oral fee agreement with exactness. Id. This was demonstrated when SIMON sent four (4) invoices to the Edgeworths over time with very detailed invoicing, billing $486,453.09 in fees and costs, from May 27, 2016, through September, 19, 2017. AA000528-556.

SIMON always billed for his time at the hourly rate of $550 per hour, and his two associates always billed at the rate of $275 per hour. Id. It is undisputed the Edgeworths paid the invoices in full, and SIMON deposited the checks without returning any money. Id. And SIMON *did not express an interest* in May of 2016 in taking the property damage claim with a value of $500,000 on a contingency basis. AA000461-466.

SIMON thought that his attorney's fees would be recoverable as damages in the underlying flood litigation. AA000067-000764. As such, it was incumbent upon him, as the attorney, to provide and serve computations of damages pursuant to NRCP 16.1 listing how much in the fees he'd charged. Id. At the deposition taken of Brian Edgeworth on September 27, 2017, he was asked what SIMON'S attorney's fees were to date, and, on the record, SIMON voluntarily admitted that "[the fees have] all been disclosed to you" and "have been disclosed to you long ago." Id.

Notwithstanding the existence of a fee agreement, a mutually understood pattern of invoices sent and paid for SIMON'S fees, and the Edgeworths' affidavits and testimony that an oral contract for fees paid at the hourly rate of $550 per hour had been reached in May of 2016, SIMON eventually wanted more than an hourly fee. Id. In mid-November, and again on November 27, 2017, and only after the value of the case skyrocketed to over $6,000,000, SIMON demanded that the

Edgeworths modify the fee contract so that he could recover a contingency fee dressed as a bonus. AA000461-466; 000919-923.

In a letter to the Edgeworths dated November 27, 2017 (AA000919-923), SIMON claimed that he was losing money and that it would be the right thing to do for the Edgeworths to agree to pay him basically 25% of the $6 million settlement with Viking. Id. SIMON also invited the Edgeworths to contact another attorney and verify that this was the way things work. Id.

In SIMON'S own words, this is how he presented his drop-dead demand to *his* clients: "I have thought about this and this is the lowest amount I can accept…If you are not agreeable, then I cannot continue to lose money and help you…I will need to consider all options available to me." Id. These words were interpreted to clearly mean that if the Edgeworths didn't acquiesce and sign a new retainer agreement that would give SIMON an additional $1,114,000 in fees, he would no longer be their lawyer. AA000461-466; 860-884. Meaning SIMON would quit, despite the looming reality that the litigation against the Lange defendant was set for trial early in 2018. AA000461-466; 000919-923.

The Edgeworths refused to bow to SIMON'S pressure and demands for a fee bonus. AA000461-466. When the Edgeworths did not acquiesce to SIMON'S demands, SIMON refused to release the Edgeworths' settlement proceeds. Id.

Instead, SIMON served two (2) attorney's liens: one (1) on November 30, 2017 (AA000099-102), and an Amended Lien on January 2, 2018. AA000104-107.

SIMON'S Amended Lien was for a net sum of $1,977,843.80. Id. This amount was on top of the $486,453.09 in fees and costs the Edgeworths had paid in full to SIMON for all his services and time from May 27, 2016, through September 19, 2017. Id.; AA000461-466; 000528-554. The math reveals that 40% (a contingency fee) of $6,000,000 is **$2,400,000**. Similar math shows that $486,453.09 plus $1,977,843.80 equals **$2,464,296.89**. On January 4, 2018, VANNAH, on behalf of the Edgeworths, filed a complaint against SIMON, alleging claims for breach of contract, declaratory relief, and conversion. AA000112-121. On March 15, 2018, VANNAH, on behalf of the Edgeworths, filed an amended complaint against SIMON, alleging claims for breach of contract, declaratory relief, conversion, and breach of the implied covenant of good faith and fair dealing. AA000470-486.

A basis for the Edgeworths' claim for conversion against SIMON is that he knew or had every reason to know through his own statements and actions (the deposition of Brian Edgeworth; NRCP 16.1 disclosures and computation of damages; the amount of the super bill of $692,120, not a billable amount "that may well exceed $1,500,000" that SIMON stated to VANNAH in a letter dated December 7, 2017; etc.) that the largest amount of additional fees that SIMON could reasonably

claim from the Edgeworths via an attorneys lien is **$692,120**. AA000065-000764; 000860-884; 002879-2982; 004103-4175. In other words, the Edgeworths' amended complaint does not challenge SIMON'S right to assert a lien. Id. Rather, it has always been about its **amount**, and SIMON'S persistent refusal to release the balance of the funds to the Edgeworths. Id.

The plain reading of SIMON'S SLAPP clearly reveals that every Count/claim against VANNAH is directly related to VANNAH'S use of the courts—a judicial body—to bring and present claims for relief on behalf of clients—the Edgeworths—against SIMON, namely the claim for conversion. NRS 41.637(3). Here are some examples of the allegations in SIMON'S SLAPP, with emphasis **in bold**:

> 19.On January 4, 2018, Edgeworth's, through Defendant Lawyers, **sued** Simon, **alleging conversion**….
>
> 23.**During the course of the litigation**, Defendants, and each of them, filed false documents asserting blackmail, extortion and converting the Edgeworth's portion of the settlement proceeds.
>
> 25. **All filings for conversion** were done without probable cause or a good faith belief that there was an evidentiary basis.
>
> 35. The Edgeworth entities, through the Defendant attorneys, **initiated a complaint**….

36. The Edgeworth entities, through the Defendant attorneys, **maintained the**…**conversion claim when filing an amended complaint**….

41. The Edgeworths and the Defendant attorneys **advanced arguments in public documents**….

50. The Defendants…intended to harm…**by advancing arguments in public documents**…**filings**….

58. The Edgeworth's and the Defendant attorneys abused **the judicial process** when **initiating a proceeding and maintained the proceeding alleging conversion**….

67. Robert D. Vannah, Chtd., **had a duty**…to act diligently and competently **to represent** (sic) **valid claims to the court and to file pleadings before the court**…

103. Defendants, and each of them…intended to accomplish the unlawful objective of (i) **filing false claims**…to **defend wrongful institution of civil proceedings**…were committed several times **when filing the complaint, amended complaint, all briefs, 3 affidavits, oral arguments and supreme court filings**…. AA000995-1022.

Other than having the intent to violate Nevada's anti-SLAPP laws by attacking VANNAH'S speech that is specifically protected by NRS 41.637(3), there is no other reasonable interpretation of the basis for, or the content of, SIMON'S

SLAPP. Id. Pursuant to Nevada law, a "Written or oral statement made in direct connection with an issue under consideration by a…judicial body…" is a protected communication under Nevada's Anti-SLAPP statute. NRS 41.637(3). Furthermore, pursuant to NRS 41.650, due to the fact that all of the allegations against VANNAH in SIMON'S SLAPP are protected communications under NRS 41.637(3), VANNAH "…is *immune* from any civil action for claims based upon the communication." NRS 41.650. (Emphasis added.)

Therefore, VANNAH cannot be sued for following the law in petitioning a judicial body for relief afforded pursuant to well-established Nevada law. Id. The absolute litigation also prevents VANNAH from being sued by SIMON on any facts alleged by him in his SLAPP. *Jacobs v. Adelson*, 130 Nev. 408, 412-413, 325 P.3d 1282, 1285-1286 (2014); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). As a result, SIMON'S SLAPP must be dismissed.

II. PROCEDURAL BACKGROUND

On December 23, 2019, SIMON filed a Complaint (SLAPP) against VANNAH and the Edgeworths. AA000038-56. On May 15, 2020, VANNAH filed a Special Motion to Dismiss: Anti-SLAPP seeking dismissal pursuant to Nevada's Anti-SLAPP law found in NRS 41.660. AA000828-923. The Edgeworth's filed a similar Special Motion (AA000924-937), of which VANNAH filed a Joinder on June 8, 2020. AA000993-994.

On May 29, 2020, SIMON filed an Opposition to VANNAH'S Special Motion. AA001840-2197. Prior to that filing, SIMON filed an Amended Complaint (SLAPP) against VANNAH and the Edgeworths. AA000995-1022. Of its eight (8) counts/claims, five (5) are directed towards VANNAH. Id. These include Counts/claims for 1.) Wrongful Use of Civil Proceedings; 2.) Intentional Interference with Prospective Economic Advantage; 3.) Abuse of Process; 4.) Negligent Hiring, Supervision, and Retention; and, 5.) Civil Conspiracy. Id.

On May 29, 2020, VANNAH filed a Special Motion to Dismiss Plaintiffs' Amended Complaint: Anti-SLAPP, seeking dismissal pursuant to Nevada's Anti-SLAPP law found in NRS 41.660. AA002198-2302. On July 15, 2020, SIMON filed an Opposition to VANNAH'S anti-SLAPP Motion. AA002550-2572. The hearing was thereafter continued to October 1, 2020.

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the next day. AA004241-4279. On November 2, 2020, VANNAH filed their Notice of Appeal. AA004250-4251.

SUMMARY OF ARGUMENTS

The district court erred, as a matter of law, in denying VANNAH'S anti-SLAPP Motion, because all of SIMON'S claims in his SLAPP against VANNAH are protected speech pursuant to NRS 41.637(3). Since all of VANNAH'S speech is protected pursuant Nevada's Anti-SLAPP law, VANNAH is "…immune from any civil action for claims based upon the communication." NRS 41.650. Furthermore, SIMON did not and cannot make a *prima facie* showing that he is likely to succeed on any of his claims, as all are barred by the absolute litigation privilege. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014); *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980).

First, VANNAH showed that the communications and actions complained of by SIMON fall squarely within the protections of the Nevada anti-SLAPP statutes. AA000828-923; 002198-2302; 002656-2709; 002710-2722; 002879-2982; 004103-4175; 004223-4231. All of the communications made by VANNAH, as alleged by SIMON in his SLAPP, are protected speech under N.R.S. 41.637(3), as all were admittedly made in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern' means any ... 3. [w]ritten or oral

statement made in direct connection with an issue under consideration by a ... judicial body." *Id*.

Second, VANNAH'S declarations and arguments showed that all alleged communications were truthful and without any knowledge of falsehood. AA000860-884. When the complaint and amended complaint were filed against SIMON alleging, among other things, conversion, the clear law of Nevada that has been on the books for 62 years stated that, "conversion is a distinct act of dominion and control wrongfully exerted over another's personal property in denial of, or inconsistent with, his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000)(citing *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958)); *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980)("We conclude that it was permissible for the jury to find that a conversion occurred when Bader refused to release their brand.")

To put a finer point on it, footnote 1 in *Bader* states as follows, "Conversion does not require a manual taking. Where one makes an unjustified claim of title to personal property, or asserts an unfounded lien to said property which causes actual interference with the owner's rights of possession, a conversion exists." Id. (Emphasis added.) That's exactly what SIMON has done here when he asserted his "unfounded" liens in amounts that he knew he had no reasonable basis to assert, the

first lien served on November 30, 2017, and the second on January 2, 2018. AA000828-923; 002198-2302; 002656-2709; 002710-2722; 002879-2982; 004103-4175; 004223-4231.

The niche case of *M.C. Multi-Family Development, L.L.C. v. Crestdale Assoc., Ltd.*, 124 Nev. 901, 911, 193 P.3d 536, 543 (Nev. 2008), was a case of first impression discussing whether the intangible property right of a contractor's license can and should be the subject of a conversion claim in Nevada. Id. In discussing the elements of the tort of conversion, the court in *M.C. Multi-Family Development* cited with approval *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000). *Id*. *Evans*, in turn, while laying out the elements of the tort of conversion in Nevada, cited with approval *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958); and, *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980), *overruled on other grounds by Evans*, 116 Nev. at 608.

This Court in *M.C. Multi-Family Development* did not overrule any portion of the law governing conversion, including that of tangible property as set forth in *Evans, Wantz*, and *Bader. Id.* This Court also did not state or imply that the "exclusivity" element for an intangible property claim was to be expanded to include that of tangible property. Id. Similarly, there isn't any language in any of these cases that holds or implies that money, such as specified settlement proceeds, or the like, is intangible property, like the contractor's license mentioned in *M.C. Multi-*

Family. *Id*. And there nothing in *Evans, Wantz*, or *Bader* that limits a claim for conversion to one with exclusive possession of property. *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000); *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958); and, *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980). In fact, the law in Nevada is to the contrary. *Id*.

Even if it is eventually determined that either the laws governing conversion don't apply to attorneys who assert liens, regardless of the amount or the facts, or that VANNAH'S interpretation of the law of conversion (as set forth in *Evans, Wantz*, or *Bader*) is incorrect, the plain language of the caselaw cited above is ample evidence that VANNAH'S reading of and interpretation of the law was based in truth and done without any knowledge of falsehood. AA00860-884; NRS 41.637(3); *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000); *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958); and, *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980).

Third, SIMON did not make a *prima facie* showing that he has a probability of succeeding on any of his claims against VANNAH for Wrongful Use of Civil Proceedings; Intentional Interference with Prospective Economic Advantage; Abuse of Process; Negligent Hiring, Supervision, and Retention; or, Civil Conspiracy. AA000828-923; 002198-2302; 002656-2709; 002710-2722; 002879-2982; 003585-3611; 004103-4175; 004223-4231. All are barred by the absolute

litigation privilege and the arguments made below show that neither the facts nor the law support anything that SIMON has alleged. Id.

Finally, *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980), reiterated the rule that "As a general proposition an attorney at law is *absolutely privileged* to publish defamatory matter concerning another…in which he participates as counsel, if it has some relation to the proceeding." *Id*., at 711-12 (emphasis added). *Bull* stated further: "The privilege rest upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to obtain justice for their clients." *Id*., at 712; *See also Jacobs v. Adelson*, 130 Nev. 408, 412-413, 325 P.3d 1282, 1285-1286 (2014).

Certainly, the protections of the absolute litigation privilege given to all lawyers in *Bull* were not intended to be limited in any manner by Nevada's anti-SLAPP law. That would be nonsensical, as absolute privilege means just that. Yet, if SIMON'S application of the law was followed, the lawyer in *Bull* would have absolute immunity under the litigation privilege for publishing even defamatory speech (Id.), yet face civil liability and receive no protection from Nevada's anti-SLAPP law for the identical speech. Nonsensical indeed.

For example, SIMON and/or VANNAH, as personal injury lawyers, could allege negligence or recklessness against a defendant, have a judge or jury disagree, then face a lawsuit from that defendant who would have the green light to make the

same claims raised in SIMON'S SLAPP. Similar complaints could be filed by all aggrieved defendants against opposing lawyers, be it in a breach of contract matter, a copyright infringement case, or any type of claim. As long as a defendant in an underlying matter believes that they have prevailed and that they were wronged, a retaliatory complaint could be filed against any lawyer who had the temerity to file the complaint to begin with. That was not and cannot be the intent or the application of the Nevada's anti-SLAPP law.

Based on the above, and the plain, reasoned, and sensible application of the law, the anti-SLAPP law requires dismissal of SIMON'S SLAPP.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A strategic lawsuit against public participation (SLAPP) is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." *See John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009) (superseded by statute as stated in *Delucchi v. Songer*, 133 Nev. 290, 296, 396 P.3d 826, 831 (2017)). An anti-SLAPP motion to dismiss is treated as a motion for summary judgment. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013). NRS 41.660 sets forth a two-pronged analysis for determining whether a Special Motion to Dismiss under Nevada's anti-SLAPP statute should be granted.

First, the defendant seeking dismissal must show, by a preponderance of the evidence, that the plaintiff's claim "is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a), *see also Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1223 (2019); *John v. Douglas County Sch. Dist.,* 125 Nev. 746, 754, 219 P.3d 1276, 1282 (2009). NRS 41.637 establishes four categories of communications that are defined by their very nature as "good faith" and are thus protected from civil liability by NRS 41.650.

Here, all of VANNAH'S communications are protected, as everything that SIMON has alleged in his SLAPP (AA000038-56; 000995-1022; 002879-2982; 4103-4175) concerns a "[w]ritten or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law." NRS 41.637(3).

The provisions of the anti-SLAPP statutes "shall be construed broadly" to safeguard "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Nygard, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 218 (Cal. Ct. App. 2008). The first step of the inquiry addresses whether the moving party has made a threshold showing that the challenged cause of action is one arising from a protected activity – that is, an activity in furtherance of the person's right of petition or free speech.

Since VANNAH has shown that all of their speech is statutorily protected speech under the first prong, the burden shifts to SIMON under the second prong, who must make a sufficient prima facie evidentiary showing that he has a probability of prevailing on his claim(s). NRS 41.660(3)(b).

On appeal, the Supreme Court conducts a *de novo* review of the decision on the anti-SLAPP motion to dismiss. *See Coker v. Sassone*, 135 Nev. Adv. Op. 2, 432 P.3d 746, 749 (2019). In *Coker*, the Supreme Court adopted California's standard of review for a denial of an anti-SLAPP motion:

> We review de novo the grant or denial of an anti-SLAPP motion. We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.

Id. at 749 (2019) (citing to *Park v. Bd. of Trustees of California State Univ.*, 2 Cal. 5th 1057, 1067, 393 P.3d 905, 911 (2017) (citations omitted)). *See also* NRS 41.665(2) ("the Legislature intends that in determining whether the plaintiff 'has demonstrated with prima facie evidence a probability of prevailing on the claim,' the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015").

Whether under state anti-SLAPP statutes or NRCP 56, courts should dispose

of meritless cases implicating protected speech early. "[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." *Good Government Group, Inc. v. Superior Court of Los Angeles County*, 22 Cal.3d 672, 685, 586 P.2d 572, 578 (Cal. 1978) *citing Dombrowski v. Pfister*, 380 U.S. 479, 486-487 (1965).

II. THE ALLEGED CONDUCT FORMING THE BASIS OF THE COMPLAINT AND AMENDED COMPLAINT

Simply put, SIMON wants to punish VANNAH and their mutual clients, the Edgeworths, for filing a lawsuit to redress wrongs that were allegedly committed by SIMON. AA000038-56; 000995-1022; 002879-2982; 004103-4175. Every allegation made by SIMON in his SLAPP against VANNAH pertains exclusively to communications contained in written complaints filed with the court, to papers and pleadings filed with the court, and to oral arguments made in the courtroom. Id.

III. DISMISSAL IS WARRANTED BECAUSE VANNAH'S COMMUNICATIONS INVOLVED PROTECTED COMMUNICATIONS MADE IN CONNECTION WITH AN ISSUE UNDER CONSIDERATION BY A JUDICIAL BODY

NRS 41.637 provides four categories of protected conduct which allow this special dismissal process. As relevant here, the statute protects any "[w]ritten or oral statement made in direct connection with an issue under consideration by a

legislative, executive or judicial body, or any other official proceeding authorized by law," as long as the statement is "truthful or is made without knowledge of its falsehood." NRS 41.637(3). For a statement to be considered in "direct connection" with an issue under consideration by a judicial body, the statement must 1.) relate to the substantive issues in the litigation; and, 2.) be directed to persons having some interest in the litigation. *Patin v. Ton Vinh Lee*, 134 Nev. Adv. Op. 87, 429 P.3d 1248, 1251 (2018). *See also, In re Episcopal Church Cases*, 45 Cal.4th 467, 477-78 (Cal. 2009) ("In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected speech or petitioning activity.").

VANNAH'S burden under this step is easily satisfied, as there is no disputing that every allegation made by SIMON against VANNAH pertains exclusively to matters presented to judicial bodies. AA000038-56; 000995-1022; 002879-2982; 004103-4175. *See, e.g. LHF Prods., Inc. v. Kabala*, No. 216CV02028JADNJK, 2018 WL 4053324, at *3 (D. Nev. Aug. 24, 2018), in which the Court held that "demand letters, settlement negotiations ***and declarations*** are clearly made in direct connection with a complaint, which is 'under consideration by a judicial body' so as to carry defendant's burden under the first step of the Anti-SLAPP analysis (emphasis added).

Further, all communications by VANNAH about SIMON are strictly limited to written complaints, filed with the court, to papers and pleadings filed with the court, and to oral arguments made in the courtroom. AA000038-56; 000995-1022; 002879-2982; 004103-4175. In fact, SIMON failed to offer any allegation or fact that the VANNAH Defendants ever published any comment about SIMON—to anyone—outside the courtroom, except to their mutual clients, the Edgeworths. Id.

Courts have routinely held that providing assistance or advice in anticipation of litigation or other official proceeding is considered a protected activity for the purposes of the anti-SLAPP statutes. *See, e.g.*, *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (plaintiff brought action for fraudulent conversion of its trademarks and sued attorney Kamran who worked with defendants to register the trademarks to defendants.

In dismissing the suit against Kamran as a SLAPP lawsuit, the Court stated, "[b]ut for the trademark application, Mindys would have no reason to sue Kamran. Because Mindys' claims arose from Kamran's act of applying to register the trademarks in [defendants'] name, they are properly subject to an Anti-SLAPP motion."); *Contreras v. Dowling*, 5 Cal.App.5th 394 (2016) ("[A]ll communicative acts performed by attorneys as part of the representation of a client in a judicial proceeding or other petitioning contacts are *per se* protected as petitioning activity by the anti-SLAPP statute" (citations omitted)); *Briggs v. Eden Council for Hope &*

Opportunity, 969 P.2d 564 (1999) ("Even [defendant's] counseling of tenant ... was in anticipation of litigation, and courts considering the question have concluded that 'just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege, ... such statements are equally entitled to the benefits of section 425.16 [the California Anti-SLAPP statutes]'"(citations omitted)); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993 (2001) (Defendants were sued in part for a complaint made to the Securities and Exchange Commission alleging violations by plaintiff.

In granting defendants' anti-SLAPP motion to dismiss, the court stated, "[w]e have little difficulty concluding that the filing of the complaint [with the SEC] qualified at least as a statement before an official proceeding... [T]he purpose of the complaint was to solicit an SEC investigation.").

The moving party "must establish only 'by a preponderance of the evidence' that the statements were true or made without knowledge of its falsehood." NRS 41.660(3)(a). In the sworn declaration of Robert D. Vannah, Esq, at paragraph 16, he states that: "I, as the senior partner of the firm, made the decisions to file the pleadings with the claims made and thereafter, the arguments presented in briefs, in court, and all other judicial proceedings, including the pending appeal." AA000860-871. His declaration further states "These decisions were made after a thorough review of the law pertaining to these claims, and a good faith belief that all of the

written and oral communications made to the court are accurate and well-founded in the law, and not done for any ulterior or improper motive." Id.

In support of VANNAH'S declaration, the clear law of Nevada that had been on the books for 62 years stated that, "conversion is a distinct act of dominion and control wrongfully exerted over another's personal property in denial of, or inconsistent with, his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000)(citing *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958)); *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980).

Footnote 1 in *Bader* states as follows, "Conversion does not require a manual taking. Where one makes an unjustified claim of title to personal property, or asserts an unfounded lien to said property which causes actual interference with the owner's rights of possession, a conversion exists." Id. (Emphasis added.) That's exactly what the evidence supported that SIMON had done here when he asserted his "unfounded" liens in amounts that he knew he had no reasonable basis to assert, the first lien served on November 30, 2017, and the second on January 2, 2018. AA000065-764.

The facts further showed that SIMON knew he couldn't charge or collect a contingency fee without the written fee agreement that he'd failed to draft or obtain. AA000528-554; 002883-2892. SIMON also knew that the additional work he

performed at his full hourly rate of $550 was never going to exceed the amount of his super bill of $692,120, yet he still continued to assert an amended lien in the amount of $1,977,843.80. Id. In short, the amount of the amended lien was "unfounded," as it's in an amount that is unsupported by the facts, including those created by, and known by, SIMON in the underlying matter. Id. And that was the good faith basis for bring the claim for conversion. Id.; AA000860-884.

Given the above, VANNAH has shown by a preponderance of the evidence under the first prong of the anti-SLAPP statute that all communications by VANNAH in written complaints filed with the court, in papers and pleadings filed with the court, and with oral arguments made in the courtroom were made in direct connection with an issue under consideration by a judicial body, and that the statements were truthful or made without knowledge of their falsehood. NRS 41.637(3). Therefore, they are protected communications. Id.

IV. SIMON CANNOT SHOW A PROBABILITY OF PREVAILING ON HIS CLAIMS AGAINST VANNAH

Having shown that VANNAH'S complained of communications are protected speech under the first prong of the Nevada anti-SLAPP statutes, the burden now shifts to SIMON to demonstrate with *prima facie* evidence a probability of succeeding on any of his other claims. *Rosen*, 453 P.3d at 1223. In order to avoid dismissal under the second prong of the Nevada Anti-SLAPP statutes, SIMON must

demonstrate both: 1.) that either of his two Complaints is legally sufficient to state a cause of action, and, 2.) that the cause of action is supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006).

The showing of facts required of plaintiff under this standard is higher than would be required to avoid a motion to dismiss. *Omerza v. Fore Stars, Ltd.*, No. 76273, at *9 (Nev. Jan. 23, 2020). SIMON has not shown, and cannot show, that either of his SLAPP suits is legally sufficient. AA000828-923; 002198-2302; 002656-2709; 002710-2722; 002879-2982; 003585-3611; 004103-4175; 004223-4231. Similarly, SIMON has not shown, and cannot show, facts supporting his causes of action. Id. As such, SIMON did not and cannot carry his burden under the second prong of the anti-SLAPP test.

1. <u>The Litigation Privilege Bars All Of Simon's Claims Against Vannah</u>

All of SIMON'S claims against VANNAH must fail, as all of VANNAH'S actions giving rise to SIMON'S claims for relief are protected under the litigation privilege. AA000038-56; 000828-923; 000993-1022; 002198-2302; 002656-2709; 002710-2722; 002879-2982; 003585-3611; 004103-4175; 004223-4231.

Furthermore, SIMON did not show a likelihood of success in proving any of his claims for relief against VANNAH under the second step or prong of the anti-

SLAPP analysis, because VANNAH is immune from suit under the litigation privilege. Id.

The litigation privilege, which is applicable here, is broadly construed as an absolute bar to lawsuits based on statements made in contemplation of or during litigation. *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014); *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). The litigation privilege is used as part of the SLAPP analysis, specifically under the second step to show a party will not be able to prevail on his claims based on the underlying protected speech.

Nevada courts have recognized "the long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy." *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983). "The scope of the absolute privilege is quite broad," and "courts should apply the absolute privilege liberally, resolving any doubt in favor of its relevancy or permanency." *Id.,* at 644.

Moreover, the privilege applies not only to communications made during actual judicial proceedings, but also to "communications preliminary to a proposed judicial proceeding." *Id.,* at 644; *See also, Bull v. McCuskey*, 96 Nev. 706, 712 (Nev

1980) ("an attorney at law is absolutely privileged ... in communications preliminary to proposed judicial proceeding ... if it has some relation to the proceeding"); *Richards v. Conklin*, 94 Nev. 84, 85 (1978) (litigation privilege applies to anticipated litigation).

The policy underlying the litigation privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege for making false and malicious statements." *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60 (1983). *See also*, *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15 (Cal.App. 4th 1997) (the reason behind the litigation privilege is to give "litigants and witnesses 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.'

In other words, the litigation privilege is intended to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes, without being chilled from exercising this right by the fear that they may subsequently be sued in a derivative tort action arising out of something said or done in the context of the litigation."). *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014); *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980).

Moreover, the courts have expressly held that the litigation privilege may be used under the anti-SLAPP statutes to show the plaintiff will be unable to carry its burden under the second prong. *Briggs*, 969 P.2d 564 (Cal 1999) ("'just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege, ... such statements are equally entitled to the benefits of section 425.16 [the California Anti-SLAPP statutes]'" (citation omitted)); *Rusheen*, 37 Cal. 4th at 1057-58 (plaintiff unable to show likelihood of prevailing under the second prong of the Anti-SLAPP analysis because the claim was barred by the litigation privilege.); *Flatley v. Mauro*, 46 Cal.Rptr.3d 606, 624 (2006) ("[t]he litigation privilege is also relevant to the second step in the anti-SLAPP analysis.").

SIMON leaned in error for support on *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). *Bull* reiterated the rule that, "As a general proposition an attorney at law is *absolutely privileged* to publish defamatory matter concerning another…in which he participates as counsel, if it has some relation to the proceeding." Id., at 711-12; emphasis added. *Bull* stated further: "The privilege rest upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to obtain justice for their clients." *Id*., at 712.

Bull went on to state: "Attorney Bull's comments may be understood to pertain to either Dr. McCuskey's competence or his credibility, and therefore, are

privileged." *Id*. Finally, the Court stated: "Although the denigrating comments of attorney Bull regarding Dr. McCuskey were privileged, *and alone would not supply a basis for liability in damages*, it does not follow that an attorney may so conduct himself without fear of discipline." *Id*., emphasis added. The discipline referred to by the court in *Bull* was before the State Bar, not a judge or jury of one's peers. Id. No "basis for liability in damages" means no duty of care owed, and no basis for SIMON'S SLAPP. Id.

It is also wrong for SIMON to argue that either *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014), and/or *Herzog v. "a" Co*., 138 Cal. App. 3d 656, 188 Cal. Rptr. 155 (Cal. Ct. App. 4th Dist. 1982), requires some "good faith" test to determine whether the absolute litigation privilege applies to VANNAH'S communications made **in the course of litigation** and during various judicial proceedings, together with the filing of pleadings, briefs, and other legal materials. Id. These cases say nothing to minimize the time-honored and absolute litigation privilege for *the* conduct alleged by SIMON against VANNAH in the SLAPP. Id.

In *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014), it is undisputed that Mr. Adelson gave a press release to the Wall Street Journal, a third party, concerning Mr. Jacobs. Id. Mr. Jacobs then amended his complaint to bring a claim for defamation per se against Mr. Adelson. *Id*. The court in *Jacobs* reiterated that

the absolute litigation privilege applies to communications made in the course of litigation, such as all of the communications SIMON alleged against VANNAH. Id.

Jacobs was very clear in its ongoing mandate that, "When the communications are made in this type of litigation setting and are in some way pertinent to the subject of the controversy, the absolute privilege protects them even when the motives behind them are malicious and they are made with knowledge of the communications' falsity." *Jacobs*, 130 Nev. at 412-413, 325 P.3d at 1285-1286 (2014). That is a critically important finding that undermines every basis for SIMON' SLAPP, and each argument made in the district court below. AA000828-923; 002198-2302; 002656-2709; 002710-2722; 002879-2982; 003585-3611; 004103-4175; 004223-4231.

The conceptual dilemma confronting the court in *Jacob*s was how far the absolute litigation privilege should apply when one makes what is alleged to be a defamatory statement to a disinterested third party such as a reporter for the Wall Street Journal in a setting that is outside of the courtroom. *Jacobs*, 130 Nev. at 412-413, 325 P.3d at 1285-1286. In addressing that novel issue, the court in *Jacobs* stated, "This court has not previously addressed whether the absolute privilege applies when the media is the recipient of the statement. We have, however, recognized that communications are not sufficiently related to judicial proceedings when they are made to someone without an interest in the outcome." *Id*., citing *Fink,*

118 Nev. At 436, 49 P.3d 645-46. The court declined to automatically extend the absolute litigation privilege in that setting. *Jacobs*, 130 Nev. at 415, 325 P.3d at 1287.

That's not what SIMON has alleged against VANNAH, as every allegation SIMON made against VANNAH in the SLAPP pertains exclusively to communications made to and in judicial forums. AA000038-56; 000065-764; 000828-923; 000995-1022; 002198-2302; 002656-2722; 002879-2982; 004103-4175; 004184-4222.

Here, since VANNAH'S communications as alleged by SIMON were all admittedly made in the course of litigation and during various judicial proceedings, together with the filing of pleadings, briefs, and other legal materials, they are "are absolutely privileged" and VANNAH "is immune from civil liability." *Jacobs v. Adelson*, 130 Nev. 408, 412-413, 325 P.3d 1282, 1285-1286 (2014); *Greenberg Traurig, LLP v. Frias Holding Company*, 130 Nev. Adv Op. 67, 331 P.3d 901, 903 (2014)(en banc)(quotation omitted); *Fink v. Oshins*, 118 Nev. 428, 432-33, 49 P.3d 640, 643 (2002); and, *Bull v. McCuskey*, 96 Nev. 706, 711-713, 615 P.2d 957 (1980).

2. <u>Simon Has Not Made a *Prima Facie* Case For His Claims of Wrongful Use of Civil Proceedings Or Abuse of Process</u>

In addition to the absolute litigation privilege and statutory immunity mentioned above, there is also a complete lack of prima facie evidence to support

SIMON'S Counts/claims for abuse of process and wrongful use of civil proceedings, as there is no set of facts that SIMON could prove that would entitle him to a remedy at law. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). One of the key elements for a claim for malicious prosecution (since abandoned in SIMON'S SLAPP) is a favorable termination of a prior action. *LaMantia v. Redisi*, 38 P.3d 877, 879-80 (2002). The same case speaks of the elements of a claim for abuse of process, which also includes the requirement of the resolution of a prior, or underlying action. *Id*.

The reasonable interpretation here is that the prior action has not been terminated favorably for SIMON. This all started when SIMON sought a contingency fee award of fees via an attorney's lien in excess of $1.9M dollars, while the Edgeworth's simply sought to pay him his hourly rate for the work he performed, including the final invoice that Brian Edgeworth asked SIMON about back in 2017, yet which SIMON wouldn't produce or provide. AA000065-764.

In her Order (that was affirmed in part by this Court), the district court awarded SIMON his hourly fees from that final invoice that Mr. Edgeworth would have paid before any of this began, as well as a quantum meruit sum of $200,000 for six (6) weeks of work that SIMON himself billed out at $33,811.25. AA000528-554. At the end of the proverbial day, SIMON was awarded approximately one-

third of the amount of his claimed lien, of which the Edgeworth's had already agreed to pay $286,000 of that amount. Id.; AA000461-466.

The language in SIMON'S claim for wrongful use of civil proceedings is nothing more, either factually or legally, than one couched in malicious prosecution and/or abuse of process, and lacks sufficient factual and/or legal support to meet his burden on these counts, either. NRS 41.660(3)(b).

A claim for abuse of process also requires more than the mere filing of a complaint itself. *Laxalt v. McClatchy*, 622 F. Supp. 737, 752 (D. Nev. 1985). Rather, the complaining party must include some allegation of abusive measures taken after the filing of a complaint to state a claim. Id. As indicated in the appellate record, nothing substantive with the Edgeworths' Amended Complaint was allowed to be taken after it was filed and served. AA000065-764. No discovery, no depositions, no nothing. Id.; AA000860-884. Without any additional "abusive measure," SIMON'S claim for abuse of process is legally insufficient. *See*, *Laxalt,* 622 F. Supp. at 752.

Furthermore, on October 31, 2018, and again on November 19, 2018, the Edgeworths sent letters to SIMON, clearly stating that they agreed to be bound the Decision and Order on Motion to Adjudicate Lien of Judge Jones and to refrain from all appeals, including the dismissal of the Amended Complaint. AA000761-763. This means that the Edgeworths agreed to pay all the fees and costs that Judge Jones

awarded to SIMON in that Order. Id. Yet SIMON refused to respond, thus subjecting himself to the appeal and the alleged ongoing harm that he claims in his SLAPP. AA000860-884. That's a prime example of an invited error. *Carstarphen v. Milsner*, 270 P.3d 1251, 128 Nev. 55 (2012). Since this count/claim is legally insufficient, SIMON cannot meet his burden under NRS 41.660(3)(b).

Since SIMON'S SLAPP is inextricably linked to written and oral communications made by VANNAH (and the Edgeworths) in the underlying judicial action, since there is no "favorable termination of a prior action" to SIMON, since no "additional abusive measure" was ever undertaken by VANNAH, and since SIMON error invited his own alleged damages, SIMON cannot show by prima facia evidence that he can prevail on his claims for abuse of process or wrongful use of civil proceedings. *See*, *LaMantia v. Redisi*, 38 P.3d 877, 879-80 (2002); *Laxalt v. McClatchy*, 622 F. Supp. 737, 752 (D. Nev. 1985).

Therefore, SIMON again cannot meet his burden under NRS 41.660(3)(b), and his SLAPP must be dismissed. Id.

3. Simon Has Not Made a *Prima Facie* Case of Intentional Interference With Prospective Economic Advantage

As with SIMON'S other Counts/claims, the one for intentional interference with prospective economic advantage must also be dismissed, as there is no set of facts that SIMON could present or prove that would entitle him or his firm to any

relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). In Nevada, the elements for a claim for intentional interference with prospective economic advantage are: 1.) A prospective contractual relationship between plaintiff and a third party; 2.) Defendant has knowledge of the prospective relationship; 3.) The intent to harm plaintiff by preventing the relationship; 4.) The absence of privilege or justification by defendants; 5.) Actual harm to plaintiff as a result of defendant's conduct; and, 6.) Causation and damages. *Wichinsky v. Moss*, 109 Nev. 84, 88, 847 P.2d 727, 729-30 (1993); *Leavitt v. Leisure Sports, Inc.*, 103 Nev. 81, 88, 734 P.2d 1225 (1987).

Furthermore, "the intention to interfere is the sine qua non of this tort." *M&R Inv. Co., v. Goldsberry*, 101 Nev. 620, 622-23, 707 P.2d 1143, 1144 (1985)(citing *Lekich v. International Bus.Mach.Corp.*, 469 F. Supp 485 (E.D. Pa. 1979); *Local Joint Exec. Bd. Of Las Vegas v. Stern*, 98 Nev. 409, 651 P.2d 637, 638 (1982).

In the caselaw governing this claim in Nevada, the plaintiff had and identified the contractual relationship that was allegedly interfered with by a defendant. Id. However, SIMON fails in his SLAPP to identify <u>any</u> actual prospective contractual relationship between SIMON and <u>any</u> third party. AA000038-56; 000995-1022; 002897-2982; 004103-4175. Instead, SIMON'S SLAPP speaks in generalities and is full of speculation and conjecture. Id. Who are the specific third parties and what are actual prospective contractual relationships that VANNAH allegedly interfered

with? SIMON didn't say. Id. Where are the facts that VANNAH had prior knowledge of any such prospective relationship? Again, SIMON didn't so state or allege. Id.

Most importantly here, the facts alleged in SIMON'S Count/claim (as are all of the claims/counts in SIMON'S SLAPP) are immune from civil liability pursuant to NRS 41.650, *and* are barred by the absolute litigation privilege. *Greenberg Traurig, LLP v. Frias Holding Company*, 130 Nev. Adv Op. 67, 331 P.3d 901, 903 (2014)(en banc); *Fink v. Oshins*, 118 Nev. 428, 432-33, 49 P.3d 640, 643 (2002); *Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court of State ex rel. Cnty of Clark*, 128 Nev. 885, 381 P.3d 597 (2012)(unpublished)(emphasis omitted); and, *Hampe v. Foote*, 118 Nev. 405, 47 P.3d 438, 440 (2002), abrogated by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); and, *Bull v. McCuskey*, 96 Nev. 706, 711-713, 615 P.2d 957 (1980).

Since this Count/claim is clearly barred by the litigation *privilege*, immune from civil liability under NRS 41.650, SIMON can't, among other things, meet element 4 ("the absence of privilege or justification by defendants"). Therefore, SIMON'S SLAPP must be dismissed as a matter of law pursuant to NRS 41.660. *See also, Wichinsky v. Moss*, 109 Nev. 84, 88, 847 P.2d 727, 729-30 (1993); *Leavitt v. Leisure Sports, Inc.*, 103 Nev. 81, 88, 734 P.2d 1225 (1987).

4. Simon Has Not Made a *Prima Facie* Case of Negligent Hiring, Supervision, and Retention or Civil Conspiracy

The basis for SIMON'S allegations contained in Count/claim IV (Negligent Hiring, Supervision, and Retention) and Count/claim VIII (Civil Conspiracy) are factually and legally defective, as well. There is no reasonable question that an attorney client relationship never existed in the underlying action between SIMON and VANNAH. AA000038-56; 000860-884; 000995-1022; 002897-2982; 004103-4175. There is no dispute that these Counts/claims (IV & VIII) are brought by SIMON, who is an admitted and documented adversary of the Edgeworths, due to communications allegedly made and actions allegedly taken in the underlying judicial action by the Edgeworths and their attorneys, VANNAH, namely the filing of pleadings, briefs, and in making arguments to Judge Jones. Id.

The law is clear that VANNAH, as attorneys, does not owe a duty of care to SIMON, an adversary of a client, the Edgeworths, in the underlying litigation. *Dezzani v. Kern & Associates, Ltd.*, 134 Nev.Adv.Op. 9, 12, 412 P.3d 56 (2018). Rather, an attorney providing legal services to a client generally owes no duty to adverse or third parties. *Id*. *See also*, *Fox v. Pollack*, 226 Cal.Rptr. 532, 536 (Ct. App. 1986); *GemCap Lending, LLC v. Quarles & Brady, LLP*, 269 F. Supp. 3d 1007 (C.D. Cal 2017); *Borissoff v. Taylor & Faust*, 96 Cal. App. 4th 418, 117 Cal. Rptr. 2d 138 (1st District 2002). (An attorney generally will not be held liable to a third

person not in privity of contract with him since he owes no duty to anyone other than his client.); *Clark v. Feder and Bard, P.C.*, 634 F. Supp. 2d 99 (D.D.C.)(applying District of Columbia law)(Under District of Columbia law, with rare exceptions, a legal malpractice claim against an attorney requires the existence of an attorney-client relationship; the primary exception to the requirement of an attorney-client relationship occurs in a narrow class of cases where the "intended beneficiary" of a will sues the attorney who drafted that will).

A simple and plain reading of Counts/claims IV & VIII of SIMON'S SLAPP shows that they are based on the breach of an alleged duty by VANNAH to SIMON in the filing of, and engaging in, litigation. AA000038-56; 000995-1022. Neither the extensive law discussed above, nor common sense, allow SIMON to make or maintain such Counts/claims against VANNAH. Since SIMON cannot maintain these claims as a matter of law pursuant to Nevada (and general) law, he cannot prevail. *See*, *Vacation Village, Inc. v. Hitachi Am. Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994)(quoting *Edgar v. Wagner*, 101 Nev. 226, 228 ,699 P.2d 110, 112 (1988); and, *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 124, Nev. 313, 316, 183 P.3d 133, 135 (2008). Since SIMON cannot prevail, he cannot meet his burden under NRS 41.660(3)(b).

SIMON'S Count/claim for civil conspiracy has additional legal flaws, as SIMON'S allegations are insufficient to establish the elements of a claim for this

relief. *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 124, Nev. 313, 316, 183 P.3d 133, 135 (2008). VANNAH agrees that meetings were held with the Edgeworths, the first of which occurred with Brian Edgeworth on November 29, 2017; that the initial meeting was held at the encouragement of SIMON; that VANNAH was retained to represent the Edgeworths' interests; that VANNAH counseled and advised the Edgeworths on their litigation options; that, as a result of the client meetings, VANNAH prepared and caused to be filed a complaint and an amended complaint to address wrongs committed by SIMON, naming SIMON as defendants. AA000065-764; 000860-884; 002879-2982.

There is nothing in Nevada law that makes it criminal or unlawful for a lawyer to meet with a client and advise the client of the option to use the judiciary to take public action to seek redress for injuries suffered by that client at the hands of another, such as SIMON. NRS 41.637(3). There is also nothing in Nevada law that makes it criminal or unlawful for an attorney to then file a complaint and/or amended complaint alleging various claims for relief, including conversion, when an adverse party, even an attorney, has laid claim to an amount of money that he knew and had reason to know that he had no legal basis to exercise dominion and control over through an attorney's lien. *Id*.; *Bull v. McCuskey*, 96 Nev. 706, 712 (Nev 1980); *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000)(*citing*, *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958)); *Bader v.*

Cerri, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980).

Finally, there is nothing in Nevada law that makes it criminal or unlawful to vigorously defend the interest and claims of that client in judicial proceedings. NRS 41.635-670*; Jacobs v. Adelson*, 325 P.3d 1282 (2014); *Bull v. McCuskey*, 96 Nev. 706, 711-713, 615 P.2d 957 (1980). This is all part of the public record and was all done to seek a remedy that SIMON withheld—a large amount of the Edgeworths' money. AA000065-000764. And he's done so now for over two (2) years. Id.; 002879-2982; 004103-4177. Neither the facts, nor the law, nor common sense support SIMON'S claim for civil conspiracy. Therefore, he cannot prevail. *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 124, Nev. 313, 316, 183 P.3d 133, 135 (2008). Since this count/claim is legally and factually insufficient, SIMON cannot meet his burden under NRS 41.660(3)(b).

5. Neither Claim Preclusion Nor Issue Preclusion Have Any Application To The Special Motion Or To This Matter

As argued in the Special Motion, and the declaration of Robert D. Vannah, Esq., the claim for conversion was brought and maintained in in accordance with existing Nevada law. SIMON and the district court are incorrect that claim preclusion has any bearing in this matter, as discussed in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008), and its predecessors.

As clearly discussed in *Five Star*, and in all of the cases discussed in *Five*

Star, for claim preclusion to be triggered and applied, two lawsuits must have been filed by the offending party, one after the other and after the initial suit was dismissed or adjudicated on the merits, with both suits seeking the same or similar relief. *Id*.

In *Five Star*, two sets of counsel on two separate occasions failed to appear for pretrial calendar calls, resulting in dismissal of the initial complaint on the merits pursuant to EDCR 2.69(c). Id. Thereafter, the second set of counsel filed a new (second) suit based on the same contract, or basic facts. Id. A motion was then brought to get the new, or second, suit dismissed on the basis of claim preclusion. Id. The Court agreed that since the first suit was dismissed on the merits under EDCR 2.69(c), the new, or second, suit was barred by the doctrine of claim preclusion. *Id*. Those were the facts and that was the law. *Id*.

Here, neither the facts nor the law jive with *Five Star*. The Edgeworths did not file a new (or second) suit, as was done in *Five Star*, after an initial suit was dismissed on the merits. Rather, the Edgeworths appealed the wrongful dismissal of their Amended Complaint. AA000065-000764. Thus, there isn't the necessary tangible second filing—the necessary condition precedent—by the Edgeworths for the doctrine of claim preclusion to apply. Id.

These are critical distinctions that preclude any application of the doctrine of claim preclusion, as discussed in *Five Star Capital Corp. v. Ruby*, 124 Nev.

1048, 194 P.3d 709 (2008). If there was a temptation to expand *Five Star* well beyond its intended boundaries here, public policy reasons and common sense should halt any such step backwards.

Also, the court in *Five Star* held that claim preclusion *may* be applied, thus bestowing discretion to the judge on whether to extinguish a second, or new, suit, a condition precedent that did not happen here. Id. Since neither the facts nor the law supports the consideration of claim preclusion here, there isn't a factual or legal basis to either consider or expand claim preclusion to this matter.

Finally, what the district court did or didn't decide has nothing to do with Nevada's anti-SLAPP law and the fact that SIMON'S suit, on its face, is a SLAPP. VANNAH'S communications are protected speech under NRS 41.637(3), and VANNAH is therefore immune from civil liability under both NRS 41.650, and the absolute litigation privilege. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). Therefore, the district court erred on all counts on the factual and legal merits claim and/or issue preclusion, in light of NRS 41.637(3), NRS 41.650, and the litigation privilege.

6. The District Court Was Factually And Legally Wrong In Finding A Pre-Litigation Accord And Satisfaction Was Reached

SIMON did not brief the issue of accord and satisfaction in his moving papers. AA003585-3611. Rather, the district court came up with it as the abbreviated

hearing was drawing near its conclusion. AA004184-4222.

In Nevada, the elements for an accord and satisfaction are: 1.) A person against whom a claim is asserted and who has a bona fide dispute over an unliquidated amount; 2.) Proves a good faith tender of an instrument to the claimant in full settlement of the entire disputed amount; 3.) An understanding by the creditor of the transaction as such, and acceptance of the payment. (There must be a meeting of the minds with regard to a resolution of the claim); and, 4.) The claim is discharged. NRS 104.3311; *Pierce Lathing Co. v. ISEC, Inc.,* 114 Nev. 291, 956 P.2d 93 (1998); *Walden v. Backus*, 81 Nev. 634 (1965) ("Accord" is an agreement whereby one of the parties undertakes to give or perform, and the others to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what s/he is, or considers himself/herself, entitled to); *Mountain Shadows v. Kopsho*, 92 Nev. 599 (1976).

Here, there was no evidence that elements 2, 3, or 4 were ever met in any pre-litigation fashion. It is undisputed, and the record clearly reflects, that since the outset, SIMON sought over $1.9M in fees and asserted his claim to this sum of the settlement proceeds via an attorney's lien. AA00065-764; 002879-2982; 004103-4175. On the other hand, the record further reflects, that since before litigation was filed, the Edgeworths wanted the entire amount of settlement proceeds paid to them and were ready, willing, and able to pay SIMON'S fee invoices for his services at

the agreed-to rate of $550 per hour. AA000461-466; 000528-554.

Since SIMON—the attorney for the Edgeworths—chose to exercise the power to assert a lien in an amount unsupported by the facts or the law; since SIMON would not release the settlement funds to the Edgeworths as they requested; and, since the settlement check needed to be deposited without becoming stale, it was agreed that the contested funds would be deposited and remain on deposit until the SIMON'S lien was adjudicated…where they remain to this day, despite being adjudicated by the district court. AA000461-466; 000860-884. Recent Motion practice before the district court seeks the release of the funds, but to no avail, yet.

The primary reason why they remain on deposit is because there never was a pre-litigation settlement of any sum of the disputed amount; there never was an understanding by a creditor or an acceptance of a payment to the Edgeworths; and, the claim was not discharged. NRS 104.3311; *Pierce Lathing Co. v. ISEC, Inc.,* 114 Nev. 291, 956 P.2d 93 (1998); *Walden v. Backus*, 81 Nev. 634 (1965). Since these material elements of accord and satisfaction were never reached pre-litigation, it is reversable error for the district court to make this unsubstantiated, and unbriefed, finding.

CONCLUSION

SIMON'S suit is a SLAPP. VANNAH has met their burden under the law, as all of their communications were protected speech under NRS 41.637(3), and

immune from civil under NRS 41.650, as well as the absolute litigation privilege. *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). On the other hand, SIMON did not and cannot meet his burden. Therefore, SIMON'S SLAPP must be dismissed under Nevada's anti-SLAPP law.

Not only is SIMON'S suit a SLAPP, it is the type of action that will most assuredly open the floodgates of retaliatory litigation against any lawyer who has the temerity to bring an action on behalf of a client.

Furthermore, neither issue preclusion, nor claim preclusion, nor accord and satisfaction have any factual or legal support in, or relevance to, this matter.

For the foregoing reasons, this Court should grant VANNAH'S Special anti-SLAPP Motion to Dismiss following *de novo* review, and award sanctions to Appellant VANNAH pursuant to NRS 41.670(1)(a)-(b).

DATED this 9th day of June, 2021.

Respectfully Submitted,

PATRICIA A. MARR, LLC

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

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

I further 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because it does not exceed 14,000 words.

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. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because it contains 12,899 words.

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 9th day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 9th day of June, 2021, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: APPELLANTS' OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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