IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT DARBY VANNAH, ESQ.; JOHN BUCHANAN GREENE, ESQ.; and ROBERT D. VANNAH, CHTD. d/b/a VANNAH & VANNAH; EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC; BRIAN EDGEWORTH AND ANGELA EDGEWORTH, INDIVIDUALLY, AS HUSBAND AND WIFE ,

Appellants,
vs.

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

Respondents.

SUPREME COURT CASE NO.: 82058

SIMON RESPONDENTS' ANSWERING BRIEF TO EDGEWORTH PARTIES' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

The Law Office of Daniel Simon, a professional corporation is not owned by any parent corporation or publicly held company.

James R. Christensen, Esq., Nevada Bar No. 3861, has also appeared in the Eighth Judicial District Court for the Respondents.

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ROUTING STATEMENT

The instant appeal challenges an order of the district court denying a motion to dismiss made pursuant to NRS 41.660, Nevada's anti-SLAPP statute. Appellants Robert Darby Vannah, Esq., John Buchanan Greene, Esq., Robert D. Vannah, Chtd d/b/a Vannah & Vannah (the "Vannah Parties"), the Edgeworth Family Trust, American Grating, LLC, Brian Edgeworth and Angela Edgeworth ("the Edgeworth Parties"), contend they have raised as a principal issue a question of statewide public importance, and thus, the Court of Appeals should be divested of its presumptive jurisdiction. NRAP 17(a)(12). Although Respondents, The Law Office of Daniel S. Simon, a professional corporation, and Daniel S. Simon (collectively "Simon"), do not concede this is a matter of first impression or significant public policy because the substantive law on the issues raised is well settled, Simon does not oppose this matter being retained by the Nevada Supreme Court.

I.

STATEMENT OF THE CASE

By way of this appeal, the Edgeworth Parties challenge the district court's denial of their motion to dismiss Simon's Complaint pursuant to NRS 41.647, (Nevada's anti-SLAPP statute) and the litigation privilege. Simon's Complaint arises from false and defamatory accusations the Edgeworth Parties made to third parties outside any litigation; as well as their bad faith filing of a complaint (hereinafter "Simon I"), alleging Simon as their lawyer, had converted settlement funds, despite that Simon never had exclusive control over the money, never deposited it into his own trust account and instead placed the funds in a neutral account held jointly by lawyers on both sides.

The district court in Simon I found the conversion complaint was not based on reasonable grounds given that conversion was a legal and factual impossibility. AA001096-1099. Pursuant to NRS 18.010, the district court further granted Simon attorney's fees and costs for having to defend against the baseless accusations. *Id*. This Court has previously affirmed the lower court's decision in Simon I. *Edgeworth Family Trust v. Simon*, 477 P.3d 1129 (table) 2020 WL7828800 (Nev. December 30, 2020); AA004257-4267.

Subsequent to the district court's dismissal in Simon I, but during the pendency of the Edgeworth Parties' appeal of that decision, Simon filed the instant

litigation ("Simon II") for defamation [against the Edgeworth Parties only], abuse of process, intentional interference with prospective economic advantage, business disparagement [against the Edgeworth Parties only], wrongful use of civil proceedings, civil conspiracy, negligent hiring, supervision and retention [against the Vannah parties only] and negligence [against the Edgeworth parties only]. The district court refused to dismiss the Simon II Complaint because it found the Edgeworth and Vannah Parties had failed under prong 1 of the anti-SLAPP analysis to make the requisite showing of good faith with respect to the at-issue statements and conduct; the absence of good faith foreclosed application of the litigation privilege; and further that under prong 2, Simon is entitled to discovery. AA004232-4240. The Edgeworth and Vannah Parties contend such denial was in error and now appeal.

II.

ISSUES PRESENTED

1. Whether the district court erred when it declined to disturb the findings of a sister district court in Simon I, which found, "it was an impossibility for [Simon] to have converted the Edgeworths' property."
2. Whether the district court erred when it found, based on the evidence and briefings before it, that there could not be any good faith legal or factual basis for the underlying conversion claim against Simon [Simon I].

3. Whether the district court erred when it found the Edgeworth Parties did not meet their burden under the first prong of the anti-SLAPP analysis because they cannot show, based on a preponderance of the evidence, that the underlying conversion claims against Simon [Simon I] were good faith communications, which were truthful and/or made without knowledge of falsity.

4. Whether the district court erred when it found that although it need not reach the second prong of the anti-SLAPP analysis given the Edgeworth Parties' failure to satisfy the first prong, Simon showed prima facie evidence of a probability of prevailing on the Edgeworth Parties' claims, and thus, there were genuine issues of material fact requiring discovery.

III.

SUMMARY OF THE ARGUMENT

The Edgeworth and Vannah Parties are not entitled to the benefit of immunity under the litigation privilege or anti-SLAPP statutes. Simon's Complaint arises out of 1) the Edgeworth Parties' defamatory statements to third parties outside any litigation; and 2) the Edgeworth and Vannah Parties' collective decision to knowingly file a claim for conversion against Simon despite having no good faith basis for such allegations. While anti-SLAPP immunity is broad, it is not without limitation.

First, the defamation-based claims against the Edgeworths are based on statements made to persons not interested in the litigation and therefore, exempt from any such privileges. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014); *Fink v. Oshins*, 118 Nev. 428 (2002). Equally as significant, to prevail on their anti-SLAPP Motion to Dismiss, the Edgeworth Parties would have needed to show the statements at issue in the underlying litigation were either true or made without knowledge of their falsity. *Delucchi v. Songer*, 133 Nev. Adv. Rep. 42, 396 P.3d 826 (2017). Any contrary ruling would not only condone, but encourage the use of the judicial system as a weapon by which to defame others while enjoying absolute immunity.

Because the Edgeworth and Vannah Parties alleged Simon converted the subject settlement funds knowing such a claim was both a legal and factual impossibility, they can never demonstrate the underlying allegations were true or made without knowledge of their falsity. The conversion complaint was a retaliatory action aimed to punish Simon for filing a lawful attorney lien.[1]

[1] The conversion claim is so outrageous that the National Trial Lawyer Association was compelled to voice their position on the issue. Robert Eglet, Esq., current president of the NTLA, filed an Amicus Curie Brief in support of the district court's position in Simon I dismissing the conversion claim. RA001045-1062. This brief echoed the undeniable fact that a lawyer who follows the law by filing a lawful attorney lien and places the funds in a protected account cannot be sued for conversion. *Id*. One cannot violate the law by following the law enacted by the legislature. The Vannah/Edgeworth team are on their own when desperately

Indeed, in Simon I, the Honorable Tierra Jones sanctioned the Edgeworth and Vannah Parties, for having filed and maintained the frivolous conversion claim in bad faith and not upon reasonable grounds. In a decision this Court has already upheld on appeal, the district court stated:

> The Court finds that the claim for conversion was not maintained on reasonable grounds… since it was an impossibility for Mr. Simon to have converted the Edgeworths' property, at the time the lawsuit was filed.

AA001096-1099. Armed with five days of sworn testimony during a highly contentious evidentiary hearing, the district court ultimately found the conversion allegations did not have a good faith basis in law or fact. AA000993-994 ¶33; *Edgeworth Family Trust v. Simon*, 477 P.3d 1129 (table) 2020 WL7828800 (Nev. December 30, 2020); AA004257-4267. Particularly relevant here, the district court determined: (1) The Edgeworths owed Simon fees and costs when Simon was discharged; (2) Simon had a valid and enforceable lien; 3) The Edgeworths' conversion complaint against Simon should be dismissed as a matter of law; and (4) The conversion complaint "was not maintained on reasonable grounds." AA000993-994 ¶¶31-33; AA000004-26; AA000028-37; AA004257-4267.

The district court's findings in Simon I alone demonstrate the Edgeworth Parties cannot meet their burden to show by a preponderance of evidence, their

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seeking to punish Simon. The facts, law and common sense do not support their position.

conduct was in good faith. The underlying orders of dismissal and award of fees are both final orders and have preclusive effect with respect to the Edgeworth Parties' failure to act in good faith. *Edwards v. Ghandour*, 123 Nev. 105, 159 P.3d 1086 (2007) (abrogated on other grounds by *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048. 194 P.3d 709 (2008)).

Victorious litigants are permitted to pursue claims for abuse of process when they have been harmed by false allegations and frivolous complaints. This includes recourse against both the clients and the attorneys who pursue such claims. *Bull v. McCuskey,* 96 Nev. 706, 615 P.2d 957 (1980). So even if the court were to apply the anti-SLAPP statutes or the litigation privilege, these protections would not bar Simon's claims.

The abuse of process, intentional interference with prospective economic advantage, civil conspiracy, and negligence claims are all based on the Edgeworth and Vannah Parties' conduct, not just their statements. Additionally, neither the Anti-SLAPP statute, nor the litigation privilege afford protection when the frivolous complaint was filed in retaliation to a valid and enforceable attorney lien. A retaliatory complaint is not free speech and is outside the purview of NRS 41.660. *Bonni v. St. Joseph Health Sys.,* 2021 WL 3201090 (Cal. July 29, 2021).

IV.

STANDARD OF REVIEW

A district court's conclusions of law, including statutory interpretations, are reviewed de novo. *Borger v. Eighth Jud. Dist. Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004). The Edgeworth's jurisdictional statement asserts all issues raised are appealable under NRS 41.670(4). Simon disagrees. The Edgeworth Parties have appealed Judge Crockett's order based only on NRS 41.660. The Edgeworth Parties did not file a motion to dismiss pursuant to NRCP 12(b)(5).

Pursuant to NRS 41.660(1), Nevada's anti-SLAPP statute, a defendant will prevail on a motion to dismiss ***only*** where the complaint is based on a good faith communication made in furtherance of the right to petition or right to free speech in direct connection with an issue of public concern. *See* NRS 41.660(1). A moving party seeking protection under NRS 41.660 must demonstrate by "'a preponderance of the evidence that the claim is based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern.'" *See Coker v. Sassone*, 135 Nev. Adv. Rep. 2, 432 P.3d 746, 749 (2019) (quoting NRS 41.660(3)(a)). "If successful, the district court advances to the second prong, whereby "'the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim.'" *Id.* at 750 (quoting NRS 41.660(3)(b)). "Otherwise, the inquiry ends at the first prong, and the case advances

to discovery." *Id.* NRS 41.637(4) defines one such category as: "[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 is made without knowledge of its falsehood." In *Shapiro v. Welt*, 133 Nev. Adv. Rep. 6, *9-10, 389 P.3d 262, 268 (2017), the Nevada Supreme Court clarified that "no communication falls within the purview of NRS 41.660 unless it is "truthful or is made without knowledge of its falsehood." Additionally, a retaliatory complaint does not qualify as protected speech falling within the protections of Anti-SLAPP. *Bonni v. St. Joseph Health Sys.,* 2021 WL 3201090 (Cal. July 29, 2021).

V.

STATEMENT OF FACTS

Mr. Simon and his wife considered the Edgeworths close friends and treated them like family. RA000766:15-20. They travelled around the world and their kids went to school together. AA003821:19-23. Mrs. Simon planned the funeral for Mrs. Edgeworth's father, among many other favors as close friends. *Id*. They shared special events, including birthdays.

In June of 2016, Brian Edgeworth approached Simon to ask him for help regarding a flood that occurred in a spec home developed by his company, American Grating. AA001151-1152. The flood resulted from the premature activation of the fire sprinklers, causing approximately $500,000.00 in property

damage. He met with other lawyers that wanted a large retainer. *Id*. Mr. Simon agreed to help by writing letters to insurance companies as a favor to try and trigger coverage for the property damage. RA000766:15-RA000767:10. When those requests were denied, Mr. Simon filed suit on behalf of Edgeworth against the sprinkler installer, Lange Plumbing, and the sprinkler manufacturer, Viking, including claims for breach of contract and product liability. *Id*.

Simon worked tirelessly on the case, conducting extensive discovery and motion practice and addressing thousands of emails, mostly from Edgeworth. While doing so, Simon did provide invoices that were paid by Edgeworth in order to prove his element of damages against the Plumber, Lange Plumbing because the contract included an attorney's fees provision. RA000767:12-RA000768:3. The case quickly elevated to a significant products liability case against a world-wide manufacturer.

Given the nature of their relationship and because the case was being aggressively litigated with multiple expert depositions and motion work, Simon and Edgeworth never finalized a formal agreement. Instead, Simon prosecuted the case, and after an unsuccessful November 10, 2017 mediation, Simon ultimately negotiated a $6 million settlement with Viking - for what started out as a $500,000 property damage claim. RA000302.

While traveling back from meeting with experts in the summer of 2017, Edgeworth acknowledged if another firm had the case, the bills generated at that time would be three times what they were and he knew the bills were not the full fee. RA000764:6-RA000765:3. Shortly after, and months before the November 2017 settlement was reached, Edgeworth sent an unsolicited email to Simon – it was in fact, Edgeworth, who suggested some form of contingent fee arrangement. AA001158; AA003777:12-23. This email confirms no agreement existed, but discussions were ongoing and the only time a fair fee could be determined was at the end of the case. RA000882:19-RA000883:1. Brian Edgeworth conceded a contract could not have been entered into earlier because the dynamics of the case were fluid and the highly successful outcome could not have been anticipated earlier on. RA000514:14-20**;** AA000995-1022 ¶13.

The Edgeworths paid a minimal amount for attorney's fees during the underlying hotly contested case against a world-wide manufacturer. This benefited the Edgeworths as they always cried poor (which was later revealed to be a ploy). It also shows the risk Simon shared and why he agreed to determine a fair fee at the end of the case. RA000904:23-RA000905:1**.** The Edgeworth's false framing of the case ignores they did not want to pay any additional attorney's fees or costs when the frivolous conversion complaint was filed.

A. THERE WAS NEVER AN EXPRESS ARGEEMENT REGARDING ATTORNEY'S FEES

Simon and Edgeworth did not have an express agreement for fees and costs because the case started out as a favor. RA000762:20-22. Simon composed bills to be used for the Rule 16.1 calculation of damages given that the construction contract had an attorneys' fees provision. RA000830:25-RA000831:11.

The Edgeworth Parties' reliance on the fact they paid part of Simon's fee based on the hourly bills is misplaced because that alone does not establish an express oral contract. The district court in Simon I heard testimony on the issue and found only an implied agreement, which the Edgeworth's terminated. AA000010; AA000016-17. As a result, Simon's office was left with a valid and enforceable lien claim for unpaid fees and advanced costs, which the district court adjudicated in Simon's favor. AA000004-26. The period of outstanding attorney's fees owed at the time of discharge was from September 2017 through March 2018. Simon continued to work to protect the client's interests long after discharge. In fact, the district court in Simon I commended Simon's efforts after discharge. AA000022-23. Equally significant, because no express contract existed, there was nothing to modify. Simon never approached Edgeworth to change anything and never asked for a bonus.

B. SIMON SENT THE NOVEMBER 27, 2017 LETTER AT THE REQUEST OF THE EDGEWORTHS.

On November 17, 2017, Simon met with the Edgeworths to discuss finalizing the settlement with Viking and pursuing their remaining claims against Lange Plumbing. Simon believed the Edgeworth Parties should consider proceeding to trial against the non-settling parties in order to obtain additional damages that would include recovering their attorney fees and costs from the Viking settlement. Simon provided the Edgeworths a copy of the outstanding costs, which Simon fronted for months at a time, and he advised the Edgeworths that any fees and costs paid to Simon would likely be recovered against Lange Plumbing under the construction contract. RA000778:17-RA000780:1. Thus, in light of those remaining claims and the fact they had not yet taken the opportunity to fully discuss Brian Edgeworth's August proposal to negotiate a final fee agreement, it was time to discuss the fair and reasonable attorney's fees.

The Edgeworths left Simon's office after stating they would discuss the fee issue among themselves and let Simon know their position. RA000794:11-15. Following this meeting, Mr. Edgeworth started acting quite different. RA000793:18-RA000794:7. His demeanor deviated drastically from the close working relationship and friendship he and Mr. Simon once enjoyed -- it was extremely difficult to reach him in order to communicate. *Id.* Nevertheless,

Edgeworth acknowledged the case was not a straight hourly matter and a fair fee needed to be decided. To that end, Edgeworth asked for something in writing so a fair fee could be worked out. RA000793:14-RA000794:7. In an effort to meet that request, Simon asked Edgeworth for a breakdown of what he believed were his out-of-pocket expenses. RA000783:4-14. Mr. Edgeworth forwarded an email to Mr. Simon on November 21, 2017 solely for this purpose. RA000303.

Pursuant to their request, Simon sent the Edgeworths a detailed letter outlining the proposed fee. AA003110-3117. Mr. Simon offered to receive a greatly reduced fee of $1.5 million and further reduced this amount by crediting all partial payments already received. *Id.* Simon also suggested the Edgeworths consider the exceptional result achieved. The Edgeworths refused to make a single phone call to Mr. Simon after receiving the letter. Instead, they responded by hiring Vannah that same day and ceasing all communications with Simon. RA000304. Against Simon's advice, the Vannah lawyers counseled the Edgeworths to waive the valuable claim against the Plumber and they opted instead to punish Simon. RA000305-306.

Vannah demanded Simon provide his attorney lien for the services provided. Simon provided the attorney lien on December 1, 2017 for the reasonable value of his services pursuant to NRS 18.015. AA000099-103. The Edgeworth's refused to sign the settlement checks. AA001268-1271. Vannah proposed and Simon agreed

to place the monies in a joint account with Vannah as a signor wherein Edgeworth would receive all of the interest while the lien dispute would be adjudicated. AA001125-1130; AA001198.

The settlement funds were placed in the joint account on January 8, 2018. RA000307-308. Nevertheless, Vannah filed suit on behalf of the Edgeworths alleging conversion of the settlement funds against Simon on January 4, 2018, and served their Complaint on Simon January 9, 2018, the day after the settlement monies were deposited in the joint account. AA000112-121. The funds finally cleared the account January 16, 2018.

Edgeworths and Vannah knew exactly what they were doing when filing a frivolous conversion suit. They filed the suit and included false narratives to support it – all in an attempt to thwart the lien adjudication. They filed an Amended Complaint months later asserting the same false allegations and continued to pursue the conversion claim relentlessly up and through a five-day Evidentiary Hearing before the district court.

The Evidentiary Hearing revealed Edgeworths' falsities and bad faith conduct. Simon never asked for a contingency fee or a percentage (a proposed agreement for a flat fee representing the reasonable value of services is not a contingency fee). Mr. Simon never asked for a bonus. This was a term fabricated and used solely by the Edgeworth Parties. RA000534:25-RA000535:10. The

Edgeworth Parties also falsely asserted Simon blackmailed and extorted millions from their settlement to support the frivolous conversion claim and asked the district court to find he was already paid in full. They also sought punitive damages against Simon personally for merely asserting an attorney lien. AA003940:25-AA00341:18. In regard to the proposed fee, Mr. Simon never said "agree to it or else." This is another self-serving interpretation to justify the Edgeworth Parties' misconduct. Afterall, within two days, the Edgeworths had competent new counsel, who could readily finalize the settlement. The district court in Simon I rejected these wild and false assertions and found the Edgeworth Parties' conversion claim was filed and maintained in bad faith, not maintained on reasonable grounds and was meritless, thus dismissing their Complaint in its entirety with prejudice. AA000028-37; AA001096-1099.

C. THE EDGEWORTH AND VANNAH PARTIES CONTINUE TO MAKE FALSE CLAIMS AGAINST SIMON

1. The Edgeworth and Vannah Parties Falsely Claim Simon Unilaterally Put His Name on the Settlement Check

Edgeworth Parties incredulously contended as a basis for conversion that Simon unilaterally requested the settlement check be made payable to both Simon and the Edgeworths. AA003508. This false explanation fell on its face when the third-party release expressly delineated how and to whom the settlement check would be made payable. AA001261, paragraph A. The Vannah Attorneys and the

Edgeworths reviewed and agreed to put Simon's name on the check. *Id.* This argument has now been abandoned.

2. The Edgeworth and Vannah Parties Falsely Claim Simon Would Not Put The Money In Vannah's Account

The Edgeworth Parties then argued Simon refused to deposit the money into Vannah's account. AA003509:2-5. First, the Vannah lawyers never made such a request and they know very well even if the money was deposited in Simon's account, that would have been the equivalent of interpleading the funds with the court. *See e.g., Golightly & Vannah*, 132 Nev. 416, 418 (2016). Even worse, Simon immediately agreed with Vannah and Edgeworth to put the money in a special protected account earning the Edgeworths 100% of the interest, even on Simon's share. AA001198. Vannah and Edgeworth met Simon at the bank to jointly deposit the funds and thus, knew exactly where the money was at all times. *Id***.** This means that a claim never existed because Simon never had exclusive control of the funds and Edgeworth never had any damages. *Kasdan, Simonds, McIntyre, Epstein & Martin v. World Sav. & Loan Ass'n (In re Emery)*, 317 F.3d 1064 (9th Cir. Cal.2003). Vannah knew this, which means so did the Edgeworths. This argument has also since been abandoned.

3. The Edgeworth and Vannah Parties Falsely Claim the Conversion Complaint Was Filed When Simon Refused To Release The Funds

Vannah and Edgeworth in sworn affidavits, state: "When Mr. Simon continued to exercise dominion and control over an unreasonable amount of the settlement proceeds, litigation was filed and served including a complaint and an amended complaint." AA002914-2915. Edgeworth repeats this false statement. AA003077. Vannah and Edgeworth both knew the proceeds had not even been received when the initial lawsuit was filed on January 4, 2018.

4. The Edgeworth and Vannah Parties Falsely Claim The Lien Amount Was The Basis For The Conversion Complaint

The reasoning underlying the conversion complaint has continued to evolve - presumably to escape liability. The amount of the lien was never argued to the district court as a basis for conversion in Simon I, but only started on appeal of Simon I. Vannah and Edgeworth, in their briefing to this Court argue the lien amount is too big. Remarkably, Vannah and Edgeworth did not even know the lien amount when the initial conversion complaint was filed which is evidenced by the fact the complaint asserts an amount was not given. AA000119:19-AA000120:20. Even worse, they never challenged the lien amount at the evidentiary hearing. AA003943:4-AA003946:2.

5. The Edgeworth and Vannah Parties Falsely Claim Simon Sought A Bonus

The Edgeworth/Vannah team also baselessly claimed that in August 2017, Simon sought a bonus *after* a significant offer was made. AA000436:4-10; AA001348:1-3**.** However, Simon *never* sought a bonus. When Simon pointed out the undeniable fact that an offer was not made in the case until late October, 2017, this portion of the affidavit was abandoned. Again, "bonus" is a word created and used solely by Vannah and Edgeworth. RA000534:25-RA000535:11. The Edgeworth Parties have never been able to explain why they asked the district court to find Simon has already been "paid in full," when all admitted they always knew the Edgeworth Parties owed him money. RA000532:20-25; AA003659:1-AA003660:3.

6. The Edgeworth and Vannah Parties Falsely Claim Simon Sought A Contingency Fee

Much like inventing an express oral contract to avoid paying fees, the Edgeworth Parties fabricated the contingency fee narrative to call Simon unethical. Simon *never* sought a contingency Fee. The district court in Simon I found just that, stating in her ruling this is not a contingency fee case, presumably to put an end to the false assertion being repeated ad nauseum. AA000024. Simon never stated he wanted a bonus or a contingency fee. Anyone can do the math and establish the percentages for a reasonable fee. This math equation does not support that Simon

demanded a contingency fee. The math for Simon's proposed fee in November 2017 equals 25%, not 40%. AA003110-3117.

Simon's lien did not request a contingency fee or a percentage and the November 27, 2017 letter sent at the Edgeworth's request does not seek a contingency fee. *Id.* These documents proposed a flat fee for the reasonable value of services. *Id.* Simon's first lien filed prior to the retaliatory conversion complaint merely sought the reasonable value of his services (quantum meruit) without a specific number. AA000099-103. Yet, the Edgeworth Parties continue to repeat the contingency falsehoods. AA002918-2919; AA003068.[2] At the request of the Edgeworth Parties, Simon asserted a specific sum in his amended lien based on the expert opinion of William Kemp, Esq. AA001414-1421; RA001171-1174.

Despite a final order on these adjudicated facts, the Edgeworth Parties continue to argue this false premise to call Simon unethical. Vannah Opening Brief at pp.8-9. The Vannah/Edgeworth team continue to allege Simon was unethical, but never challenged former State Bar Counsel's opinion Simon did everything right. AA001200-1210. That opinion was adopted as a finding by the district court, which

[2]Perhaps unintentionally, but astonishing nevertheless, the Edgeworth special motion to dismiss previously filed by Patricia Lee, Esq. finally admits to this fraudulent scheme by acknowledging a contingency fee was never sought, but only a flat fee. AA000929-930. Finally, the Edgeworths admit the alleged contingency assertion was a false narrative, which confirms their fraud upon the court and that their communications were not truthful.

has since been affirmed by this Court. AA004257-4267. An attempt to establish a false fact is sanctionable. *Estate of Adams, by and through Adams v. Fallini* 132 Nev. 814, 386 P.3d 621 (2016). That naturally includes false facts about the record in Simon I or the finding by this Court in its decision dated December 30, 2020. The district court in Simon I already rejected the same factual assertions contained in the new self-serving affidavits to support the instant appeal, and made a judicial finding that the compliant was not filed and maintained in good faith. The Edgeworth Parties ignore the final orders adjudicating all facts and continue to advance false facts.

7. The Allegation Simon and Edgeworth had an Express Oral Contract is Also False.

Among the many falsehoods that have now been conclusively proven is the allegation that Simon and Edgeworth had express oral contract regarding attorney's fees. In a shocking admission, Edgeworth has now given a third version about how this fabricated contract was formed. AA002910-2921. Edgeworth first told the court, through Vannah, it occurred at Starbucks in May, 2016; then emails produced forced him to change the contract formation to a phone call in June, 2016. AA003649:11-25. Now, his new affidavit to the lower court conceded an agreement was not actually formed and it was just what he personally believed. AA003063. Incredibly, the Vannah lawyers adopted these same false statements in

their affidavits to the court attempting to demonstrate good faith and truthfulness. AA002928.

D. THE CONVERSION CLAIM WAS INTENDED TO PUNISH SIMON

The Edgeworth Parties openly admitted, under oath, they filed the frivolous conversion complaint to punish Simon. AA003942:21-23. Undeniably, this is a retaliatory complaint brought in bad faith. Simply, a frivolous complaint riddled with false allegations known to the parties at the time of filing are not protected by anti-SLAPP.[3] The Edgeworth's assertions, through the Vannah attorneys, follow a long and winding road. Not surprisingly, they do not address this damning testimony in their earlier affidavits or briefs to this Court. These admissions alone, confirm their bad faith, and this Court does not need to look beyond the Simon I district court order dismissing and sanctioning the Vannah/Edgeworth team. AA001096-1099; AA000028-37.

[3] The Edgeworths incorrectly argue that "Simon recognizes that the damages he clams all stem from the Edgeworth complaint lawsuit, which is protected speech." AA003502. This is not true and certainly not the end of the story. The damages were caused from the abuses of the process, as well as the defamation per se to parties outside the litigation. It is not the mere filing of the complaint, but all of the ongoing abuses and malicious conduct attacking the integrity and moral character of Simon, as well as the relentless pursuit of the frivolous claims through false testimony that caused the damages.

E. THE UNPRIVILEGED DEFAMATORY STATEMENTS OF ANGELA AND BRIAN EDGEWORTH

Filing an attorney lien is not blackmail, extortion or theft. The Edgeworth and Vannah Parties were well aware of the falsity of the statements when repeatedly made. Angela Edgeworth admitted, under oath, to all of these false statements. Specifically, Mrs. Edgeworth testified she stated to Ms. Carteen, as follows:

> Q. Okay. The words you used, ma'am -- and I won't go through them all -- when you talked to Ms. Carteen -- did I get that right?
> A. Yes.
> Q. Were those the words you used to her when describing Mr. Simon?
> A. I'm sorry. Which – what do you mean?
> Q. Terrified, blackmailed, extorted.
> A. I used blackmailed, yes.
> Q. You used those words to her.
> A. And I used extortion, yes.
> Q. Similarly, when you talked to Justice Shearing in February of 2018, were those the words you used?
> A. I don't think they were that strong. I just told her what happened. Lisa is more of a closer friend of mine, so I was a little bit more open with her.
> Q. **And you were talking to Lisa as your friend, not your lawyer, right?**
> **A. Correct.**

AA003931:3-20. (Emphasis added)

Mrs. Edgeworth's new self-serving June 4, 2020 affidavit is the exact opposite of her sworn court testimony. RA001078-1080. Mrs. Edgeworth now attempts to make Lisa Carteen her lawyer instead of her friend to avoid liability for defamation. *Id*. The new affidavit also undermines the false narrative that they were

scared upon receipt of Mr. Simon's November 27, 2017 letter. AA003874:4-23. She now contends (if you believe any of it), she was counseled by Carteen prior to Vannah. RA001078-1080. She had lawyers advising them immediately how to avoid paying the reasonable fees and yet, apparently concealed Carteen's involvement as counsel at the time of the evidentiary hearing.

When she told the false stories of extortion and blackmail to Carteen, was it as a friend or lawyer? It cannot be both because she was asked point blank and testified the statements were made to her as a friend, **and not as her lawyer.** AA003931:3-20. Nevada has recognized the sham affidavit rule and Mrs. Edgeworth cannot change her testimony to apply NRS 41.660. *Yeager v. Boulin,* 693 F.3d 1076 (9th Cir. 2012) Cert. denied, 569 U.S. 958 (2013).

Angela Edgeworth went onto to confirm her malice when she testified to the real reason for the frivolous complaints and testified, under oath, as follows:

Q. You made an intentional choice to sue him as an individual as opposed to just his law office, fair?
A. Fair.
Q. That is an effort to get his individual money; correct? His personal money as opposed to like some insurance for his law practice?
A. Fair.
Q. And you wanted money to punish him for stealing your money, converting it; correct?
A. Yes.
Q. And he hadn't even cashed the check yet; correct?
A. No.

AA003942:15-25; AA000995-1022 ¶¶27,75,76,77,78,85,86,87. (Emphasis added). Notably, the punishment plan included suing Simon personally even though the liens were filed by the Law Office of Daniel Simon, A Professional Corporation. AA003942:15-25. The testimony of Angela Edgeworth confirms the malice and ulterior motive when filing the retaliatory conversion complaint.

Mr. Edgeworth equally adopted the statements of his wife and also independently told third parties outside the litigation that Mr. Simon was extorting and blackmailing the Edgeworth's for millions of dollars. AA000463; AA000995-1022 ¶22. Specifically, Edgeworth stated in his affidavit to the district court in Simon I, as follows:

> "I read the email, and was forced to have a phone conversation followed up by a face-to-face meeting with Mr. Herrera where I was forced to tell Herrera everything about the lawsuit and **SIMON'S attempt at trying to extort millions of dollars from me**. …"

AA001320:17-20.

Edgeworth also continued to falsely assert Simon has been "paid in full." AA00119-8; AA000482:21-AA000483:21. Although the Edgeworth Parties now contend they were only referring to invoices sent and paid that assertion is not contained in his affidavits and is contrary to their Complaint and Amended Complaint wherein Edgeworth Parties sought an order from the Court that Simon was "paid in full." AA001346-1354; AA001313-1322; AA000995-1022 ¶¶75-78,

85-87. It is also directly contrary to his under-oath testimony in his initial affidavits in Simon I stating: "since we've already paid him for this work to resolve the LITIGATION, can't he at least finish what he's been retained and paid for?" AA000466A1-11. Simon was owed substantial attorney's fees and costs when he was discharged on November 29, 2017, yet Edgeworth wants Simon to work for free when asserting he was already paid in full in his affidavit in February, 2018.

The Vannah/Edgeworth self-serving affidavits are riddled with falsehoods in an attempt to re-litigate the facts already decided by the district court in Simon I and this Court. Their conduct has already been determined to be in bad faith and changing their testimony to apply NRS 41.660 cannot be condoned under the law. *Yeager v. Boulin, Supra.*

F. IN SIMON I, THE DISTRICT COURT ADJUDICATED ALL OF THE FALSE FACTS ASSERTED BY THE EDGEWORTH PARTIES

At the five-day evidentiary hearing, there was extensive testimony about alleged conversion, extortion, blackmail, contingency fees, unethical conduct, timing of settlement, timing of discharge, and the lien claimed. The district court in Simon I also considered all facts in support of the causes of action in the frivolous complaints, including the false express oral contract, breach of contract, fiduciary duties and conversion. She considered the valid lien and Edgeworth Parties' admission Simon was owed money. She considered Vannah's invitation for Simon

to assert the biggest number and the agreement to open the special bank account earning Edgeworth 100% interest.

The district court also considered the November 27, 2017 letter, the invoices sent, the checks deposited, the release language, the several thousand emails between the parties, the amount of work done, over 80 exhibits, phone records, the Edgeworth's testimony, Simon's testimony and the expert reports of Will Kemp and David Clark, among other witnesses. The Simon I court adjudicated all of these facts finding the entire complaint should be dismissed as a matter of law. AA000028-37. Simply, there was no evidence to support any of their wild and unsupported false accusations and they were sanctioned for their bad faith.

When considering the sanctions, the district court was tasked with determining whether the Edgeworth Parties acted in good faith. The court ultimately concluded the complaint was filed and maintained in bad faith and not on reasonable grounds. This Court upheld these findings. *Edgeworth Family Trust v. Simon*, 477 P.3d 1129 (table) 2020 WL7828800; AA004257-4267.

The same parties litigated all facts and claims at the evidentiary hearing and these are the exact same facts that provide the basis for Simon's claims against the Edgeworth Parties. Therefore, issue preclusion and claim preclusion foreclose the Edgeworth Appellants' efforts to apply NRS 41.660 to escape liability.

VI.

ARGUMENT

The Edgeworth Parties confuse the application of the litigation privilege with anti-SLAPP protections. The anti-SLAPP statutes only immunize a communication made in "good faith," which is "true or made without knowledge of its falsehood." NRS 41.637; *See also, Delucchi v. Songer*, 133 Nev. Adv. Rep. 42, 396 P.3d 826 (2017). The Edgeworth and Vannah Parties seek anti-SLAPP protection for knowingly false statements and at the same time insist the litigation privilege also protects such statements regardless of falsity. However, the litigation privilege would only apply to statements made during the course of litigation. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014). No defamation claims are asserted against Vannah with respect to any such statements and the Edgeworth's defamatory statements were made to third parties outside the litigation. Thus, the litigation privilege does not apply.

Even if applied, the litigation privilege would only protect statements **made in good faith**, and would not immunize the Edgeworth Parties' abusive conduct under the facts of this case. As demonstrated below, neither the statutory anti-SLAPP, nor litigation privilege protections apply here.

A. THE EDGEWORTH PARTIES CANNOT SHOW GOOD FAITH UNDER PRONG ONE OF THE ANTI-SLAPP ANALYSIS BECAUSE CONVERSION WAS A LEGAL AND FACTUAL IMPOSSIBILITY.

Boldly suggesting that even intentionally false statements are entitled to anti-SLAPP protection, the Edgeworth Parties assert Simon's claims are barred. In so doing, the Edgeworth Parties ask this court to ignore that NRS 41.637 only protects a ***good faith*** communication made in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

Here, the Edgeworth Parties cannot get past the good faith requirement. First, the district court in Simon I already determined the conversion claim was not brought in good faith. AA001096-1099. This Court affirmed those findings. AA004257-4267. The Edgeworth Parties further fail to demonstrate by a preponderance of the evidence that their allegations against Simon were ***truthful or made without knowledge of [their] falsehood."*** NRS 41.637(4) (Emphasis added).

Simply, the Edgeworth Parties' conversion complaint was filed in retaliation for Simon filing a valid attorney lien and does not qualify for anti-SLAPP protection. *Bonni v. St. Joseph Health Sys*., 2021 WL 3201090 (Cal. July 29, 2021). The Edgeworth Parties, not Simon, must first make such a showing – these are burdens the Edgeworth Parties can never meet. Because they cannot clear this preliminary evidentiary hurdle, the burden never shifted to Simon to provide prima

facie evidence of a likelihood of success. Thus, the district court never even needed to reach the second prong of the analysis. Nonetheless, to avoid any doubt, the district court expressly noted that if it had, Simon has made prima facie showing that he is likely to prevail on the merits. AA004238:1-4.

1. <u>The District Court's Order In Simon I Conclusively Establishes The Lack Of Good Faith</u>

In *Five Star, Capital Corp. v. Ruby,* 124 Nev. 1048, 194 P.3d 709 (2008), the Nevada Supreme Court set forth the following three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same; (2) the final judgement is valid; and (3) the subsequent action is based on the same claims or any part of them that were or could have been brough in the first case. These three factors in varying language, are used by the majority of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

The Court in *Five Star* also set forth four factors for application of issue preclusion: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgement is asserted must

have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

The *Five Star* court clarified that while claim preclusion can apply to all claims that were or could have been raised in the initial case, issue preclusion only applies to the issues that were actually and necessarily litigated and on which there was a final decision on the merits. The reason for this distinction is claim preclusion applies to preclude an entire action based on the same set of facts and circumstances, while issue preclusion applies to prevent re-litigation of specific issues that were decided in a previous suit between the parties, even if the second suit is based on different causes of action and different circumstances. *Five Star, Supra.*

These doctrines provide that any issue that was actually and necessarily litigated in one action will be estopped from being re-litigated in a subsequent suit. In *Laforg v. State, University System,* 116 Nev. 415, 997 P.2d 130 (2000), this court clarified that issue preclusion may apply even though the causes of action are substantially different, if the same fact issues are presented. The purpose of claim preclusion is to obtain finality and prevent a party from re-litigating the same set of facts that were present in the initial suit even if the second suit is based on different causes of action. *Laforg v. State, University System,* 116 Nev. 415, 997 P.2d 130 (2000).

Here, Simon satisfies all elements. The exact same parties in this case were involved in Simon I. There, the district court considered the issue of the Edgeworth's lack of good faith when sanctioning them. These sanctions were upheld by this court on December 30, 2020 and are final. Simon's complaint here arises from the same claims and same set of facts already adjudicated in Simon I. It is of no consequence that Simon is using issue preclusion offensively. The rule is that if something has already been litigated, it cannot be re-litigated. *Five Star, supra.* This is the entire reason for the policy behind finality. It is also irrelevant that Simon's causes of action are different than the underlying conversion complaint as the claims arise from the same set of facts already litigated. *Laforg v. State, University System,* 116 Nev. 415, 997 P.2d 130 (2000).

The Edgeworth Parties can never show Simon converted the settlement funds because the money went directly into the special trust account agreed to by the Vannah/Edgeworth team. Simon was not in possession of the money when the conversion action was filed. Since there was never a justiciable claim, the false accusations of theft, blackmail and extortion in support of the conversion claim were always known to be false. The Edgeworth Parties agreed where to place the money with Vannah equally controlling it in a protected account. AA001198. The conversion complaint was filed January 4, 2018. AA000112-121. The checks were deposited January 8, 2018, Simon was conveniently served on January 9, 2018, and

the money finally cleared the bank into ***the joint account*** on January 16, 2018. RA000307-308.

2. <u>Simon's Filing of a Lien Was Always Protected By NRS 41.660 , which Further Establishes the Conversion Complaint was Frivolous.</u>

The Edgeworth's admit that they sued Simon for conversion for filing an amended attorney lien. AA003509. This retaliatory complaint proves Simon was protected by the very arguments the Edgeworth Parties are now advancing because the law firm followed the judicial process of NRS 18.015. This is yet another reason their complaint was filed in bad faith and is a retaliatory complaint. Filing an attorney's lien is a protected activity. *Beheshti v. Bartley*, 2009 WL 5149862 (Calif, 1st Dist, C.A. 2009); *Transamerica Life Insurance Co., v. Rabaldi*, 2016 WL 2885858 (D.C. Calif. 2016).

Simon I was initiated to chill Simon's right to petition the court to adjudicate his lien for attorneys' fees admittedly owed. Simon actually sought anti-SLAPP immunity for the filing of his lien but the motion was denied as moot because the district court dismissed the conversion lawsuit as meritless pursuant to NRCP 12(b)(5) before issuing sanctions. AA000028-37**;** AA001096-1099. Because the district court in Simon I dismissed the Edgeworth conversion complaint and found it was filed in bad faith and not maintained upon reasonable grounds, the Edgeworth Parties cannot ever meet the threshold showing of "good faith" in the instant action.

Thus, the district court properly exercised its discretion in denying the Edgeworth Parties' motion in this case.

B. THE DISTRICT COURT PROPERLY ANALYZED THE LAW AND FACTS BEFORE IT IN THE LIGHT MOST FAVORABLE TO SIMON – THE NON-MOVING PARTY

The Edgeworth Parties brazenly ask this Court to accept as true, their new anti-SLAPP declarations with respect to their subjective good faith beliefs and further contend Simon did not present any evidence to contradict this new testimony. Edgeworth Opening Brief at p.30. This assertion is absolutely false. To be clear, the district court compared the new Edgeworth declarations with the prior declarations in Simon I. In an effort to persuade the district court there, Mr. Edgeworth testified under oath that "…. I was forced to tell Herrera everything about the lawsuit and **SIMON'S attempt at trying to extort millions of dollars from me**. …". AA001320:17-20. Completely flipping in this case, Edgeworth tried to persuade the district court by testifying, **"……I never used the words …..extortion or blackmail**." FN 5, P14 of Edgeworth Opening Brief.

The district court here in Simon II also had before it specifically identified defamatory statements, which were not merely alluded to as the Edgeworth Parties now suggest. The district court in Simon II further considered Mrs. Edgeworth's sworn testimony in Simon I, whereby she admitted to defaming Simon when she told Lisa Carteen, as her friend, ***not her lawyer*** that Simon was extorting and

blackmailing them. AA003931:3-20. Now, her new anti-SLAPP affidavit concedes she said these things, but claims she was speaking to her as a lawyer and not her friend. RA1078-1080.

Even more incredible is the new assertion that Mrs. Edgeworth was speaking to Justice Shearing in her capacity as a lawyer. This too is absolutely false. Mrs. Edgeworth testified she did not retain her as her attorney and she only spoke to her as her friend. AA003901:11-15. Mrs. Edgeworth's new version of events about a few questions at a fundraiser is a far cry from a legal consultation as her lawyer. If discovery is allowed, Simon anticipates Justice Shearing will likely deny giving legal advice as her lawyer. At a minimum, Simon is entitled to conduct discovery and allow Justice Shearing to weigh in on the discussion.

The recent case of *Delucchi v. Songer*, 133 Nev. Adv. Rep. 42, 396 P.3d 826 (2017), further demonstrates why dismissal at this stage would have been improper. In *Delucchi*, the Nevada Supreme Court reversed the district court dismissal of the complaint based on anti-SLAPP finding Delucchi and Hollis presented sufficient evidence to create a genuine issue of material fact.

Importantly, the *Delucchi* Court held:

> **We conclude that Delucchi and Hollis presented sufficient evidence to defeat Songer's special motion under the summary judgment standard. In opposing Songer's special motion to dismiss, Delucchi and Hollis presented the arbitrator's findings as well as**

> **testimony offered at the arbitration hearings. The arbitrator concluded that the Songer Report was not created in a reliable manner and contained misrepresentations. The arbitrator's determination was based on the evidence presented at the hearing, which included testimony from Songer. Delucchi and Hollis thus presented facts material under the substantive law and created a genuine issue for trial regarding whether the Songer Report was true or made with knowledge of its falsehood**. *See City of Montebello v. Vasquez*, 376 P.3d at 633 (providing that the substantive law in deciding whether a communication is protected is the definition of protected communication contained in the anti-SLAPP legislation). We thus conclude that the district court erred in granting Songer's special motion to dismiss.

Id., at 833-34. (emphasis added)

This case is similar to *Delucchi*.[4] A five-day evidentiary hearing was conducted in Simon I that established testimony that the Edgeworth Parties knew their statements about Simon stealing, extorting and blackmailing them were false. Further, the district court issued findings that the statements were not reliable and that there was no merit to the conversion claims. AA001096-1099; AA000001-37. The district court's decision in Simon I is prima facie evidence that defeats the anti-SLAPP Motion.

[4] The recent case *Nielsen v. Wynn*, 2020 Nev. Unpub. LEXIS 821, re-confirms the analysis in *Delucci* that supports Simon when applying the facts to this case.

The Edgeworth Parties contend the district court in Simon II ruled in error because their objections at the time of oral argument were ignored and the court was initially leaning in favor of dismissal. To the contrary, the district court reiterated it had considered the extensive briefing containing all arguments, law and substantial exhibits, as well as its sister court's decision in Simon I. AA004235-4238. The record is replete with the specific Edgeworth defamatory statements, as well as their own contradictory statements. Most importantly, the undisputed facts and Court orders support the lower's court's decision.

In short, the district court had ample evidence upon which to find the Edgeworth Parties had contradicted their earlier sworn testimony. Nevada law precludes such sham affidavits from magically applying NRS 41.660. *Yeager, Supra*. At a minimum, such contradictory evidence creates genuine issues of material fact, precluding dismissal. It is the district court's ultimate decision that matters, and the fact that Simon's counsel ultimately persuaded the court to abandon its initial leanings only shows thoughtfulness, not a lack of consideration.

C. THE EDGEWORTHS CANNOT INSULATE THEMSELVES FROM THE ACTS OF THEIR LAWYERS.

Vannah and Edgeworth blame each other for the wrongful conduct. Nevada law makes it clear that a client is bound by the acts of his lawyers. *See, Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992), FN 9; *Link v.*

Wabash R. Co., 370 U.S. 626 (1962). Beyond their lawyer's abusive conduct, the Edgeworths were actively involved in their representation. Although prepared by Vannah, Edgeworth signed the affidavits, under oath, containing the false and defamatory statements. RA000399:14-15; RA000403:14-18. He testified at the hearing about the non-sensical blackmail, extortion and theft and then intentionally advanced the false story about an express oral contract that has now been conclusively proven as false.

The Edgeworth Parties did not rely on counsel when they testified the case was filed to punish Simon. The Edgeworth Parties always knew they owed Simon, a longtime friend, money for a great result, but went to great lengths to avoid payment. Although their lawyers were willing to oblige, all were involved in the devised plan and are equally liable for the conspiracy to abuse the process with the intent to punish Simon.

1. <u>The Edgeworth's Attempt to Now Characterize the Admitted Defamatory Statements as Opinion in a Public Place also Fails.</u>

The Edgeworths also now suggest they are excused because their defamatory statements are opinions. AA003505. Although not supported, this may be an affirmative defense, but is not dispositive when considering NRS 41.660.

Mr. Edgeworth's affidavit telling the volleyball coach Simon was attempting to extort him was not stated as an opinion but rather, a fact. AA001353:11-15**.** It

was put in an affidavit and filed with the Court to persuade the Court not to dismiss the conversion claim. Mr. Edgeworth is a lay witness and his statement is not qualified as an opinion. After all, why would opinions be put in the affidavit when only facts are to be presented? Regardless, the Supreme Court of Nevada has also confirmed that defamation is actionable when a person states an opinion that a plaintiff is a thief if the statement is made in such a way as to imply the existence of information which would prove plaintiff to be a thief. *Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, 342 (1983)* (Opinion which gives rise to inference that the source has based the opinion on underlying, undisclosed defamatory facts.)

The statements of theft, conversion and blackmail were presented to the court as facts to persuade the court to cast Simon as a bad unethical lawyer not deserving of a fee. After all, they had the Vannah Parties, very seasoned lawyers, advising them when preparing their affidavits and testimony for court. RA000403:14-18. One would presume these statements would not be advanced by these very experienced lawyers unless there existed some evidentiary basis and certainly implied the existence of information in their possession to prove their wild defamatory statements. *Also see Cohen v. Hansen, 2015 U.S. Dist. LEXIS 74468, 19-21 (D. Nev. June 9, 2015*) (expressions of opinion may suggest the speaker knows certain facts to be true or may imply that facts exist which will be sufficient

to render the message defamatory if false); *Wynn v. Smith 117 Nev. 6, 16 P.3d 424, 431 (Nev. 2001*) (the statement I think he must be an alcoholic is actionable because a jury might find that it implied that the speaker knew undisclosed facts justifying his opinion.) Restatement (Second Torts, s556, see also *Gordon v. Dalrymple, No. 3:07-CV-00085-LRH-RAM, 2008 U.S. Dist. LEXIS 51863, 2008 WL 2782914, at 4(D. Nev. July 8, 2008)* ("Any statement which presupposes defamatory facts unknown to the interpreter is defamatory.").

Finally, the opinion defense is not an appealable issue under these circumstances. Whether a statement is opinion vs. fact is a question for the jury and is also not a basis to dismiss this claim on a motion to dismiss. *Fink v. Oshins*, 118 Nev. 428 (2002).

2. <u>The Edgeworth's statements to uninterested third parties are not protected by NRS 41.660.</u>

The Edgeworth parties effectively ask this Court to adopt the bizarre position that the Edgeworth Parties can defame anyone they want as long as the defamation occurred in a restaurant or at a fundraiser. AA003504. The statements to the Volleyball coach were at an Italian restaurant and the statements to Justice Shearing were made at a fundraiser. An Italian restaurant or a fundraiser is not a public forum contemplated by NRS 41.660.

Additionally, the statements made to third parties are false no matter where they are made and simply because a statement to a third person is made in a public place, does not mean it cannot be defamation. There is nothing contained in NRS 41.660 or the litigation privilege that allows a person to defame someone to third persons not interested in the litigation. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014). Although baseless, the defamation defenses can be asserted after discovery is completed and do not concern the application of NRS 41.660.

In another attempt to get something to stick, the Edgeworths for the first time on appeal argue a statute of limitations defense for defamation. These arguments were never presented to the district court here, likely because they lack merit. The Edgeworth Parties filed only an anti-SLAPP motion, not one for dismissal under NRCP 12(b)(5) and in any event, the statute of limitations issue was never raised at all. Arguments made for the first time on appeal should not be considered. *Schuck v. Signature Flight Support of Nevada, Inc.,* 126 Nev. 434, 437, 245 P.3d 542, 544 (2010).

Nevertheless, even if the SOL had been raised, the argument would still fail. The Edgeworths concede one of the statements is timely[5]; therefore, this is not a basis to find Simon lacked a likelihood of success. Regardless, defamation claims

[5] The Edgeworth's concede that the extrajudicial statement to Justice Shearing does not fall outside the statute of limitation. Edgeworth Opening Brief at p.16.

are based on the discovery rule when the Plaintiff knew or should have known of the defamatory statement.

This Court has previously held (in an unreported decision), that defamation is subject to the discovery rule when determining the statute of limitations. *Lahren v. Nevada System of Higher Educ.*, 124 Nev. 1486 (2008) (unpublished). The Ninth Circuit and Nevada Federal courts have likewise held the discovery rule can toll the statute of limitations for defamation as well. See e.g., *JM Martinac Shipbuilding Corp. v. Washington*, 363 Fed. Appx. 529, 532 (9th Cir. 2010); *Morrison v. Quest Diagnostics, Inc.*, 139 F. Supp.3d 1182, 1187 (Nev. Dist. Ct. 2015); and *Eid v. Alaska Airlines, Inc.*, 2006 WL 8429873, *3 (Nev. Dist. Ct. June 15, 2006).

Simon learned of the defamatory statements to the volleyball coach in the affidavits filed February 12, 2018 and March 15, 2018. AA001352-1354; AA001320-1321. Notice of the Carteen and Shearing defamation occurred at the hearing on September 18, 2018. AA003901:11-15; AA003900:18-22; AA003931:18-20. Simon filed his complaint for defamation against Edgeworth December 23, 2019. Therefore, the statute of limitations arguments is another unfounded basis for relief.

D. SIMON HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

If this Court were to conclude the district court erred in finding the Edgeworth Parties did not make an initial showing as to the first prong, the burden shifts to Simon to show with prima facie evidence a probability of prevailing on his claims. NRS 41.660(3)(b), *Shapiro, Supra*. If a court gets that far in the analysis, and a plaintiff then shows a probability of prevailing on the claim, the anti-SLAPP Motion is denied. The summary judgement standard analysis affords Simon the benefit of all reasonable inferences when analyzing this issue.

The Edgeworths argue for absolute immunity and skip over the two-prong test that a prima facie case gets to move forward with discovery. This case stands on unique facts already litigated and decided in Simon's favor. At a minimum, there are genuine issues of material fact.

The prima facie case is established merely by the judicial finding of bad faith sanctioning the Edgeworths along with the admissions of the Edgeworths -- that the ulterior purpose was to punish Simon for stealing, converting their money, among other improper purposes. AA003942:21-25. Edgeworth Parties, and each of them, made blatantly false allegations of theft, extortion, blackmail, and conversion. The retaliatory complaint was used in an improper attempt to refuse payment of attorney's fees admittedly owed, as well as to punish and harm Simon,

not to achieve success on the conversion claim. This is already admitted by all Edgeworth Parties, under oath, and correctly asserted in Simon's Complaint and Amended Complaint in Simon II. AA003942:15-25; AA000995-1022 ¶¶ 24-27,59-61,103-104.

E. THE AMENDED COMPLAINT CONTROLS

The Edgeworths argue Simon cannot plead around anti-SLAPP in his amended complaint and urges the court to follow California law. In doing so, the Edgeworth Parties ignore the merits of the amended complaint and mislead this court to believe that California law never allows an amended complaint to be filed when Anti-SLAPP may be applied. To the contrary, even California allows an amended complaint when directed by the District Court. *Verizon Delaware, Inc. v. Covad Commc'ns Co*, 377 F.3d 1081, 1091 (9th Cir. 2004) ("[G]ranting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment."). In *Verizon Del.,* the Court specifically stated:

> But we have also cautioned that "[p]rocedural state laws are not used in federal court if to do so would result in a direct collision with a Federal Rule of Civil Procedure" and have accordingly refused to apply certain discovery-limiting provisions of the anti-SLAPP statute because they would conflict with Fed. R. Civ. P. 56. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845–46 (9th Cir.2001) (internal quotation marks omitted).

Verizon Delaware, Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004). In Nevada, a party may amend their complaint with leave of court pursuant to NRCP 15(a), which mirrors FRCP 15(a) and thus Plaintiffs' Amended Complaint should be permitted with leave of court. Here, the district court heard the Edgeworth Parties' objections and ordered the parties to only address the amended complaint when he stated, as follows:

> THE COURT: …… But you do have this guidance. As far as I'm concerned, the filing of the amended complaint on May 21st of 2020 does supersede the original complaint, and as such, any motions that are challenging the complaint document need to be addressing the amended complaint.

RA001108:15-24.

Therefore, this order is leave of court allowing the filing of the amended complaint. In making this argument hoping to void the amended complaint, it appears that even Edgeworth agrees that Simon's amended complaint as plead defeats their appeal. The Edgeworth's form over substance arguments are not supported and should be summarily dismissed.

1. <u>All Edgeworth Parties Are Liable For Abuse of Process</u>

In Nevada, the elements for a claim of abuse of process are:

1. Filing of a lawsuit made with ulterior purpose other than to resolving a dispute;

2. Willful act in use the use of legal process not proper in the regular conduct of the proceeding; and

3. Damages as a direct result of abuse.

LaMantia v. Redisi, 118 Nev. 27, 30, 38 P.3d 877, 897 (2002); *Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980); *Dutt v. Kremp*, 111 Nev.567, 894 P.2d 354, 360 (Nev. 1995) overruled on other grounds by *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 897 (2002)); *Laxalt v. McClatchy*, 622 F.Supp. 737, 751 (1985) (citing *Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980); *Nevada Credit Rating Bureau, Inc. v. Williams,* 88 Nev. 601 (1972); 1 Am. Jur. 2d Abuse of Process; *K-Mart Corporation v. Washington*, 109 Nev. 1180 866 P.2d 274 (1993)).

Notably, one who procures a third person to institute an abuse of process is liable for damages to the party injured to the same extent as if he had instituted the proceeding himself. *Catrone v. 105 Casino Corp.,* 82 Nev. 166, 414 P.2d 106 (1966). In both *Datacomm Interface, Inc. v. Computerworld, Inc*., 396 Mass. 760, 775, 489 N.E.2d 185 (1986), and *Neumann v. Vidal*, 228 U.S. App. D.C. 345, 710 F.2d 856, 860 (D.C. Cir. 1983), the courts recognized an injury to business and business reputation as an improper ulterior motive and abuse of process. An "ulterior purpose" includes any improper motive underlying the issuance of legal process. *Dutt v. Kremp*, 108 Nev. 1076, 844 P.2d 786, 790 (Nev. 1992).

Abuse of process is established if the Vannah/Edgeworth team initiated and maintained the conversion claim with malice for an ulterior purpose. Angela

Edgeworth admitted under oath to the improper purpose of their claims - to punish Simon personally for stealing, converting her money. AA003942:21-25; AA000995-1022 ¶¶27,75,76,77,78,85,86,87. There is no mistake about their malice and ulterior purpose to injure Simon. The relentless pursuit even through today supports Simon's claims.

The other ulterior purposes include their motives to refuse payment of attorney's fees admittedly owed and subject Simon to harsh punishment. Simon incurred substantial expenses in excess of $300,000 to defend the frivolous abuses, as well as harm his reputation to friends, colleagues and the general public causing damage and loss to his business and ultimately him and his family. The claims were so obviously lacking in merit that they could not logically be explained without reference to the Edgeworth Parties improper motive and ill-will, and malice is proven. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252,259, 92 P.3d 882, 889 (App. 2004).

More ulterior motives include the invented story of an express oral contract to refuse payment coupled with the fabricated stories of theft, extortion and blackmail in an effort to secure a court order that Simon was already paid in full. Their conduct was also aimed to destroy Simon's practice and his livelihood, another ulterior purpose. They sued him personally to punish him. AA003942:21-25. They also sought to avoid lien adjudication and intentionally cause substantial

expense to defend the frivolous claims. This is another ulterior purpose. *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (1982).

The Edgeworth Parties' attempt to dismiss all claims with the brush of a litigation privilege wand is contrary to Nevada law. Nevada clearly allows abuse of process claims against the party's and their attorneys. In *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980), the Nevada Supreme Court confirmed that abuse of process claims can go forward regardless of the litigation privilege. The litigation privilege only concerns statements when here, it is the conduct that controls the analysis. If this case is dismissed entirely based on the litigation privilege it would abolish all claims for abuse of process. Simon has properly plead the Abuse of Process claims based on Edgeworth Parties' on-going abusive conduct long after the mere filing of the Edgeworth frivolous conversion Complaints.

The facts in *Bull* are similar to the present case. What possible legal standing did the Vannah/ Edgeworth Parties have to pursue a conversion claim against Simon on behalf of the Edgeworth's when no justiciable claim ever existed? The only basis offered to the district court in Simon I was the cavalier statement from Mr. Vannah that "He thought it was a good theory." RA000342:20-24. Greene could never provide authority. RA001085-1090. The Edgeworth and Vannah Parties had actual knowledge that prior to filing their lawsuit, a conversion never occurred and could never occur in the future. Succeeding on the conversion claim was a legal

impossibility and the district court in Simon I made the final determination of bad faith.

Mrs. Edgeworth also confirmed that she was the equal owner of American Grating, LLC and equal trustee of Edgeworth Family Trust, acting on behalf of the entities and fully approved and ratified the conduct of these entities. AA003964:23-AA003965:16. She also testified she adopted all testimony of her husband – the other equal owner. *Id.;* AA003908:2-8. Thus, when considering all inferences in the light most favorable to Simon, district court did not err in denying Edgeworth Parties motions to dismiss.

2. <u>Intentional Interference With Prospective Economic Advantage Is Properly Pled</u>

A claim for Intentional Interference with prospective Economic Advantage is established when:

> (1) a prospective contractual relationship between Simon and a third party;
> (2) knowledge by defendant of the prospective relationship;
> (3) intent to harm plaintiff by preventing the relationship;
> (4) the absence of privilege or justification by defendant; and
> (5) actual harm to plaintiff as a result of defendant's conduct.

See, Wichinsky v. Mosa, 109 Nev. 84, 88, 847 P.2d 727 (1993).

The Edgeworth Parties contend Simon has failed to plead specific prospective contractual relationships with third parties for their Intentional Interference with Prospective Economic Advantage cause of action. The Edgeworth Parties do not cite any authority to support their position. Presumably, the

Edgeworth Parties fail to do so because the Nevada Supreme Court has clearly stated that this cause of action falls within the liberal pleading requirements of NRCP 8(a) and not the more specific particularity required by NRCP 9(b) as held in *Kahn v. Dodds (In re AMERCO Derivative Litg.),* 127 Nev. 196, 222-23, 252 P.3d 681, 699 (2011). Regardless, this is not an argument that has anything to do with the Anti-SLAPP analysis and the Edgeworth Parties did not file a general motion for dismissal under NRCP 12(b)(5). The district court properly rejected this argument and this issue is not appealable.

Moreover, Simon properly alleged that "Plaintiffs [Simon] had prospective contractual relationships with clients who had been injured due to the fault of another, including but not limited to persons injured in motor vehicle accidents, slip and falls, medical malpractice and other personal injuries." AA000995-1022 ¶ 48. Simon further alleged, "The Edgeworths knew plaintiffs regularly received referrals for and represented clients in motor vehicle accidents, slip and falls, medical malpractice and incidents involving other personal injuries." AA000995-1022 at ¶ 49.

The Edgeworths admitted under oath they knew that Simon was a personal injury lawyer. AA003821:24-AA003822:1. They are highly educated people understanding the effects their wild accusations would have on Simon's practice, which is why they did it. Consequently, they were well aware that the false

defamatory statements would have a devastating impact on his livelihood, while assuming the litigation privilege would shield them from a later suit. The Edgeworth Parties are well aware Simon's prospective clients would be deterred from retaining an attorney accused of the most egregious conduct that a lawyer could commit -extorting millions from a client. Nevada law does not provide such protection nor should it.

Nevada courts have found that allegations of the loss of prospective clients is sufficient when pleading intentional interference with prospective economic advantage. *See, Barket v. Clarke*, 2012 U.S. Dist. LEXIS 88097, *8-10, 2012 WL 2499359 (D. Nev. June 26, 2012). Simon does not need to specify the exact relationships and this claim has been properly pled. AA001007 at ¶¶48, 49.

3. Wrongful Use Of Civil Proceedings Is Properly Pled

Exceeding what is required on a motion to dismiss, Simon has already met each and every element of their claim for wrongful use of civil proceedings ("WUCP"). More specifically,

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if:
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

Restatement (Second) of Torts, §674 (1977).

What constitutes probable cause is determined by the court as a question of law. *Bradshaw*, 157 Ariz. at 419, 758 P.2d at 1321 (1977). When the Court reviews these claims, "[t]he malice element in a civil malicious prosecution action does not require proof of intent to injure." *Bradshaw*, 157 Ariz. at 418–19, 758 P.2d at 1320–21 (citing Restatement (Second) of Torts §676 (1977), hereinafter referred to as the "Restatement," comment c). "Instead, a plaintiff must prove that the initiator of the action primarily used the action for a purpose 'other than that of securing the proper adjudication of the claim.'" *Id.* (again citing Restatement § 676, *inter alia*). Malice may be inferred from the lack of probable cause.

The Restatement discusses several "patterns" of WUCP, such as "when the person bringing the civil proceedings is aware that his claim is not meritorious"; or "when a defendant files a claim, not for the purpose of obtaining proper adjudication of the merits of that claim, but solely for the purpose of delaying expeditious treatment of the original cause of action," "**or causing substantial expense to the party to defend the case."** Restatement (Second) of Torts § 676, comment c. (emphasis added). *Nienstedt v. Wetzel*, 133 Ariz. 348, 354, 651 P.2d 876, 882 (App. 1982), is exemplative of when and against whom a WUCP claim can be asserted: "In all of these situations, if the proceedings are also found to have been initiated

without probable cause, the person bringing them may be subject to liability for wrongful use of civil proceedings." Of course, WUCP also includes "when the proceedings are begun primarily because of hostility or ill will" "this is 'malice' in the literal sense of the term, which is frequently expanded beyond that sense to cover any improper purpose." *Id.*

Importantly, the district court in Simon I already decided all facts and ruled as a matter of law that the conversion theft claim was brought in bad faith and not maintained upon reasonable grounds and thus, certainly without probable cause. The Edgeworth Parties all admit the claim was brought to punish Mr. Simon and his Law Firm. The Simon I district court's findings that conversion was brought in bad faith and not maintained upon reasonable grounds were made final by this Court on December 30, 2020. Therefore, Simon has already established a prima facie case and likelihood of succeeding on this claim.

4. <u>Defamation Per Se Is Properly Pled</u>

In her June 4, 2020 affidavit, Mrs. Edgeworth reconfirmed her adoption of all of Mr. Edgeworth's false testimony. RA001078-1080. Individually, she admitted under oath that she told several people outside of the litigation that Mr. Simon was extorting and blackmailing them, including Lisa Carteen and Justice Miriam Shearing. AA003931:6-17.; AA000995-1022 ¶¶27,75,76,77,78,85,86,87. At the time the defamatory statements were made, these individuals did not have a

significant interest in the proceedings, therefore, these statements are not protected by the litigation privilege. *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014).

Mrs. Edgeworth confirmed her statements to Ms. Carteen were as her friend, not her lawyer. AA003931:18-20.; AA000995-1022 ¶¶23,77,87. These admissions alone establish all elements for Simon's claims against all Edgeworth Parties, and preclude the application of the litigation privilege or NRS 41.660. Mr. Edgeworth equally adopted the statements of his wife and also independently told third parties outside the litigation that Mr. Simon was extorting and blackmailing the Edgeworth's for millions of dollars as set forth in his affidavit. AA000995-1022 ¶¶23,77,87. Therefore, Simon properly pled this claim against all Edgeworth Parties in the Amended complaint.

5. <u>Business Disparagement Is Properly Pled</u>

Business disparagement is established when:

(1) a false and disparaging statement,
(2) the unprivileged publication by the defendant,
(3) malice, and
(4) special damages.

See Clark County Sch. Dist. v. Virtual Educ. Software, Inc., 125 Nev. 374. 386, 213 P.3d 496 (2009).

As set forth above in detail, Simon has met every element and has incurred substantial special damages that continue to accrue through today defending the wild accusations, as well as loss of income.

6. Civil Conspiracy Is Properly Pled

A claim for Civil Conspiracy is established when:

1. A defendant [The Edgeworth Parties], by acting in concert, intended to accomplish an unlawful objective for the purpose of harming plaintiff [Simon]; and

2. Plaintiff [Simon] sustained damage resulting from their act or acts.

C*onsolidated Generator-Nevada, Inc. v. Cummings Engine Co.,* Inc., 114 Nev. 1304, 971 P.2d 1251 (1999). Simon merely needs to show an agreement between the tortfeasors, whether explicit or tacit. *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998). The cause of action is not created by the conspiracy but by the wrongful acts done by the Edgeworth Parties to the injury of Simon. *Eikelberger v. Tolotti*, 96 Nev. 525, 611 P.2d 1086 (1980). A plaintiff may recover damages for the acts that result from the conspiracy. *Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965), overruled on other grounds by *Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1998).

An act lawful when done, may become wrongful when done by many acting in concert taking on the form of a conspiracy which may be prohibited if the result be hurtful to the individual against whom the concerted action is taken. *Eikelberger,*

supra; Flowers v. Carville, 266 F. Supp. 2d 1245 (D. Nev. 2003). The Edgeworths, Vannah and Greene devised a plan to punish Simon, and these tortious acts of abuse of process, wrongful use of civil proceedings, intentional interreference with prospective economic advantage and negligence are the wrongful acts that were performed with an unlawful objective to cause harm to Simon.

It is unlawful to file frivolous lawsuits and present false testimony of theft, extortion and blackmail. It is unlawful to make up stories of an express oral contract to file a retaliatory complaint. The Edgeworth's and the Vannah attorney's all followed through with this plan for their own benefit. Vannah and Greene were charging $925 an hour each for their efforts to overlook their independent duties and bill against the endless well of disputed money held in trust. RA000304. It is readily apparent they overlooked their independent duties to further the plan because they could never provide any authority and refused to speak with Mr. Christensen to refrain from the theft and conversion arguments in their filings. Mr. Christensen pleaded with them to withdraw these false allegations. RA001085-1090. Vannah/Edgeworth thumbed their nose to this simple and straightforward request continuing with the plan to punish Simon.

7. <u>Negligence Is Properly Pled</u>

Negligence is the failure to exercise the degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances.

Nevada Jury Instructions 4.02 and 4.03; and BAJI 3.10. An ordinarily and careful person (or corporation) would not sue Simon for conversion in bad faith and then defame Simon in order to punish him instead of paying him the reasonable fees he was owed.

The Edgeworth Parties breached their duty when choosing to act in bad faith and harm Simon via the improper and meritless conversion claim along with the related defamatory statements by its officers. These statements are not protected by the litigation privilege and only go to prove the Edgeworth entities conduct, which, at the minimum, was negligent toward Simon, thus resulting in damages – all of which is plead in the Amended Complaint. AA000995-1022.

F. AT A MINIMUM, SIMON SHOULD BE ALLOWED TO CONDUCT DISCOVERY

The Edgeworth Parties' attempt to shield themselves with the protections of NRS 41.660 is without merit as they do not meet any element of the requirements for such protection. Asserting ***ex-post facto,*** new conversion theories long after the evidentiary hearing does not rescue the lack of good faith and knowing falsehoods at the time the Edgeworth Complaints were filed and maintained. This Court should focus on the facts that existed at the time the complaint and amended complaint were filed.

The lower court properly denied Vannah's motion to dismiss pursuant to NRCP 12(b)(5) and any issues outside of NRS 41.660 are not appealable. At this stage of the case, when taking the facts alleged in the Complaint in the light most favorable to Simon as true, it is clear that neither the litigation privilege, nor anti-SLAPP protections can be applied. *See e.g., Eaton v. Veterans, Inc.*, 2020 U.S. Dist. LEXIS 7569, *5-6 (U.S. Dist. Ct. Mass., Jan. 16, 2020) (When ruling on Defendant's motion to dismiss, the court held that it must accept plaintiff's allegations as true at that stage of the proceeding and that the allegations created the reasonable inference that Defendant threatened legal action in bad faith and, therefore, was not entitled to the litigation privilege at that juncture).

Even if the Court reaches the second prong, Simon has demonstrated a likelihood of success on the merits and discovery should move forward. The prior judicial determinations and party admissions of why the case was filed create a genuine issue of material fact. Thus, the district court properly concluded that at a minimum, Simon should be afforded the opportunity to conduct discovery pursuant to NRS 41.660(4) pending a final Anti-SLAPP ruling. *Crabb v. Greenspun Media Grp., LLC*, 2018 Nev. App. Unpub. LEXIS 526, 46 Media L. Rep. 2143 (July 10, 2018).

Specifically, Simon seeks discovery about what the Edgeworth Parties knew or did not know when filing the initial Edgeworth complaint and/or subsequent

pleadings. The Vannah attorneys aver they did substantial research prior to filing the initial Edgeworth Complaint in support of their good faith basis. However, they have not provided any evidence of this research, or even a relevant fact specific case through today. Discovery surrounding their research, including the specific research and the research trails is crucial to determine the asserted good faith by the Vannah Attorneys.

Simon also seeks discovery about what the Edgeworth Parties told Rueben Herrera, Justice Miriam Shearing and attorney Lisa Carteen. The new Edgeworth affidavits attached to their Special Motion to Dismiss: Anti-SLAPP specifically address what they assert was told to these witnesses and their depositions are crucial to determine exactly what was said to these witnesses. Their new sham affidavits stating what was told to these witnesses is completely opposite of their in-court testimony.

Additional discovery surrounding the email communications, text communications as to what they knew, their devised plan and on-going abuses is also needed to address the core issue of good faith at the time the initial Edgeworth Complaint and subsequent filings. All Edgeworth Parties are in exclusive possession of this information and thus far have refused to allow imaging of their portable devices to preserve this evidence. Simon specifically requested this

discovery below and the district court properly deemed discovery to be warranted. RA001100-1101.

G. THE LITIGATION PRIVILEGE DOES NOT BAR SIMON'S CLAIMS.

The proceeding must be "contemplated in good faith" in order for the privilege to apply. *Id.*; *see also* Restatement (Second) of Torts, § 586 cmt. e (1977). This requirement is notable and illustrates that the litigation privilege does not apply in every case. Here, the facts show that Edgeworth Parties did not "contemplate in good faith" the Conversion claim against Simon.

Another way to consider the "contemplated in good faith" requirement is to assess whether Edgeworth Parties had a "good faith belief in a legally viable claim" in order for their statements to be privileged. *See e.g., Hawkins v. Portal Publs., Inc.,* 189 F.3d 473 (9th Cir. 1999) (unpublished decision). Either way, when taking the allegations in the Simon Complaint and Amended Complaint in the most favorable light to Simon, it is clear that Edgeworth Parties did not have a good faith belief in a legally viable claim for conversion against Simon. They did not file it for a legitimate purpose. Rather, the Edgeworth Parties contemplated the conversion in bad faith for the ulterior purpose to avoid paying the reasonable attorney's fees admittedly owed and retaliate to punish Simon, not to obtain legal success of the conversion claim at trial.

The record clearly supports the Edgeworth Parties' lack the requisite good faith and the litigation privilege does not bar Simon's claims at this stage of the proceedings. At a minimum, there are issues of material fact to be decided by a jury. Irrespective of the statements made, it is the ***malicious conduct*** of the Edgeworths that also preclude dismissal.

VII.

CONCLUSION

Based on the foregoing facts and argument, dismissal is improper at this juncture. The Edgeworth Parties did not and cannot make the threshold showing that would entitle them to protection of the litigation privilege or Anti-SLAPP statutes. Simon has pled sufficient facts supporting all causes of action, especially when taking the plead facts in the light most favorable to the non-moving party. Simon has also presented, under oath testimony directly disputing the self-serving false facts presented in the new affidavits in support of their Motions. Finally, the

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order of district court in Simon I and the party admissions to punish Simon when filing the retaliatory complaint deprives Edgeworth Parties of the protections sought. Therefore, Simon respectfully requests this Court DENY the Edgeworth and Vannah Parties' Appeals in their entirety.

Dated this 9th day of September, 2021.

CHRISTIANSEN LAW OFFICES

By _____
PETER S. CHRISTIANSEN, ESQ.
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VERIFICATION

STATE OF NEVADA)
) :ss
COUNTY OF CLARK)

I, Peter S. Christiansen, am an attorney for Respondents herein. I hereby certify that I have read the foregoing Simon Respondents' Answering Brief to Vannah Appellants' Opening Brief, have personal knowledge concerning the matters raised therein, and to the best of my knowledge, information, and belief, the factual matters set forth are as documented in the records of the case and Appendix, and that the arguments herein are not frivolous nor interposed for any improper purpose or delay.

I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

Dated this 9th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this SIMON RESPONDENTS' ANSWERING BRIEF TO EDGEWORTH PARTIES' OPENING 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font. I further certify that this brief complies with the page or type volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,604 words.

I hereby certify that I have read this SIMON RESPONDENTS' ANSWERING BRIEF TO EDGEWORTH PARTIES' 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 SIMON RESPONDENTS' ANSWERING BRIEF TO EDGEWORTH PARTIES' OPENING BRIEF complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that it is not in conformity with the Nevada Rules of Appellate Procedures.

Dated this 9th day of September, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September 2021, I served a copy of the foregoing SIMON RESPONDENTS' ANSWERING BRIEF TO EDGEWORTH PARTIES' OPENING BRIEF on the following parties by electronic service pursuant to Nevada Rules of Appellate Procedure:

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