IN THE SUPREME COURT OF NEVADA

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC; BRIAN EDGEWORTH AND ANGELA EDGEWORTH, INDIVIDUALLY, AND AS HUSBAND AND WIFE; ROBERT DARBY VANNAH, ESQ.; JOHN BUCHANAN GREENE, ESQ.; AND ROBERT D. VANNAH, CHTD, d/b/a VANNAH & VANNAH, and DOES I through V and ROE CORPORATIONS VI through X, inclusive,

Appellants,

v.

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

Respondents.

Supreme Court Case No. 82058

Dist. Ct. Case No. A-19-807433-C

EDGEWORTH APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made to enable the Justices of this Court to evaluate possible disqualification or recusal.

Edgeworth Family Trust is a trust formed under the laws of the State of Nevada. American Grating, LLC, is a Limited Liability Company formed under the laws of the State of the Nevada. Appellants Brian Edgeworth and Angela Edgeworth, individuals, own American Grating, LLC; they are the Trustees of Trust. These Appellants were represented in the district court by the law firm of Hutchison & Steffen, Messner Reeves LLP, and Tucker Ellis, LLP. These Appellants are now being represented by Steve Morris, Rosa Solis-Rainey of Morris Law Group, and Lisa Carteen of Tucker Ellis, LLP.

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I. JURISDICTIONAL STATEMENT

Appellants have timely appealed from the Order denying their Special anti-SLAPP Motion to Dismiss pursuant to NRS 41.647. The Order was entered on October 26, 2020 and notice of entry was filed on October 27, 2020. AA004232-40. Appellants further appeal all rulings made appealable by the foregoing Order.

Appellants' notice of appeal was timely filed on November 3, 2020. AA004252-54. This appeal is made pursuant to the direct appeal provisions of NRS 41.670(4). Therefore, this Court has appellate jurisdiction over all issues presented in this appeal.

II. ROUTING STATEMENT

The Nevada Supreme Court has jurisdiction over this appeal pursuant to NRAP 17(a)(12). The appeal raises a question of statewide public importance, namely, the extent of the protections of Nevada's anti-SLAPP statute. The express language of the anti-SLAPP statute provides that an appeal lies to the Supreme Court. NRS 41.670(4) states that "[i]f the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

III. ISSUES PRESENTED

A. Did the district court err in considering the amended complaint filed without leave of court and after special motions to dismiss the original complaint under Nevada's anti-SLAPP statute had been filed?

B. Did the district court err by denying the Edgeworths' anti-SLAPP special motion to dismiss despite acknowledging the action was premised principally on the judicial record in a prior proceeding in another court (*Simon I*)?

C. Did the district court err by declining to dismiss under the premise that the decision in *Simon I* and three extrajudicial statements testified to in that proceeding before another judge were dispositive of the good faith prong of the anti-SLAPP statute without even examining the statements?

D. Did the district court err by relying on unexamined extrajudicial statements regarding judicial proceedings in *Simon I* without considering defendants' contention, supported by authority, that the statements were absolutely privileged?

IV. STATEMENT OF THE CASE

This retaliatory lawsuit (*Simon II*) was commenced by Respondent Daniel Simon filing a complaint on December 23, 2019, to recover damages under a variety of tort theories from Brian and Angela Edgeworth, the Edgeworth Family Trust, and their business, American Grating, LLC (collectively referred to as Edgeworths) and the Edgeworths' lawyers Robert Vannah, John Greene, and their firm Vannah & Vannah (collectively referred to as Vannah).

Daniel Simon is the Edgeworths' former lawyer who represented them several years ago in a lawsuit in which they recovered a large sum of money. Before the recovery was realized, but after he had been paid several hundred

thousand dollars by the Edgeworths under an implied agreement with them to compensate him at the rate of $550 per hour, Simon demanded more than a million dollars as a bonus, as if he had been working under a contingent fee agreement that he tendered to the Edgeworths, which they refused to sign. Simon then filed a charging lien to secure and collect the bonus he demanded. That lien was adjudicated in *Simon I* by District Court Judge Tierra Jones after a five-day hearing before her and did not result in the recovery of a bonus for Simon.

Simon's tort claims in this case (referred to herein as *Simon II*) before retired Judge James Crockett are based on Judge Jones's decision in *Simon I*, and particularly on testimony of the Edgeworths (in person and in affidavits) before Judge Jones that Simon alleges defamed him and resulted in injury to him under a variety of other tort theories.

The Edgeworths and Vannah filed special anti-SLAAP motions to dismiss Simon's complaint as protected statements under NRS 41.637 and as absolutely privileged statements made in the course of litigation. Before those motions were heard, Simon amended his complaint in an effort to plead around the anti-SLAAP statute, over the objections of the Edgeworths and Vannah. Judge James Crockett ignored the objections, and the Edgeworths and Vannah renewed their special motions to dismiss in response to Simon's amended complaint without waiving their objections to its filing.

Judge Crockett held a hearing on the renewed special motions to dismiss the amended complaint, and after announcing that he was leaning toward granting them, and without hearing argument from the defendants, he turned to Simon's counsel to argue against the motions. During that argument Judge Crockett announced he had changed his mind and would deny the motions, saying that Judge Jones's ruling in *Simon I* showed that the Edgeworths' conversion claim that was dismissed by her was not filed in good faith and thus did not meet the requirements of NRS 41.660(3)(a).

Judge Crockett went on to say that although he did not need to address prong 2 of the anti-SLAAP statute (NRS 41.660(3)(b)) in view of his ruling on the first prong, he would do so anyway. Without considering the uncontradicted declarations presented to him by the Edgeworths or any of the privileges applicable to their petitioning and testimony in *Simon I*, and despite the fact Simon ***did not present any evidence***, he summarily declared that Simon had established a probability of prevailing on his claims and that the extrajudicial statements Simon alluded to but did not present, raised issues of fact. After saying the hearing was at an end, he grudgingly permitted the Edgeworths' counsel to briefly speak and concluded the hearing. His written decision prepared by Simon's counsel was filed thereafter. This appeal followed.

V. STATEMENT OF FACTS

A. THE UNDERLYING LITIGATION IN "*SIMON I* ".

The Court is familiar with the extensive allegations in the underlying litigation, *Simon I*; it was the subject of two previously decided appeals and a writ petition. Nev. Sup. Ct. Case Nos. 77176, 77678, and 79821. Thus the history of *Simon I* will be summarized only to the extent that history is relevant to this appeal.

1. The Parties and Counsel in *Simon I*

The Edgeworth Family Trust and American Grating LLC were the named plaintiffs in *Simon I*. Brian and Angela Edgeworth are trustees of the Edgeworth Family Trust and the owners of American Grating (the Edgeworths, their Trust, and American Grating are collectively referred to as the "Edgeworths"). Daniel Simon ("Simon") was their attorney until he was constructively discharged on November 29, 2017, when the Edgeworths hired Vannah & Vannah ("Vannah") to work with Simon to wrap up a settlement he had "helped secure." AA004258. The Edgeworths retained Vannah to work with Simon on finalizing the settlement, the principal terms of which had been agreed to on November 15, following mediation. AA000031.

Simon I was initiated by the Edgeworths on the advice of Vannah on January 4, 2018. They alleged breach of contract, declaratory judgment, and conversion claims, after Simon unsuccessfully pressed the Edgeworths to

change the terms of his employment and filed a multi-million dollar charging lien to secure payment of fees ***based on his proposed*** new terms of employment that the Edgeworths had rejected. AA001289-98.

On behalf of the Edgeworths, Vannah amended the complaint on March 15, 2018 to add a claim for breach of the covenant of good faith and fair dealing. AA001300-11. Robert Vannah declared that he filed these claims in good faith after a thorough review of the facts and the law as he understood them. AA000868 ¶25.

2. Nature of the Dispute in *Simon I*

Despite having billed the Edgeworths at a "'reduced' rate of $550 per hour," for nearly 18 months (AA000030 ¶¶7-11), on the eve of finalizing the settlement accepted on November 15, Simon called the Edgeworths to his office to say he wanted almost $1 million more than what he had earned at $550 per hour. AA003066 ¶55. "If," Simon told the Edgeworths, "you are not agreeable, then I cannot continue to lose money and help you." AA003114; AA003110-17 (Simon's complete proposal to replace compensation at $550 per hour). Simon invited the Edgeworths to contact other counsel to verify that his proposal should be accepted, and two days later they hired Vannah and constructively discharged Simon. Thereafter, acting on advice of their new counsel, the Edgeworths sued Simon for breach of contract and conversion, as indicated above.

Simon moved to dismiss *Simon I* (AA000028; AA004258) and moved to adjudicate his charging lien in the net sum of $1,977,843.80 (AA000032

¶20) with an attached invoice for $692,120 for legal services rendered (AA000033 ¶25). Because district court Judge Tierra Jones found no express agreement existed between Simon and the Edgeworths with respect to attorney fees, she dismissed the contract-based claims. She also dismissed the conversion claim under NRCP 12(b)(5). AA000028-37.

Dismissal of the Edgeworths' conversion claim in *Simon I* followed a five-day evidentiary hearing set by the court to adjudicate Simon's charging lien. AA000033 ¶25. The district court found that Simon was employed through November 29, 2017 under an implied contract for $550 per hour and that he was constructively discharged on November 29, when Vannah was hired. AA000012; AA000015:1-2. The district court rejected Simon's claim for a bonus, and held that he was entitled to the reasonable value of his services for the limited work he performed post-discharge to wrap up his work on the now-settled case, which she pegged at $200,000, without describing the nature or value of the post-discharge work or stating how $200,000 for that negligible work was reasonable under a *Brunzell* analysis. AA000024. Given the number of hours Simon submitted for post-discharge work, 71.10, that award of fees yielded compensation to him at a rate of ***$2,789 per hour***. (AA000282-286 and AA000423-25 billed entries from 11/30/17 to end of billings total 71.10 hours).

With respect to the dismissed conversion claim, the district court granted Simon fees and costs because she concluded that under NRS 18.010, the claim was not "maintained upon reasonable grounds." AA004264;

AA000677-79. She awarded Simon $5,000 in expert costs (later determined to be only $2,520) and $50,000 in attorneys' fees, which she also did not arrive at under *Brunzell. Id*. The district court's order granting the NRCP 12(b)(5) dismissal of the conversion claim ***did not*** attribute bad faith to the Edgeworths in filing it. AA000028-37. In fact, although the district court concluded as a matter of law that the conversion claim should be dismissed, Judge Jones recognized that "the Edgeworths 'believed' that the settlement proceeds [Simon had liened] were solely theirs." AA000034:6-8. Furthermore, the district court rejected Simon's request for fees and costs to defend the other claims and for the lien adjudication. AA000678 ¶2.

This Court in its order in the consolidated cases No. 77678/78176, filed on December 30, 2020, affirmed the district court's finding that Simon was constructively discharged on November 29, 2017 and its award of costs associated with defending the conversion claim. AA004260; AA004266. However, this Court also held that the district court had not properly substantiated the fee awards she made and remanded the case with instructions to the district court to examine the reasonableness of the $50,000 awarded to defend the conversion claim, and explain the basis and reasonableness of the $200,000 awarded for post-discharge work under *Brunzell*. AA004266.

B. THE RETALIATORY *SIMON II* LITIGATION – THIS CASE.

1. The Initial Complaint

Based exclusively on the record in *Simon I*, on December 23, 2019, Simon filed this retaliatory lawsuit naming the Trust, American Grating, the Edgeworths personally, and the Vannah lawyers who represented them following Simon's discharge on November 29, 2017. Simon alleged seven causes of action against the Edgeworths: (1) Wrongful Use of Civil Proceedings (which Nevada has not recognized); (2) Malicious Prosecution; (3) Abuse of Process; (5) Defamation Per Se; (6) Business Disparagement; (7) Negligence; and (8) Civil Conspiracy. AA000046-55 (Cts. I–III, V–VIII). He also alleged a claim for Negligent Hiring, Retention and Supervision against the Vannah parties. AA000050-51 (Ct. IV). The gist of all the claims was that the Edgeworths, acting through counsel, made baseless legal claims and unspecified false and disparaging statements in support of their claim for conversion in *Simon I*. AA000041-47 (Compl. ¶¶12 – 29); *see also, id. (e.g.*, ¶¶31–35, 41–44, 49–52, 66, 79, 84). ***All*** of Simon's allegations are based on statements or judicial claims made on the advice of counsel in *Simon I. Id. (see, e.g.*, ¶23 (asserting that unidentified "false documents" were "filed" "[d]uring the course of the litigation").

Simon's only allegation regarding alleged defamation per se is in paragraph 66, which does not reference specific statements but instead refers to the Edgeworths' "publicly filed" complaint, briefs and affidavits filed in the *Simon I* proceeding. AA000051 ¶66. Simon's complaint merely adds

formulaic and conclusory allegations to describe the elements of the so-called defamation claim. *Id*. ("The Edgeworth's [sic] repeated these [unidentified judicial] statements to individuals independent of the litigation"); *Id*. at ¶68 ("publication of these statements to third parties was not privileged").

2. The Amended Complaint.

After the Edgeworths filed their special anti-SLAPP motions to dismiss this retaliatory lawsuit (AA000924-37; AA000938-83), Simon filed an amended complaint without leave of court to do so. AA000995-1022. In it, Simon replaces the second cause of action for wrongful prosecution with a claim for intentional interference with prospective economic advantage, without reference to any specific business relationships or "interference" other than the Edgeworths filing *Simon I*. AA001007-08. In Simon's untimely and unauthorized amended complaint, he attempts to plead around and out of the anti-SLAPP statute by adding "new" allegations about "false documents asserting blackmail, extortion and theft" that had been filed in *Simon I*, claiming that these documents are "evidenced by" Brian Edgeworth's February and March 2018 affidavits and in-court testimony of Angela Edgeworth in *Simon I* in September 2018. AA001001 ¶23; AA001013 ¶77; *see also id.* ¶¶75 - 76 (adding that the Edgeworths spoke of *Simon I* to people "who were not significantly interested in the proceedings").[1]

[1] Judge Crockett ignored defendants' objection to Simon filing an amended complaint while their special anti-SLAPP motion was pending.

a. The Amended Complaint is Deficient.

Remarkably, Simon's amended complaint does not directly set out the allegedly defamatory statements the Edgeworths supposedly made to three supposedly disinterested people: attorney Lisa Carteen, former Justice Miriam Shearing, and volleyball coach Ruben Herrera. *See* AA001013 ¶23 (merely pointing to record excerpts from *Simon I*, but not the participant in the conversation); AA001013 ¶77 (same)). Nor does Simon identify what portion of the statements were allegedly defamatory or the specific damage that resulted from the statements, all of which were undisputedly presented to the district court in the course of the *Sim`on I* judicial proceedings.[2] *Id.* Simon also threw in a request for *Rocker* discovery in his amended

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Nevertheless, to avoid delay, the defendants renewed their Special Motion to Dismiss the Amended Complaint (AA002372-74), without waiving their objections to the untimeliness or propriety of amendment in the midst of Special Anti-SLAPP motion practice. On order of the district court (AA002878A-B), the Edgeworths again renewed their Special Motion to Dismiss on August 27, 2020, and again raised the impropriety of permitting amendment in the midst of anti-SLAPP motion practice. AA003498:14-27; AA003996 n.1 (reserved all rights). The renewed motions were not heard until October 20, 2020, far beyond the time required in NRS 41.660(3)(f).

[2] During the five-day hearing before Judge Jones, Simon's counsel suggested to the Edgeworths in cross-examination that in speaking to Coach Herrera, Ms. Carteen, and former Justice Shearing that they ***accused*** Simon of "stealing," "extortion" and the like which the Edgeworths unequivocally denied. To each person, they expressed their opinion of how Simon was treating them in unreasonably and, without any basis, pressuring them to obtain $1M+ dollars from them as a "fee" ***in addition to*** what he earned, was paid, and accepted at $550 per hour.

complaint, without specifying why it was necessary. AA001014-15 ¶82; *but see*, NRS 41.660(4) ("court shall allow limited discovery" only "[u]pon a showing by a party that information necessary to oppose the burden pursuant to paragraph (b) of subsection 3 is . . . not reasonably available without discovery").

Without offering more than these bare references to the prior judicial proceeding, and notwithstanding declarations and sworn testimony given by the Edgeworths explaining the timing and context of these three extrajudicial statements, Simon, in his opposition papers and especially at the motions to dismiss hearing before Judge Crockett, leaned heavily on his ***contention*** that the district court's fees and costs award under NRS 18.010 in *Simon I* and the alleged three extrajudicial defamatory statements that he alluded to but ***never identified*** in his deficient amended complaint precluded dismissal under NRS 41.660. *See generally* AA003523-53; AA004197-211. The three communications alluded to by Simon in his amended complaint are described below.

FIRST Conversation.[3] Brian and Angela Edgeworth founded the Las Vegas Aces Volleyball Club, a nonprofit corporation to promote volleyball for children in southern Nevada. AA001193:6-7. The Edgeworths' two

[3] This conversation, and the second one, took place more than two years before Simon filed his complaint. To the extent that he suggests these statements are actionable, he is wrong: they fall outside the statute of limitations. *See* NRS 11.190(4)(c) (defamation is subject to the two year statute of limitation).

daughters and Simon's daughter were on Club teams. Ruben Herrera was the head coach and Club Director (hereafter "Coach Herrera"). AA003074 ¶110. The Edgeworths and Simon were Club board members. Simon sent Coach Herrera unsolicited emails on November 30 and December 4, ***after*** filing his charging lien, insinuating that the Edgeworths were a danger to children. AA003134-36; AA003074 ¶112.

The emails to Coach Herrera were not copied to the Edgeworths. *Id.* In the emails, Simon requested that his daughter be excused from practice and released from the Club because she had to be kept away – to protect her – from the Edgeworths. AA003134-36. Coach Herrera then confronted Brian about Simon's emails and forwarded them to Brian (AA003134), who, in response, met with Coach Herrera that same day at a restaurant open to the public to explain that Simon's false accusatory emails were the product of an ongoing fee dispute with Simon. AA003074 ¶¶113-19. Brian testified to this meeting at the hearing in *Simon I* before Judge Jones and said that although he personally ***felt*** Simon was trying to extort millions of dollars from [him] which he was not entitled to, he did not use the word "extort" in explaining the lien and fee dispute with Simon to Coach Herrera.[4] AA001194-95;

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[4] Even if Brian had used the word "extort" to describe his feelings and personal beliefs, courts have recognized that the mere use of this word constitutes opinion. *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 391 (Ala. Civ. App. 1999); *Sabharwal & Finkel, LLC v. Sorrell*, 985 N.Y.S. 2d 70, 70-71 (N.Y. App. Div. 2014); *see also Abrams v. Sanson*, 136 Nev. 83, 90, 458 P.3d 1062, 1068-69 (2020) (the gist, rather than the literal meaning of specific words, should be considered). Statements of opinion are incapable of being

AA002320:5-10; AA003075. Brian's declaration was offered in good faith in *Simon I* to explain that the defamatory emails were the real reason that he did not wish to speak to Simon.[5] AA001320 ¶26.

SECOND Conversation. The second extrajudicial statement which Simon alludes to as defamatory in his amended complaint occurred in a conversation between Angela Edgeworth ("Angela") and her long-time business lawyer, Lisa Carteen, over dinner at a local sushi restaurant on December 21, 2017. AA003619 ¶39. Again, as he failed to do in addressing Brian's conversation with Coach Herrera, Simon does not identify the alleged defamatory statement; he merely incorporates by reference portions of Angela's testimony in *Simon I* before Judge Jones, which of course is absolutely privileged, in which she acknowledges discussing the ongoing fee dispute, and her feelings about it with her lawyer, Ms. Carteen, whom Angela also described as a friend. AA001001, AA001013 ¶¶23, 75; AA003420:12-25 (acknowledging she ***felt*** blackmailed and extorted); AA003425 (same); *but see* AA003394:1-7 (identifying Ms. Carteen as one of two lawyers she consulted for advice); AA003371 (confirming that in her

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false and therefore protected under the anti-SLAPP statutes. *Id.* at 89; 458 P.3d at 1068.

[5] In his affidavit offered in this case, Brian confirmed his meeting with Coach Herrera and that he "never used the words 'stole[,]' 'stolen' 'theft' 'extortion' or 'blackmail' during [his] conversation with Herrera" and that "any and all statements made by me to Herrera were my opinion about the dispute with Simon." AA003075 ¶¶122-25.

November 27, 2017 email exchange with Simon, she informed him she "would like to have our attorney [Ms. Carteen] look at [his proposed] agreement before signing").

In support of the Edgeworths' special anti-SLAPP motion, Angela submitted a declaration in which she confirmed that she had planned to obtain legal advice from Ms. Carteen as early as November 27, 2017, when she asked Simon to send her the draft of the Viking settlement agreement so she could go over it with her lawyer (*i.e.* Ms. Carteen). AA003619 ¶38. Angela's affidavit confirmed that although she considers Ms. Carteen a friend, she spoke to her frankly about the fee dispute with Simon because she wanted Ms. Carteen's legal guidance, AA003620 ¶¶47-49, which influenced how the Edgeworths proceeded with the litigation. *Id.* ¶51.

THIRD Conversation. The third extrajudicial statement was a brief conversation between Angela and one of her professional colleagues, former Supreme Court Justice Miriam Shearing, at a fundraiser held on February 8, 2018, at the Bellagio. AA003620 ¶¶53-56. In the declaration she submitted in support of the special anti-SLAPP motion, Angela explained that she and former Justice Shearing serve as directors of a women's organization. *Id.* ¶54. She knew former Justice Shearing to be a well-respected attorney and former member of the judiciary and asked for her advice on whether the lawsuit against her lawyer was legally justified. AA003620-21 ¶¶58-59. In doing so, she shared her opinions about the ongoing litigation with her lawyer and expressed how his actions ***made her feel.*** AA003620 ¶57. The discussion with

Justice Shearing gave Angela comfort that the lawsuit against her lawyer, filed the preceding month, was legally justified. AA003621 ¶60. Angela's declaration also confirmed that she never used the words "stole[,]" "stolen" or "theft" in her statements to Ms. Carteen and former Justice Shearing. *Id.* ¶62.

Angela's declaration is consistent with the testimony she provided at the hearing before Judge Jones, only an incomplete and out-of-context portion of which Simon misleadingly incorporated in his amended complaint in this retaliatory case. He omitted Angela's testimony that Justice Shearing was the second of two lawyers she consulted for advice on the *Simon I* litigation. AA003394:1-7; AA003395:24 – AA003397:15. Angela testified her conversation with Justice Shearing "gave [her] confidence in what we were doing and that we were in the right." AA003396:21-22.

Two of the foregoing three extrajudicial statements (to Coach Herrera and Lisa Carteen) fall outside the statute of limitation; none were specifically raised in Simon's initial complaint. They are suggested in the amended complaint only by reference, yet the unidentified statements and the *Simon I* judicial record are the crux of what Simon pleaded in his amended complaint and argued to support his eight causes of action. Retired Judge Crockett injudiciously relied on Simon's argument about these statements to deny the special anti-SLAPP motions to dismiss, which we now come to.

3. Adjudication of the Edgeworths' Special Motion to Dismiss Under the Amended Complaint.

Despite not directly addressing the Edgeworths' three extrajudicial statements in his amended complaint, Simon's opposition briefing and argument at the anti-SLAPP hearing focused heavily on those three alluded to but never identified statements described above. *See* AA003534-35; AA003538:1-10. He ignored the fact that Angela testified she spoke to lawyers Carteen and Justice Shearing for advice ***at Simon's invitation***. *See* AA003394:1-7. Simon also failed to tell Judge Crockett that Angela also testified that in the discussions she had with both of these lawyers, she was expressing her feelings and opinions. AA003420:2 – AA003421:15 (confirming, that among other feelings, she ***felt*** threatened, shocked, and blackmailed). *Simon's counsel himself* describes the "gist" of Angela's testimony on this point as (i) a "***belief*** that if [they] didn't sign the [proposed retainer] . . . Mr. Simon would blow up the $6 million settlement" (AA003425:21-24) and (ii) "you ***feel*** extorted, blackmailed, terrified, spooked" AA003426:2-4 (emphasis added). Angela agreed that she ***felt*** it "was a possibility at that time" the settlement would fall apart if they did not agree to Simon's demand for an additional million dollars as his fee. AA003425:25. Simon offered no evidence to contradict this testimony.

Brian Edgeworth also submitted a declaration in this retaliatory lawsuit (*Simon II*) elaborating on his conversation with Coach Herrera (AA003074-75 ¶¶113–14, 124); he included Simon's emails that prompted

Coach Herrera to confront Brian. AA003134-36 (emails to Coach Herrera including Simon's sinister statements about the Edgeworths as the reason Simon's daughter had to leave the volleyball Club, because "as parents, we must do everything in our power to protect our children").

Brian confirmed that "all statements made by [him] to Herrera were [his] opinion about the [fee] dispute with Simon," and were "also a truthful and accurate recounting of what had occurred." AA003075 ¶¶122–23. He reiterated that he did not use the words *stole*, *stolen*, *theft*, *extortion*, or *blackmail* during his conversation with Coach Herrera. *Id.* ¶125; *see also* AA001194:6 – AA001195:7 (Brian's Testimony before Judge Jones, denying use of the words "extorting," "extortion," "stealing," "theft," "blackmail," or "[a]nything . . . that could be considered criminal" in his conversation with the coach), and note 5, *supra*. Simon did not discuss this testimony with Judge Crockett or contradict it in any manner, nor did Judge Crockett discuss or evaluate the statements under the absolute litigation or other applicable privileges. *See* AA003500 (asserting immunity under NRS 41.650); AA003503 (asserting absolute litigation privilege); AA003505 and AA004008 (asserting conditional reply privilege).

4. The Dynamics of the Hearing in the District Court.

Judge Crockett opened the hearing on October 6, 2020 by summarizing the defense arguments and announcing that he was inclined to grant defendants' special motions to dismiss on the basis that the defendants' initial burden had been satisfied and Simon could not meet his burden under

the second prong of the statute, NRS 41.660(3)(b) and NRS 41.650. AA004192:8-10; AA004196:4-6 ("so at this point, I'm leaning in favor of granting the special anti-SLAPP Motions to Dismiss"). Judge Crockett recognized Simon's complaint was built on allegations that "are in fact privileged and protected actions." AA004190:13-16; *see also* AA004191-92 ("Since these written and oral communications . . . are absolutely privileged, there is no set of facts which would entitled Simon to any relief from Vannah or to prevail"). Having said this, he asked Simon's attorney to proceed with argument, without first allowing defense counsel to speak in support of the motions he was "leaning in favor of granting . . . ." AA004197:20-22.

Simon's argument against dismissal primarily focused on Judge Jones's order in *Simon I* granting a portion of his attorney's fees and costs. AA004197-99. Because Judge Jones *ultimately* dismissed the conversion claim in November 2018, Simon reasoned to Judge Crockett, the Edgeworths and their counsel should have known ***before*** they filed the claim in January 2018 that it would be dismissed. Simon argued that Judge Crockett was "stuck with that ruling," AA004201:24, and insisted that the "finding that the claim for conversion was made without reasonable basis makes the anti-SLAPP or litigation privilege fail, because they can't meet the first prong, which is good faith belief or reasonable basis." AA004205.

This fanciful but specious argument, which was persuasive to Judge Crockett, is not only a misstatement of the absolute litigation privilege, which Simon incorrectly argued the district court could not yet consider

(AA003551:7-9), but with respect to the anti-SLAPP statute, the argument erroneously persuaded the district court to evaluate the Edgeworths' petitioning for judicial relief by looking backwards to (i) Judge Jones's conclusion on November 19, 2018, that the Edgeworths' conversion claim failed as a matter of law rather than looking at (ii) what they ***believed*** in good faith, as their uncontradicted sworn testimony showed when the conversion claim was filed on January 4, 2018. At this point, the proceedings went off the rails: Judge Crockett was persuaded by advocacy, as distinguished from evidence and law, that Judge Jones's conclusion in *Simon I* was ***dispositive*** of both prongs of the anti-SLAPP statute in the motions to dismiss before him. *See* AA004205:6-7 (". . . hold on, though. I don't reach a different conclusion than Judge Jones. It's not my province to do that.").

He then abandoned his intended ruling and, **before allowing the Edgeworths' counsel to speak** (only briefly, ***after*** he had ruled), said: "to those who think that it is impossible for me to be re-directed, take note. I found Mr. Christiansen's arguments persuasive. They gave me a different perspective through which to view the information in the Motions to Dismiss . . . . And so, I am now ruling that I'm denying [the motions]." AA004211:16-21.

Simon's contention that underlying privileges could not be considered at this stage (AA003551:7-9) also persuaded Judge Crockett to ignore them and erroneously conclude that the three extrajudicial statements of the Edgeworths were not protected First Amendment activity and raised issues

of fact that precluded dismissal under the anti-SLAPP statute. AA004215:10-20; *see also* AA004217 (refusing to consider the appropriate standard on anti-SLAPP motions).

Not only did Judge Crockett erroneously rule against the defendants' anti-SLAPP motions by looking back to Judge Jones's adjudication of the fees and costs motion on the dismissed conversion claim in *Simon I*, as opposed to looking at what the Edgeworths believed in good faith and on advice of counsel when they filed their conversion claim ten months prior, he also failed to consider the interplay between the anti-SLAPP claims and the absolute litigation privilege, and the conditional privilege of reply recognized by this Court in *Jacobs v. Adelson,* 130 Nev. 408, 325 P.3d 1282 (2014), that Brian's conversation with Coach Herrera unmistakably presented. The three extra-judicial statements discussing the proceedings initiated by Simon's lien are also privileged under the fair reporting privilege. *Adelson v. Harris*, 133 Nev. 512, 515–19, 402 P.3d 665, 667-68 (2017).

VI. SUMMARY OF ARGUMENT

Simon I was presided over by District Judge Tierra Jones. After a five-day evidentiary hearing she held in late 2018 to adjudicate Simon's lien, she dismissed the Edgeworths' contract claims and their claim for conversion as a matter of law, holding that the conversion claim was not maintained upon reasonable grounds and awarded fees for defense of that claim. Judge Jones

also adjudicated Simon's lien for the nearly $2 million claimed by Simon beyond the hundreds of thousands of dollars he had already billed and collected. The district court ***rejected*** Simon's claim for the contingent-like fee he asserted in his lien. Instead, she awarded him unpaid fees for pre-discharge work on the basis of $550 per hour (which the Edgeworths did not contest and would have paid prior to filing *Simon I* if Simon had invoiced them, which he repeatedly declined to do in favor of making up his lien claim for a bonus). She also awarded Simon $200,000 in *quantum meruit* for services post-discharge, but declined to award him fees and costs for defending the remaining claims or adjudicating his lien.

The Edgeworths testified and submitted affidavits in *Simon I* describing, among other things, discussions Angela Edgeworth had with two lawyers seeking advice about litigation with Simon. Brian Edgeworth also testified about discussions with a third party, Ruben Herrera, to whom Simon had sent defamatory emails about the Edgeworths, accusing them of being a danger to children. That person confronted Brian about Simon's emails, and Brian expressed his opinion that the emails were due to judicial proceedings involving the fee dispute over Simon's claim for nearly $2.5M for legal work the Edgeworths believed would be performed on an hourly basis, as Simon had been billing throughout the litigation.

This retaliatory lawsuit, *Simon II*, is premised on dismissal of the conversion claim in *Simon I* and on three extrajudicial statements testified to in the hearing before Judge Jones, which Simon says defamed him and gave

rise to a variety of other torts. The Edgeworths and the Vannah defendants timely moved to dismiss Simon's complaint under the anti-SLAAP statute and on the basis of the absolute litigation privilege and other common law privileges. In response Simon filed, without permission of the district court, an amended complaint in effort to plead out of the anti-SLAAP statute.

The district court in *Simon II* should have promptly ruled on the defendants' anti-SLAAP motions filed in response to Simon's original complaint without allowing Simon, over defendants' objections, to amend his complaint, ***after*** the motions were filed, in a transparent effort to avoid application of the anti-SLAAP statute. Improperly entertaining Simon's amended complaint undermined the Nevada Legislature's intent to provide SLAAP defendants with a speedy remedy to dismiss without prolonged and expensive proceedings and endorsed Simon's efforts to disguise the vexatious and false nature of his retaliatory lawsuit by filing an amended complaint.

In proceeding under the amended complaint, the district court erred by concluding that the dismissal of the Edgeworths' conversion claim in *Simon I* before Judge Tierra Jones meant that they had not commenced that lawsuit in good faith and for that reason they could not establish their good faith under the first prong of NRS 41.660(3)(a). Judge Jones made no determination about the Edgeworths' good faith in filing *Simon I*. Simon invented that in argument to Judge Crockett at the hearing in October 2020 on the defendants' anti-SLAAP motions to dismiss the amended complaint.

Nor did Judge Jones make any determination regarding the Edgeworths' testimony, which Simon did not even set out in *Simon II* (he merely alluded to it). Nevertheless, Judge Crockett erroneously treated the November 2018 dismissal of the conversion claim in *Simon I* as dispositive of the Edgeworths' good faith in filing their complaint in January 2018. He did not credit or examine the Edgeworths' declarations as to their good faith in pursuing *Simon I*, as this Court has instructed.

Judge Crockett also erroneously concluded that Judge Jones's ruling was sufficient to show Simon's probability of prevailing on his claims under NRS 41.660(3)(b), despite having received ***no evidence*** from Simon to meet his burden of proof as the statute requires. The district court accepted Simon's contention that issues of fact concerning the extrajudicial statements remained, which precluded him from considering the litigation privilege and other privileges that clearly barred Simon's claims irrespective of the anti-SLAAP statute. *Hall v. Time Warner, Inc.*, 63 Cal. Rptr. 3d 798 (2007) (privileges can negate a probability of success). And for good measure, after having commenced the hearing acknowledging that *Simon II* was based on petitioning activity and protected speech, and announcing that he was leaning in favor of granting the defendants' motions to dismiss, and without allowing the defendants to speak, Judge Crockett continued his erroneous ways by announcing that Simon's argument had persuaded him to "change my mind" and that Simon had demonstrated by that argument, ***not by***

evidence as required by NRS 41.660(3)(b), that he had a probability of prevailing on his claims.

In the argument that follows this summary, the Edgeworths will show, as a matter of law and undisputed fact, that Judge Crockett should have leaned in a little further at the outset of the hearing and stuck with his initial inclination to grant the motions. We will show that the law as articulated and applied by this Court and courts elsewhere but ignored by Judge Crockett compels the Court to REVERSE Judge Crockett's decision and remand with instructions to grant the Edgeworths' motion to dismiss this case with prejudice under the anti-SLAAP statute and under the litigation privilege and other privileges that bar Simon's claims against them that Judge Crockett erroneously disregarded.

VII. STANDARD OF REVIEW IN ANTI-SLAPP CASES.

This Court reviews the grant or denial of an anti-SLAPP motion to dismiss *de novo*. *Coker v. Sassone*, 135 Nev. 8, 9, 432 P.3d 746, 747 (2019). The anti-SLAPP statute immunizes from liability "[a] person who engages in 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 41.650. To determine whether immunity is warranted, the court considers whether the anti-SLAPP movant has met the requirements of the first prong of the statute, NRS 41.660(3)(a). If so, the court then determines whether the plaintiff "has established with prima facie evidence a probability of

prevailing on the claim," under the second prong of the statute, NRS 41.660(3)(b); *Smith v. Lackey*, 462 P.3d 254 (Table) (Nev. 2020).

A. THE FIRST PRONG

Under the first prong of the anti-SLAPP statute, the court evaluates "whether the moving party has established, by a preponderance of the evidence," that he or she made the protected communication in good faith. NRS 41.660(3)(a); *see also Coker*, 135 Nev. at 12, 432 P.3d at 749. In making this determination, "the defendant's evidence, ***especially a declaration regarding the defendant's state of mind, is . . . entitled to be believed at this stage, . . . 'absent contradictory evidence in the record***.'" *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212, 1217 (2020) (emphasis added) (quoting *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020)). Judge Crockett did not consider this rule, and there was no "contradictory evidence in the record." Instead, he decided that the Edgeworths' ***unrebutted*** declarations expressing their states of mind when they initiated the *Simon I* litigation presented issues of fact that were not within NRS 41.660(3)(a). Essentially, he adopted Simon's erroneous reasoning that Judge Jones's dismissal of the conversion claim for failure to state a claim, and the partial award of fees and costs for defending that claim, was dispositive of both prongs of the anti-SLAPP statute.

B. THE SECOND PRONG

Under the second prong of the statute, the burden shifts to the plaintiff to show prima facie evidence of a probability of prevailing on the claim. *See* NRS 41.660(3)(b). NRS 41.665 states that in evaluating whether a plaintiff "has demonstrated with prima facie evidence a probability of prevailing on the claim," the burden of proof under California's anti-SLAPP statute as of June 8, 2015 shall be applied, which Simon did not meet. (This Court has specifically relied upon California authority in construing Nevada's anti-SLAPP law. *See, e.g.*, *Shapiro v. Welt*, 133 Nev. 35, 39-40, 389 P.3d 262, 268 (2017))

VIII. ARGUMENT

A. THE COURT SHOULD NOT HAVE ALLOWED AMENDMENT OF SIMON'S COMPLAINT IN THE MIDDLE OF BRIEFING THE ANTI-SLAPP MOTIONS ON HIS ORIGINAL COMPLAINT.

Nevada's anti-SLAPP statute protects constitutional free speech and the right to petition a court for judicial relief from vexatious lawsuits that could chill the exercise of those rights ***by providing a streamlined and expedited process*** for court review of the viability of the claims without the burdens of expense and delay of discovery. Nothing in the plain language of our anti-SLAPP statute or NRCP 15 authorizes the use of an amended pleading to avoid dismissal of claims challenged by a pending motion under the statute against the original complaint. *See* NRS 41.660; NRCP 15(a).

On this precise point, California courts provide helpful guidance; they have long forbidden amended pleadings in the context of pending anti-SLAPP motions to dismiss. *See, e.g.*, *Salma v. Capon*, 74 Cal. Rptr. 3d 873, 888-89 (Cal. App. 2008); *Enwere v. Hiller*, No. C 11-00645 JSW, 2011 WL 2175497, at *2 (N.D. Cal. June 3, 2011). Those courts recognize that allowing an amended pleading after an anti-SLAPP motion has been filed, as occurred here, "would completely undermine the statute by providing the pleader a ready escape from California's anti-SLAPP statute's quick dismissal remedy." *Salma*, 74 Cal. Rptr. 3d at 888–89 (quoting *Simmons v. Allstate Ins. Co.*, 112 Cal. Rptr. 2d 397, 401 (2001)).

Given the chance to "go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit," the SLAPP plaintiff could prolong the burden of the litigation cycle on the defendant engaging in protected conduct. *Id.* Indeed, courts reviewing motions to dismiss generally consider *only* the allegations in the initial complaint —not entirely new theories of liability disclosed in an amended complaint that are missing in the initial complaint. *See, e.g.*, *Simmons*, 92 Cal. App. 4th at 1072. Accordingly, the Edgeworths respectfully ask this Court to accept this well-established California authority and hold as a matter of law that Simon's amended pleading may not be used to bypass or delay anti-SLAPP motions filed by the defendants, as occurred in this case.

B. THE DISTRICT COURT ERRED IN APPLYING THE ANTI-SLAPP STATUTE, IN ANY EVENT.

It cannot be reasonably disputed that the cornerstone for Simon's complaint in this case is the judicial record in *Simon I*. NRS 41.650 provides that "[a] person who engages in 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 ***is immune from any civil action*** for claims based upon the communication." (emphasis added)

This Court in *Shapiro*, 133 Nev. at 38, 389 P.3d at 267, held that the phrase "good faith in furtherance of the right to petition or the right to free speech" is defined in NRS 41.637. The statute says:

> "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" means any:
>
> . . . .
>
> 3. Written 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; or
>
> 4. Communication made in direct connection with an **issue of public interest in a place open to the public** or in a public forum,
>
> which is truthful or is made without knowledge of its falsehood.

(Emphasis added.) Here, it is undisputed that Simon's complaint is based on the *Simon I* judicial record and First Amendment communications that fall within NRS 41.637(3) and (4).

The determination of whether a special anti-SLAPP motion should be granted consists of a two-prong analysis. Under the first prong, the court ***shall,*** "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the 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). With respect to prong one, this Court recently held that in the absence of contrary evidence, "defendant's evidence, ***especially a declaration regarding the defendant's state of mind, is . . . entitled to be believed at this stage.*** *Taylor*, 136 Nev. Adv. Op. 50, 482 P.3d at 1217. Simon presented ***no evidence*** to Judge Crockett to contradict the Edgeworths' testimony and declarations that they believed they were wronged by Simon and sought judicial relief on the advice of their counsel, as well as seeking advice from two other lawyer friends whom they trusted and respected, one of whom has represented them for many years.

C. THE UNREBUTTED EVIDENCE PRESENTED TO THE DISTRICT COURT, BUT NOT CONSIDERED, SATISFIED THE GOOD FAITH REQUIREMENT OF NRS 41.660(3)(a).

At Simon's urging, the district court incorrectly concluded that the first prong of the anti-SLAPP statute was not satisfied. In reaching this erroneous

conclusion, the court did not consider the testimony and affidavits of the Edgeworths, as NRS 41.660(3)(d) and this Court's decision in *Taylor v. Colon*, *supra*, required him to do. Instead of considering the nature of the petitioning activity in seeking judicial relief in *Simon I*, and accepting the Edgeworths' unrebutted declarations showing their states of mind when they filed their complaints in early 2018, Judge Crockett wrongly accepted Simon's argumentative proposition that Judge Jones's ***dismissal*** of the conversion claim in November 2018, and her award of a portion of Simon's attorney's fees and costs in defending against the claim because the conversion claim was not "maintained upon reasonable grounds," precluded him from finding that the litigation was ***initiated and maintained*** in good faith by the Edgeworths and their counsel to the point of dismissal.

Dismissal of a claim in the previous *Simon I* litigation, without more, does not establish that the Edgeworths made this claim and litigated it in bad faith, especially so here, where the Edgeworths commenced *Simon I* on advice of their counsel. **If this were the case, any instance in which a court dismissed claims and granted fees and costs under NRS 18.010(b)(2) would spawn additional litigation**. Simon did not point Judge Crockett to any false statements made by the Edgeworths or other evidence of bad faith. He relied exclusively on the district court's statement in awarding Simon some fees in obtaining her dismissal of the conversion claim under NRCP 12(b)(5). Judge Crockett did not consider that the Edgeworths testified they felt pressured into accepting the final settlement agreement Simon prepared, adding

himself to the Edgeworths' settlement check, and in acquiescing to having the settlement check deposited into an account controlled by Simon and Vannah. (*e.g.*, AA003425:21-25 (Angela testified about being fearful of having the settlement blown up)).

In anticipation of having to litigate to obtain their money from Simon, the Edgeworths not only acted on advice of Vannah, but they also sought advice from their long-time business lawyer, and spoke to another trusted lawyer to confirm that the litigation Vannah initiated on their behalf was appropriate. Angela offered sworn testimony that she shared her opinions and feelings with these lawyers to obtain advice and that she benefitted from their advice. AA003396:21-22 (Justice Shearing's advice "gave [Angela] confidence in what we were doing and that we were in the right"); AA003616-22.

1. The Edgeworths' Uncontradicted Declarations Established Good Faith.

The Edgeworths presented declarations in *Simon II* --- evidence under NRS 41.660(3)(d) --- to the court confirming that they believed their statements to the lawyers and Coach Herrera were truthful. AA003616-22; AA003062-82. Dismissal of their conversion and related contract claims by Judge Jones in *Simon I*, as a matter of law, does not contradict that, ***as a matter of fact***, the Edgeworths initiated and litigated *Simon I* in good faith, ***on the advice of counsel***. Thus, their lawsuit and discussions with Ms. Carteen, Justice Shearing, and Coach Herrera at the time they were made

and testified to before Judge Jones in *Simon I* (and by declarations in this case) all fall within NRS 41.637(3) and (4).[6]

Judge Crockett, however, did not evaluate or even acknowledge the evidence that the Edgeworths filed the complaint in *Simon I* on advice of counsel, or consider their good faith in initiating and maintaining the lawsuit until it was dismissed, as he should have done to comply with *Taylor v. Colon.* 136 Nev. Adv. Op. 50, 482 P.3d at 1217. Nor did Judge Crockett consider that the absolute litigation privilege applies to the statements at issue and defeats any probability of success under 41.660(3)(b), which was thoroughly addressed in the defendants' motion papers. AA003503-04. Essentially, Judge Crockett concluded that the Edgeworths could never satisfy NRS 41.660(3)(a) because Judge Jones in *Simon I* ultimately dismissed the conversion claim and awarded Simon some of his fees. This was error because nothing in *Simon I* established that the facts underlying the legal

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[6] These communications are also absolutely privileged, as we point out *infra*. Likewise, the extrajudicial statement attributed to Brian – made in December 2017 in response to the immoral attack on the Edgeworths initiated by Simon – was a protected discussion held in a public restaurant about an attorney's conduct (in this case, the attorney's attempt to collect an unauthorized and extortionate fee), something this Court has recognized as an issue of public concern. NRS 41.637(3); *Abrams,* 136 Nev. Adv. Op. 9 at *87, 458 P.3d at 1066-67. The statement was also protected under Brian's conditional right of reply to Simon's accusatory emails of December 4 (AA003134-36), recognized by this Court in *Jacobs*, 130 Nev. at 417, 325 P.3d at 1288.

claim for conversion were false or that the complaint was not filed and maintained in good faith by the Edgeworths.

Without referring to any evidence, and ignoring applicable privileges, Judge Crockett also announced that he did not need to reach the second prong in NRS 41.660(3)(b). Nonetheless he concluded, without evidence required by the statute, that Simon had made a prima facie showing, and "there are genuine issues of material fact at this stage in the litigation, which require discovery." AA004238 ¶8. This too was error.

The Nevada Legislature has it made clear that a plaintiff "must" demonstrate a probability of prevailing on a claim with prima facie ***evidence***, as required under "California's anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015." NRS 41.665.

> Under California law,
> [t]o demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally sufficient and must present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. The ***plaintiff's showing of facts must consist of evidence that would be admissible at trial***. The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. If the plaintiff presents a sufficient prima facie showing of facts, the moving defendant can defeat the plaintiff's evidentiary showing only if the defendant's evidence establishes as a matter of law that the plaintiff cannot prevail.

Hall, 63 Cal. Rptr. 3d at 804–05 (internal quotations and citations omitted) (emphasis added). It is significant for this appeal that Simon did

not submit, and Judge Crockett did not cite, any admissible evidence to demonstrate a probability of success on the merits. *Id.*

2. The Edgeworths' Reliance on Counsel Also Demonstrates Their Good Faith.

The Edgeworths' good faith in commencing *Simon I* is also demonstrated by their reliance on counsel. AA003078 ("I [Brian] relied on Vannah, the senior partner of the firm, to make the decisions to file the pleadings . . . and all other judicial proceedings"); AA003619 ("I [Angela] relied on Mr. Vannah . . . to make decisions to file the pleadings . . . and all other judicial proceedings"); AA000860-71 (Vannah confirming same).

There is no requirement that the legal claims a lawyer deems are appropriate to initiate in a lawsuit must be ***successful*** on pain of being found to have been filed in bad faith.

Although the court in *Simon I* ultimately dismissed the conversion claim and awarded some fees for maintaining it, there was no finding that the Edgeworths had filed the suit in bad faith to spite Simon. To the contrary, the district court in *Simon I* concluded, as a matter of law that the Edgeworths believed their action was justified. She said "the Edgeworths ***believed*** that the settlement proceeds were solely theirs and Simon asserting an attorneys lien constitutes a claim for conversion." AA000034:6-8. Furthermore, although the district court determined Simon's lien was "enforceable in form" (AA000010:6-7), the district court agreed with the Edgeworths that he was not entitled to the extraordinary sum he claimed in

his lien. AA000025 (awarding $284,982.50 under the implied contract and $200,000 in *quantum meruit* instead of the nearly two million Simon claimed).

The Edgeworths had every legal right to seek judicial relief against Simon in district court. It would be unreasonable to expect them as laypersons to have the legal training and knowledge to question their counsel's decision to pursue a legal claim. Any statements made by them in advance of and in support of that litigation constitute "good faith" petitioning activity under NRS 41.637.

D. THE THREE ALLEGED EXTRAJUDICIAL STATEMENTS BY THE EDGEWORTHS AND THE RETENTION OF VANNAH TO LITIGATE ARE PROTECTED AS PETITIONING AND FIRST AMENDMENT ACTIVITY.

Notwithstanding his failure to specifically allege the three extrajudicial statements in his pleadings, Simon contended the statements are actionable and defeat dismissal under NRS 41.650. In point of fact, however, the three statements are protected petitioning or first Amendment activity.

1. Brian Edgeworth's Conversation with Coach Herrera is Protected Under the Anti-SLAPP Statute and by Privilege.

First, the statements made by Brian to Coach Herrera are protected free speech under NRS 41.637(4), as well as protected under the fair reporting privilege and/or the conditional right to reply under *Jacobs*. 130 Nev. at 418, 325 P.3d at 1288 (recognizing conditional right of reply).

Under NRS 41.637(4), Brian's meeting with Coach Herrera was a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or … made without knowledge of its falsehood."[7] Brian and Coach Herrera met at Ventano's—a restaurant open to the public for regular business on the day of the meeting—to discuss the darkly suggestive emails sent by Simon to the Coach, which he, in turn, sent to Brian. AA003134-36. Brian met with Coach Herrera to respond to the emails Simon sent to the Coach saying that his daughter had to withdraw from the volleyball club to ***protect*** her from the Edgeworths. AA003135. Brian explained to the coach that Simon's defamatory emails were the product of the fee dispute Simon initiated in which he was attempting to use the judicial process to obtain money from the Edgeworths. Brian expressed his opinion that Simon was not entitled to more than he had agreed to for his fee to assist the Edgeworths. NRPC 1.5(a) (a lawyer shall not charge or collect an unreasonable fee).

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[7] Brian's affidavit confirms he merely let Coach Herrera know what was taking place in the fee dispute in which Simon filed an excessive lien for amounts he claimed (as opposed to earned). AA003075 ¶¶116–23. Under *Adelson v. Harris,* 133 Nev. at 515, 402 P3d at 667, the fair reporting privilege protects discussions about ongoing legal proceedings so long as it is clear to the recipient that the statements are derived from a legal proceeding. Here, discussing the dispute and Simon's filing a lien to use the judicial machinery to squeeze money out of the Edgeworths to which he was not entitled is pertinent to the legal proceedings to adjudicate that lien in *Simon I*; *see also* NRPC 1.5(a) (a lawyer shall not charge or collect an unreasonable fee.).

This Court recently confirmed the public importance of attorney conduct in *Abrams* and held that published statements criticizing an attorney's courtroom conduct and practices are "directly connected with an issue of public interest." 136 Nev. at 87, 458 P.3d at 1066; *see also Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1227 (2021) (describing *Abrams* as "holding that the public has an interest beyond a mere curiosity in an attorney's courtroom behavior because it serves as a warning to any potential, or current, client looking to hire that lawyer"); *Veterans in Politics Int'l v. Willick*, 457 P.3d 970 (Table) (Nev. 2020) (attorney fee eligibility, which was at issue in *Simon I*, is "a topic that implicates public policy concerns of interest to the public generally"). In his unsuccessful writ petition in *Simon I*, Simon *himself* contended that a lawyer/client fee dispute is of such public interest as to require a panel of seven Justices to consider it. AA003483-87.

Brian's statements of opinion to Coach Herrera are also not actionable under anti-SLAPP law. *See, e.g.*, *Zilverberg,* 137 Nev. Adv. Op. 7, 481 P.3d at 1228 ("[S]tatements of opinion cannot be false"); *Abrams*, 136 Nev. at 89, 458 P.3d at 1064 (reiterating that "[b]ecause there is no such thing as a false idea, statements of opinion are statements made without knowledge of their falsehood under Nevada's anti-SLAPP statutes") (internal quotations omitted) (citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002)). "[I]n determining whether the communications were made in good faith, the court must consider the 'gist or sting' of the communications

as a whole, rather than parsing individual words in the communications," such as "extort." *Abrams*, 136 Nev. at 90, 458 P.3d at 1068-69 (quoting *Rosen v. Tarkanian*, 135 Nev. 436, 453 P.3d 1220, 1222 (2019). Without additional defamatory context, the word "extort" is not actionable. *Blevins,* 768 So. 2d 386 at 391; *Sabharwal,* 985 N.Y.S. 2d at 70-71 (characterizing an adversary's legal strategy as "an attempt to 'extort money' is non-actionable opinion[] about the merits of the lawsuit and the motivation of [the] attorney[], rather than statements of fact"). Brian merely communicated his opinion on matters before the district court, and he did so in response to Simon's attack on the Edgeworths' character in emails to Coach Herrera.

Simon offered ***nothing*** to rebut Brian's declaration or provide additional allegedly defamatory context. That brings us back to the rule, which the district court ignored: a defense declaration "regarding the defendant's state of mind, is . . . entitled to be believed . . . absent contradictory evidence in the record." *Taylor*, 136 Nev. Adv. Op. 50, 482 P.3d at 1217 (citation and internal quotation marks omitted); *see also Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d at 1228.

Moreover, to the extent Brian was discussing *Simon I* with Coach Herrera in response to Simon's emails suggesting Brian and Angela were a danger to children (AA003134-36), his statements are protected both as free speech under NRS 41.637(4) and NRS 41.650, ***and*** by the absolute fair reporting privilege, as well as by the conditional reply privilege. *See also,* Note 7*, supra.*

2. Angela Edgeworth's Statements to Two Lawyer Friends Are Also Protected Under the Anti-SLAPP Statute and by Privilege.

Simon's pleadings also failed to identify any false statements by Angela to two lawyers, who Simon, in attempting to force-market his desired fee structure to the Edgeworths, ***invited*** them to speak to about his proposal. AA003394:1-7; AA003110-21. Angela accepted Simon's invitation and spoke to two lawyers (Lisa Carteen and former Justice Shearing) about her feelings in the dispute and sought their advice in anticipation of litigation and after filing suit for conversion. AA003394-96; AA003425-26. Simon points to nothing in those conversations that would take them out of the protection of NRS 41.637(3) or (4) and NRS 41.650, the absolute litigation privilege, or the fair reporting privilege.

E. THE DISTRICT COURT ERRED IN IGNORING THE EFFECT OF APPLICABLE PRIVILEGES IN ITS DEFICIENT ANTI-SLAPP ANALYSIS.

The crux of nearly all of Simon's claims in *Simon II* is his contention that the dismissal of the conversion claim in *Simon I*, and unidentified litigation statements made in support of that claim were false, malicious, and amounted to accusations of theft by Simon. AA000043 ¶23. Simon, however, fails to point to any specific statement that he alleges was false, malicious or an accusation of theft. But even if Simon were correct that the papers in *Simon I* contained such statements, the absolute litigation privilege, irrespective of NRS 41.660(3), shields the Edgeworths from liability for statements made in testimony and in documents submitted in the course of judicial proceedings before Judge Jones. This includes Angela's extrajudicial

statements of her state of mind to two lawyers, one in anticipation of litigation (Carteen), and the other (Justice Shearing) in the midst of litigation. The application of the absolute litigation privilege would, as a matter of law, negate any probability of success by Simon. *Hall*, 63 Cal. Rptr. 3d at 804–05.

1. The Absolute Litigation Privilege Protects Statements Made By Litigants and their Attorney, Regardless of Truth or Merit.

"This privilege, which acts as a complete bar to defamation claims based on privileged statements, recognizes that [c]ertain communications, although defamatory, should not serve as a basis for liability in a defamation action and are entitled to an absolute privilege because the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Jacobs*, 130 Nev. at 413, 325 P.3d at 1285 (internal citations omitted) (collecting authority for the State's "long" history of applying absolute immunity to litigation statements). This privilege shields litigation statements against ***all forms*** of civil liability, *Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 630, 331 P.3d 901, 903 (2014), and applies to statements made in ongoing litigation, or future litigation contemplated in good faith. *Jacobs, supra.* Contrary to Simon's claim that the privilege applies only to defamation, the litigation privilege bars liability under other litigation theories. *Id.*; *see, e.g., Smith v. Craig*, No. 2:19-cv-00824, 2020 WL 1065715, at *8 (D. Nev. Mar. 4, 2020) (civil conspiracy claim); *Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court*, 128 Nev. 885, 381 P.3d 597

(Table), 2012 WL 1117467, at *3–4 (2012) (unpublished disposition) (abuse of process, slander of title, intentional interference claims).

2. Statements Made With Respect to Litigation Underway or Reasonably Anticipated Are Not Actionable.

The absolute litigation privilege equally protects attorney statements and client statements made in litigation underway or reasonably anticipated, *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 383, 213 P.3d 496, 402 (2009), so long as the statements are "in some way pertinent to the subject of the controversy" and "even if the communications were made with knowledge [of falsity] and malice." *Smith v. Craig*, 2020 WL 1065715 at *8 (quoting *Greenberg Traurig*, 130 Nev. at 630–31, 331 P.3d at 903). This Court has instructed district courts to "apply the absolute privilege liberally, resolving any doubt in favor of its relevancy or pertinency," which Judge Crockett failed to do. *Fink v. Oshins*, 118 Nev. 428, 433–34, 49 P.3d 640, 643-44 (2002) (citation and internal quotation marks omitted) ("the privilege is absolute: it precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.").

The Court has previously considered the litigation privilege as a defense in appeals involving anti-SLAPP motions without expressly applying the traditional two-prong anti-SLAPP standard that requires the movant to show good-faith petitioning activity at step 1 of the first prong of

the statute, *see, e.g.*, *Shapiro*, 133 Nev. at 40-41, 389 P.3d at 268; *Patin v. Ton Vinh Lee*, 134 Nev. 722, 727 n.4, 429 P.3d 1248, 1252 n.4 (2018), without regard to the truth or merit of the statement in issue. This makes sense because application of the privilege is a complete defense to claims such as Simon's, which are founded on absolutely privileged statements made in *Simon I* and brought up in this SLAPP suit. *See Hall*, 63 Cal. Rptr. 3d at 804–05; *Flatley v. Mauro*, 139 P.3d 2, 17 (Cal. 2006) ("The litigation privilege is also relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing").

By definition and on their face, the Edgeworths' legal claims in *Simon I*, filed on the advice of counsel, are petitions to a judicial body seeking aid from the court to resolve a legal dispute. *See, e.g.*, NRS 41.637(3); *Abrams,* 136 Nev. at 86, 458 P.3d at 1066. While the Edgeworths maintain the legal claims in *Simon I* contained no false statements and constitute petitioning activity for the reasons stated above, the statements would not be actionable even if they were false because of the absolute litigation privilege. Thus, Judge Crockett was dead wrong in his gratuitous pronouncement that Simon "demonstrated" with prima facie evidence a probability of prevailing on [any] claim. AA004238 ¶8.

3. Simon's Other Tort Claims, in Addition to his Defamation Claim, are not Actionable.

Judge Crockett also erred in not analyzing each claim to determine the application of the anti-SLAPP statute. Simon's first cause of action for wrongful use of civil proceedings is not recognized in Nevada. *Ralphaelson v. Ashtonwood Stud Assocs., L.P.*, No. 2:08-CV-1070-KJD-RJJ, 2009 WL 2382765, at *2 (D. Nev. July 31, 2009). Simon's second cause of action in his original complaint asserted malicious prosecution, which requires "a prior criminal proceeding" to go ahead. *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002).

In his unauthorized amended complaint, which Judge Crockett nevertheless considered, Simon jettisoned his malicious prosecution claim in favor of a claim for intentional interference with prospective economic advantage (IIPEA). This claim, however, does not allege any specific relationship, knowledge, or damages that would support it. Rather, Simon asserts generally that the Edgeworths "knew Plaintiffs regularly received referrals for and represented" personal injury claimants and intended to harm those relationships by asserting the conversion claims (which Simon strategically but falsely reframed in his amended complaint as "crimes of stealing, extortion and blackmail") in public documents, causing plaintiffs damages. AA001007-08 ¶¶49-52. But the elements of this claim require the plaintiff to plead the facts of "knowledge of by the defendant of the prospective relationship," "intent to harm . . . by preventing the relationship,"

and the "absence of a privilege by the defendant," none of which Judge Crockett considered and none of which were satisfied by the pleading or the argument of Simon's counsel. *Wichinsky v. Mosa*, 109 Nev. 84, 88, 847 P.2d 727, 729–30 (1993) (discussing elements); *see Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 88–89, 734 P.2d 1221 (1987) (recognizing that when the actions of the defendant are in protection of that defendant's own interests, such action is privileged and cannot support a claim for IIPEA).

For his third claim, Simon asserts abuse of process, which requires an "ulterior process . . . other than resolving a legal dispute, and a willful act in the use of the legal process not proper in the regular conduct of the proceeding." *LaMantia*, 118 Nev. at 30, 38 P.3d at 879. Neither of Simon's complaints allege these facts.

Simon's claims of defamation and business disparagement each require a false and defamatory or disparaging statement, which Simon did not assert, and "an unprivileged publication." *Pegasus*, 118 Nev. at 718, 57 P.3d at 90 (listing elements of defamation); *Clark Cnty Sch. Dist.,* 125 Nev. at 386, 213 P.3d at 504 (listing elements for a business disparagement claim). Neither of these necessary requirements were satisfied by pointing to the record in *Simon I* since filings or statements made in anticipation of or in the course of judicial proceedings are absolutely privileged.

So too for Simon's claim of negligence that alleges "[i]n or about January, 2018," Brian and Angela made false representations about Simon to individuals "not having a significant interest in the proceedings." Simon

does not identify the allegedly false statements or to whom they were made, and the date alleged does not align with the three alleged extra-judicial statements Simon "incorporated" into other portions of his amended complaint. In any event, Simon does not allege a duty, how that non-existent duty was breached, and damages resulting from the breach, which defeats this claim. S*anchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009).

Finally, Simon asserts a defective "civil conspiracy" claim against the Edgeworths, their attorney Vannah, and others that he does not describe, to "accomplish the unlawful objectives of [] filing false claims for an improper purpose" (AA000054) – all premised on the dismissed conversion claim but not on specific allegations of fact. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.,* 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) ("An actionable civil conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage [that] results from the act or acts" (internal quotations and citations omitted)).

No discovery or factual findings are necessary to determine that the claims in the original and amended complaints, derived from the proceedings in *Simon I*, are protected under NRS 41.650 and by the absolute litigation privilege, and/or the fair reporting privilege, as well as the conditional right of reply discussed in the preceding pages.

IX. CONCLUSION

It is remarkable as well as reprehensible that a false fee dispute generated by an attorney against his client to collect a contingent fee for which the lawyer did not have an agreement could spawn this separate multi-year litigation over his former client's suit contesting the attorney's meritless claim for fees to which he was not entitled ***and*** failed to persuade the district court otherwise. *See* NRPC 1.5(c) (a "contingent fee agreement shall be in writing and signed by the client"). The Edgeworths have demonstrated that Simon's complaint in this case rests upon the judicial record in *Simon I*, which reflects that they sought legal redress in good faith on the advice of counsel and based their claims on unadorned truthful facts. That the district court in *Simon I* ultimately rejected their legal claim does not take their petitioning activity to that court out of NRS 41.637 in *Simon II*.

The record in this case, derived mostly from *Simon I*, more than satisfies the first prong of the anti-SLAPP statute, NRS 41.660(3)(a). Moreover, all of the conduct that Simon's complains of in his two complaints is protected by the absolute litigation privilege and other privileges and cannot form a basis for civil liability, thus precluding Simon from showing the probability of success required under prong 2 of the statute, NRS 41.660(3)(b).

The trial court should have dismissed Simon's SLAPP suit at the outset without considering his amended complaint. NRS 41.650. Still, considering the anti-SLAPP case under the unauthorized amended complaint yields the

same outcome: this SLAPP suit should have been dismissed by Judge Crockett last year for the reasons given in the preceding portions of this brief.

The Edgeworths respectfully ask this Court to REVERSE the district court's denial of their Special Anti-SLAPP Motion and remand with instructions to dismiss this action against them and their counsel.

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CERTIFICATE OF COMPLIANCE

1. I certify that I have read the **EDGEWORTH APPELLANTS' OPENING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and limitations in NRAP 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Palatino 14 point font. Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 11,292 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of 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 is to be found.

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 2nd day of September, 2020, a true and correct copy of the foregoing **THE EDGEWORTH APPELLANTS' OPENING BRIEF** was served by the following method(s):

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Dated this 11th day of June, 2021.

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