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 VANNAH PARTIES OPENING BRIEF

PETER S. CHRISTIANSEN, ESQ.
Nevada Bar No. 5254
KENDELEE L. WORKS, ESQ.
Nevada Bar No. 9611
710 S. 7th Street
Las Vegas, Nevada 89101
Telephone: (702)240-7979
Facsimile: (866)412-6992
pete@christiansenlaw.com
kworks@christiansenlaw.com
Attorneys for Respondents

CHRISTIANSEN TRIAL LAWYERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

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 company or publicly held company.

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

PETER S. CHRISTIANSEN, ESQ.
Nevada Bar No. 5254
KENDELEE L. WORKS, ESQ.
Nevada Bar No. 9611
710 S. 7th Street
Las Vegas, Nevada 89101
Attorneys for Respondents

ROUTING STATEMENT

The instant appeal challenges an order of the district court denying a motion to dismiss 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 Vannah Parties challenge the district court's denial of their motion to dismiss Simon's Complaint pursuant to NRS 41.660 (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 the Vannah and Edgeworth parties' 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. Pursuant to NRS 18.010, the district court further granted Simon attorney's fees and costs for having to defend against the baseless accusations. 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; 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 Vannah 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 Vannah Parties' failure to satisfy the first prong, Simon showed prima facie evidence of a probability of prevailing on the Vannah Parties' claims, and thus, there were genuine issues of material fact requiring discovery.

5. Whether the district court erred in finding Simon has properly pled all causes of action in Simon II.

III.

SUMMARY OF THE ARGUMENT

The Vannah Parties ignore that only good faith communications are entitled to the protections of the anti-SLAPP statutes. While anti-SLAPP immunity is broad, it is certainly not without limitation. To prevail on their Motion to Dismiss, the Vannah Parties had the burden of showing the statements at issue were made in good faith and 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 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. Accordingly, this Court should reject the Vannah Parties' invitation to immunize the knowing and intentional filing of frivolous lawsuits and affirm the district court.

Additionally, the doctrines of issue and claim preclusion foreclose the Vannah Parties' attempts to persuade this Court their conversion allegations were brought in good faith.[1] Particularly relevant here, the Honorable Tierra Jones, in Simon I, determined that: (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

[1] The orders of dismissal and award of fees are both final orders, which were affirmed by this Court and the doctrine of issue preclusion forecloses relitigating such issues. *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)).

grounds." AA000995-1022 ¶¶31-33; AA000004-26; AA000028-37; AA001096-1099. The district court in Simon I remarkably went on to sanction the Vannah/Edgeworth team, awarding costs to Simon for having to oppose the Edgeworth's baseless claims. AA001096-1099.

On December 30, 2020, this Court issued a final order upholding the district court's findings in Simon I, affirming the conversion claims were a legal and factual impossibility. *Edgeworth Family Trust v. Simon*, 477 P.3d 1129 (table) 2020 WL7828800; AA004257-4267. These findings cannot be re-litigated and alone demonstrate the Vannah Parties cannot meet their burden to show by a preponderance of the evidence, that their conduct was in good faith. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048. 194 P.3d 709 (2008). Moreover, since the lawsuit was filed in retaliation to Simon filing a valid attorney lien, the frivolous filings are not protected speech. *Bonni v. St. Joseph Health Sys.,* 2021 WL 3201090 (Cal. July 29, 2021).

In sum, the Vannah Parties knowingly lodged false allegations having no good faith basis in law or fact. If Simon steals money from his clients, he is personally a crook and his business and, its services, are criminal. This is the sting of the Vannah/Edgeworths' conduct, which has permeated the Las Vegas Community. Simon has sustained substantial damages resulting from the frivolous Simon I complaint, false statements and abusive conduct. This Court should not

permit the Vannah Parties to use the anti-SLAPP statutes as a vehicle by which to knowingly and intentionally abuse the system and cause harm.

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 Vannah Parties' jurisdictional statement asserts all issues raised are appealable under NRS 41.670(4). Simon disagrees. The Vannah Parties brought two motions to dismiss – one under the anti-SLAPP statutes and one pursuant to NRCP 12(b)(5). The district court in this case denied both, but only the anti-SLAPP motion is independently appealable. *Kirsch v. Traber, 134 Nev. 163 (2019).*

A. STANDARD FOR SPECIAL MOTION TO DISMISS-ANTI-SLAPP

Pursuant to NRS 41.660(1), Nevada's Anti-SLAPP statue, 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 NRS 41.660. *Bonni v. St. Joseph Health Sys.,* 2021 WL 3201090 (Cal. July 29, 2021).

V.

STATEMENT OF FACTS

Simon and Edgeworth were close family friends. Edgeworth could not find other counsel without charging a large retainer. RA000764:6-RA000765:3. 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.

Both the Vannah and Edgeworth Parties knew that Simon does not generally work on an hourly fee basis and the bills that were generated only contained a fraction of the actual work performed. Mr. Edgeworth was abundantly aware as he was on the other end of all the unbilled emails and phone calls. The few bills generated over the course of intense litigation totaled $365,006.25 in attorney's fees through September 19, 2017 and were composed to be used for the Rule 16.1 calculation of damages given that the construction contract had an attorney's fees provision. RA000830:25-RA000831:11. Vannah and Edgeworth then turned those bills on Simon to fabricate the existence of an express oral contract in order to challenge Simon's true reasonable fees. Mr. Edgeworth sent hundreds of emails, none of which, discuss that Simon agreed to an hourly fee.

Defendants' reliance on the fact the Edgeworths 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 Edgeworths terminated. AA000010; AA000016-17.[2] As a result, Simon's office was left with a valid and enforceable

[2] The impact of the checks sent by the Edgeworths in the underlying case was ruled on by the district court in Simon I and affirmed by this Court. AA004257-4267.

lien claim for unpaid fees and advanced costs, which the district court in Simon I adjudicated in the firm's favor. AA000004-26.

Equally significant, because no express contract existed, there was nothing to modify. Simon never approached Edgeworth to change anything. At the Edgeworth's request, Simon sent a letter proposing a flat fee representing a fair and equitable amount for the work actually performed. RA000793:14-RA000794:7. Pursuant to NRS 18.015 a discharged lawyer is entitled to the reasonable value of his/her services. This is all Simon ever sought.

Simon never asked for a contingency fee or a percentage. This is a false narrative created by Vannah/Edgeworth to call Simon unethical, and was squarely rejected by the District Court. AA000004-AA000026; RA001110-1134; RA001207-1231. Glaringly absent from the evidence adduced at the lien adjudication hearing is any document requesting a contingency fee. Implicitly acknowledging there was not a contract in place, Edgeworth emailed Simon in August, 2017 proposing a contingency fee. AA001158; AA00377. Edgeworth further requested the November 27, 2017 letter from Simon so both could agree on the reasonable fee. RA000793:14-RA000794:7. Simon never sent a proposed contingency fee and never used the term "bonus." AA003110-3117. Vannah and

Edgeworth alone used these words to forward a false narrative. After receiving the November 27, 2017 letter, the Edgeworths refused to make a single phone call to Simon to discuss the issue. RA000797:16-19. Instead, Edgeworth devised a different plan with the Vannah attorneys to punish Simon.

A. <u>THE RETALIATORY COMPLAINT</u>

The Vannah Parties and Edgeworth Appellants admit in their moving papers the conversion complaint was filed because of Simon's attorney lien. AA003509. Undeniably, the conversion complaint was filed in retaliation to Simon's valid lien. The retaliatory conversion complaint is confirmed when the Vannah parties could never provide any case specific authority even though Simon did. When the court asked for the basis of conversion claims, Vannah replied **"we just think it is a good theory."** RA000342:20-24. This really says it all and the changing reasons for the initial Edgeworth Complaint underscores their bad faith. Asserting ***<u>ex-post facto,</u>*** new conversion theories long after the evidentiary hearing does not remedy the lack of good faith and falsehoods at the time the Edgeworth Complaints were filed and maintained.

The retaliatory conversion complaint was used by the Vannah and Edgeworth parties to advance wild accusations aimed to punish Simon and destroy his practice. They invented stories of extortion, blackmail, and theft of millions of dollars from their settlement, which was a factual and legal impossibility. They invented a

narrative of an express oral contract that is now proven to be false by their own admissions. Edgeworth first told the court the contract was formed at Starbucks in May, 2016. Emails produced forced Edgeworth to change the contract formation to June 10, 2016 over the phone. AA003649:11-25. In an astonishing admission, Edgeworth now concedes an agreement was never reached, it was just his personal belief. AA003063. Incredibly, the Vannah lawyers adopted these same false statements in their affidavits to this court attempting to present their good faith and truthfulness. AA002928. The conduct in pursuing all of these fabricated stories is not protected by any statute or privilege.

B. THE VANNAH/EDGEWORTH NARRATIVE WAS FULLY LITIGTTED AND REJECTED BY THE DISTRICT COURT.

The district court in Simon I conducted a five-day evidentiary hearing and adjudicated all of the false facts asserted by the Vannah Parties. There was extensive discussion and testimony about conversion, extortion, blackmail, contingency fees, breach of fiduciary duties, unethical conduct, timing of settlement, timing of discharge, and the lien claimed. In fact, the district court in Simon I 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 expert reports of Will Kemp, Esq., and David Clark, Esq. (former

Nevada State Bar Counsel), among other witnesses. The district court then adjudicated all of these facts confirming that the entire complaint should be dismissed as a matter of law. AA000028-37.

The district court in Simon I found that:

a. On November 29, Mr. Simon was discharged by Edgeworth.
b. On December 1, Mr. Simon appropriately served and perfected a charging lien on the settlement monies.
c. Mr. Simon was due fees and costs from the settlement monies subject to the proper attorney lien.
d. No express oral contract was formed.
e. There was no evidence to support the conversion claim.

AA000028-37**;** AA000995-1022 ¶32.

In a later motion, the Vannah and Edgeworth parties were sanctioned for Simon having to defend against the frivolous conversion theft claim. AA001096-1099**;** AA000995-1022 ¶33. When entering the sanction, the district court in Simon I found that Vannah/Edgeworth did not maintain the conversion claim on reasonable grounds and it was a factual and legal impossibility. This is a bad faith finding. This Court affirmed these findings. *Edgeworth Family Trust v. Simon*, 477 P.3d 1129 (table) 2020 WL7828800; AA004257-4267.

C. VANNAH'S EXPRESS AGREEMENT UNDERSCORES THE BAD FAITH IN THIS CASE

The Edgeworths, through Vannah, refused to sign the settlement checks so that they could be deposited in Simon's law firm trust account. AA001268-1271.

The basis for their refusal was purported fear Simon would steal the money. *Id.* Vannah confirmed he did not believe Simon would steal the money. AA001125-1130. Vannah proposed and Simon agreed to put the money in a special trust account with Vannah equally controlling the account as a signor with 100% interest going to the client, even Simon's share. *Id*. This was purportedly done to eliminate the fear Simon would steal the settlement funds. Vannah and Greene also confirmed the terms of the agreement to the District Court and stated the following:

> MR.VANNAH: In other words, he chose a number that – *in other words, we both agreed that* look, here's the deal. Obviously can't take and keep the client's money, which is about 4 million dollars, so we -- ***I asked Mr. Simon to come up with a number that would be the largest number that he would be asking for.*** *That money is still in the trust account*.

AA003944:7-12. (Emphasis and Italics added.)

As part of this agreement, Simon promptly signed all documents to open the account with Vannah as an equal signor. Simon never had any control of the funds prior to the conversion theft complaint. The Conversion complaint was filed on January 4, 2018, the checks were deposited January 8, 2018, and the funds cleared the bank on January 16, 2018. RA000307-308. The Edgeworth's were immediately paid $4 million, which the Edgeworth's admit made them more than whole. AA003940:13-17.

D. DEFENDANTS BAD FAITH AND LACK OF TRUTHFULNESS IS CONFIRMED BY THEIR AD HOC RESCUE ARGUMENTS FOR THE FRIVOLOUS CONVERSION CLAIMS.

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. However, when the conversion complaint was filed, no checks had been deposited and no justiciable claim existed. Plus, there never were any recoverable damages at any time, because the settlement money in dispute was safekept in trust and the Edgeworth's earned interest on the entire sum. Certainly, the conversion Complaint was not filed when Simon refused to release the funds since the funds were not even received at the time the complaint was filed.

Equally false is the new unfounded theory that the lien amount was the basis for conversion. The initial complaint does not assert the lien amount as too large. Instead, it alleges an amount is not given. AA000119:19-AA000120:20. The conversion complaint also falsely asserts Simon was "paid in full." AA000119:6-8; AA000482:21-AA000483:21; AA003659:1-AA003660:3; Vannah Opening Brief at p.8. This false statement was repeated by Mr. Edgeworth in several affidavits to the court when he stated "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?" AA000466:1-11. Mr. Vannah personally represented to the Court 100% of the funds were the Edgeworth's. AA000119:17-18. These blatantly false statements were made despite the under-oath testimony - they always knew they owed Simon money for attorney's fees and costs. RA000532:20-25; AA003659:1-AA003660:3.

The Vannah/Edgeworth Team now argue in their opening brief the conversion was filed when Simon presented a superbill showing $692,120.00 in fees owed. Vannah Opening Brief at p.10. This is yet another falsehood. This super bill was not presented to the Vannah attorneys until January 28, 2018, long after the conversion complaint filed on January 4, 2018. Notably, this superbill was not a final bill, but merely an itemization of the work performed so that the district court in Simon I could understand the extensive work done to award the full amount of quantum meruit as requested.

1. <u>The Vannah Parties Equally Participated in the Abusive Conduct.</u>

Although the Vannah Parties have an independent duty not to oblige the willfulness of their clients, they were on board to advance the smear campaign as part of the devised plan. On January 9, 2020, Vannah wrote an email confirming his true malicious intent from the outset to personally punish Simon. RA001043-1044. Vannah stated **<u>"I have no intention of abandoning our efforts to hold Danny Simon liable for what he has done in this case, which I interpret as</u>**

taking our clients money hostage… Whether you call that conversion, or some other tort, doesn't really matter to me. …. I am asking the Supreme Court to reverse that dismissal of our case, then I intend to pursue that case, including punitive damages." *Id.* (Emphasis added) No matter how frivolous, the Vannah Parties advanced falsehoods to keep the conversion claim alive as a basis to seek punitive damages. The Vannah Parties stated intent to seek punitive damages based on an impossible claim wreaks of bad faith.

2. More False Blaming

The district court in Simon I ordered the funds remain in the account after Edgeworths appealed to the Supreme Court. RA001031-1032; RA001335-1337. In another false spin, Vannah wants to blame Simon for the Edgeworth's appeals on the basis of the invited error doctrine. This red-herring argument was made and rejected in Simon I and has nothing to do with the Anti-SLAPP analysis.

If they wanted to pay the order adjudicating the lien, then don't appeal and pay. Instead, they not only appealed it but filed many briefs regurgitating the same false narrative already rejected. Significantly, this Court remanded the matter for the district court in Simon I to clarify her quantum meruit findings and the Edgeworths filed numerous motions to reconsider and again appealed the same order as recently as July 22, 2021. *See*, Edgeworths Motions to reconsider, generally at RA001140-1170; RA001232-1249. It is disingenuous to blame Simon when they

are continuously appealing virtually the same orders while refusing to concede this Court's final December 30, 2020 order. These acts are ongoing abusive measures still attempting to punish Simon.

The district court in this case noted the express agreement to place the settlement funds in a joint account with Vannah as a signor was akin to an accord and satisfaction as it relates to the bad faith conduct of the Vannah Parties and Edgeworth Appellants. AA004246. It is of no consequence whether you label it an accord and satisfaction or simply an agreement between the parties. The agreement was straightforward. Judge Crockett merely analyzed the lack of good faith and noted the common-sense conclusion that you cannot have good faith when you enter into an agreement as to how to exercise dominion and control of the settlement proceeds and turn around and sue the lawyer entering into the agreement. *Id.* This is the epitome of bad faith, especially when pursuing a legally impossible claim asserting false accusations aimed to destroy a lawyer's practice and livelihood. The district court never stated there was a pre-litigation settlement, which was the entire reason for lien adjudication. The only agreement was where to place the funds pending lien adjudication and Vannah invited the biggest number supported by Will Kemp, Esq. AA003944:2-22.

E. THE VANNAH/EDGEWORTH AFFIDAVITS ARE A SHAM

A party cannot create a sham affidavit to avoid liability. *Yeager v. Boulin,* 693 F.3d 1076 (9th Cir. 2012). Here, the affidavits contain false facts already decided in an attempt to collaterally attack the district court's findings in Simon I. The cases cited that discuss believing the Anti-SLAPP declarations don't have a factual finding from an earlier case. The district court's findings in Simon I are final. When looking closer at the self-serving affidavits, they still promote the same falsehood's as if the district court orders in Simon I do not exist. AA002918-2919. Simon never presented a contingency fee contract and never pursued one. The district court in Simon I stated this is not a contingency fee case. AA000024. Vannah ignores this finding and continues to argue this false premise to this Court to call Simon unethical. It was Edgeworth, not Simon that sent a contingency fee proposal in August, 2017. AA001158; Vannah Opening Brief at pp.8-9.

The district court in Simon I also confirmed Simon was not seeking a bonus but only sought payment for reasonable attorney's fees pursuant to his valid lien, yet the Vannah Parties are still pursuing the falsehood. For example, Mr. Greene's Affidavit in support of Vannah's Renewed Anti-SLAPP Motion, is false when he states that "after the value of the case blossomed from one of property damage of approximately $500,000 to one of significant and additional value due to the conduct of the Viking defendant, the evidence showed that Mr. Simon became

determined to get more, so he started asking the Edgeworth's to modify the contract, beginning in August of 2017." AA002925. When making this false factual statement under oath, Greene forgot that there was not an offer from either the Viking Defendants or Lange Plumbing Defendants in August of 2017, confirming the affidavit's falsehood by the undeniable fact that the first significant offer was in late October of 2017. Vannah repeats this falsehood in his Anti-SLAPP affidavits to this Court.

Of importance, the Vannah attorneys equally participated and created the baseless allegations of unethical conduct, which was also part of their devised plan. The Law Office of Daniel S. Simon, A Professional Corporation acted properly pursuant to Nevada Rule of Professional Conduct 1.15 "Safekeeping Property." The Rule states in relevant part:

> (e) When in the course of representation, a lawyer is in possession of funds or other property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

Simon followed the exact course mandated by the Rules of Professional Conduct. Simon followed the law and placed the settlement money into a joint trust account with all interest accruing to Edgeworth. AA000995-1022 ¶20. Simon is allowed by law to assert an attorney lien. Former counsel for the State Bar of Nevada, reviewed the case and explains in detail that Simon followed the exact

procedure mandated by law. AA001200-1210. When adopting Mr. Clark's opinion as a finding, the District Court noted in its decision and order that Vannah and Edgeworth never disputed Mr. Clark's opinion, and also stated Simon should be commended for his efforts after termination. AA000034. Will Kemp testified he would not have taken the case and Edgeworth was lucky Simon was willing to get involved. RA000968:24-RA000969:17.

The Vannah Parties cannot re-write the narrative and request this Court to make factual findings inconsistent with the findings of the district court, and ultimately this Court, in Simon I. This is the entire basis for issue preclusion and finality. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048. 194 P.3d 709 (2008). This Court affirmed the district court's findings in Simon I, which are final orders on these issues. AA004257-4267. Moreover, the complete disregard for the law and facts in furtherance of their goal to punish Simon is actionable based on their own conduct.

F. THE LACK OF CASE SPECIFIC AUTHORITY ALSO UNDERSCORES THE VANNAH PARTIES' LACK OF GOOD FAITH

Vannah and Greene base their conclusory statements of good faith to file the case on the premise they researched the law supporting the claims. In their affidavits they only cite *Evans v. Dean Witter Reynolds, Inc*., 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) as a basis. AA0918; AA002931. *Evans* does not provide support and

the Vannah attorneys have never provided any authority allowing them to sue an attorney for conversion for merely filing an attorney lien. RA001085-1090.

In *Evans*, the attorney actually controlled the money by forging his aunt's name and put the money in his own personal account. No such facts exist in this case and the Vannah attorneys are well aware that the *Evans* case does not support their conversion claims, yet this is the only case they cite as the basis for the conversion claim. Significantly, this case was cited for the first time by the Vannah/Edgeworth team in their appellate briefs to the Supreme Court in Simon I. When asked by the district court in Simon I for authority, Vannah stated in open Court his basis that **"we just think it is a good theory"** RA000342:20-24.; AA000995-1022 ¶22. This is not the legal basis that allows for frivolous litigation. Since they did not cite the case in the opposition to Simon's motion to dismiss the conversion complaint to the district court in Simon I, we know Vannah and Greene never reviewed or relied on it as asserted in their new sham affidavits.

Even though not mentioned in their affidavits, the Vannah Parties now suggest they reviewed and relied on *Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d.314, 317 (1980), a case also never cited to the district court in Simon I. This case also does not remotely relate to the instant matter as it involves a rancher that branded someone else's cattle after he defaulted on a purchase contract. In *Bader*, branding cattle as his own when he did not pay for it was conversion. Unlike *Bader*, Simon

immediately released all undisputed funds of $4 million for a $500,000 property damage claim. The Vannah Parties still assert to this Court that Simon exerted **wrongful** dominion over the funds. Vannah Opening Brief at p.16. The district court found as a matter of law, the element of ***wrongful*** could not be established at the evidentiary hearing and this Court affirmed these findings. AA000004-25; AA001096-1099. It is improper to continue to argue facts and law contrary to findings already made final. *Estate of Adams, by and through Adams v. Fallini* 132 Nev. 814, 386 P.3d 621 (2016).

The Vannah Parties' lack of authority continued throughout the entire case when Mr. Christensen repeatedly requested the conversion authority, but none could be given. RA001085-1090. As a lawyer, maintaining an action for over three years without legal support after the highest court in the land has ruled, is bad faith.

1. The Vannah Parties Were Well Aware that the Conversion Claim Was Frivolous

Due to the Edgeworth/Vannah conversion complaints, Simon filed two separate motions to dismiss. One of which was pursuant to NRCP 12(b)(5) on January 29, 2018 and one of which, was based on Anti-SLAPP on March 2, 2018. Vannah, Greene and the Edgeworths, were all made aware of the facts and law as to why the conversion theft claim was frivolous. AA000995-1022 ¶ 22. The law is clear that filing an attorney lien is a protected communication and Edgeworth could

never sue Simon for filing the attorney lien. *Jensen v. Josefsberg*, 2018 WL 5003554 (C.A. 2nd Dist. Div. 2, 2018) (unpublished) (a complaint challenging an attorney lien as unethical was subject to dismissal under the Anti-SLAPP statute); *Finato v. Fink*, 2018 WL 4719233 (C.A. 2nd Dist. 2018) review denied 2019 (unpublished)(Finato recognized filing an attorney lien was a protected activity under the Anti-SLAPP law and on appeal ordered dismissal of lien related claims for malpractice, breach of fiduciary duty and breach of contract.)

The Edgeworth entities admit in their moving papers the conversion complaint was filed because of Simon's attorney lien. AA003509. Following the law by filing a lawful attorney lien is not a wrongful act that can be used to establish conversion.

> "A mere contractual right of payment, without more, will not suffice" to bring a conversion claim.

Plummer v. Day/Eisenberg, 184 Cal.App.4th 38, 45 (Cal. CA, 4th Dist. 2010). *See*, Restatement (Second) of Torts §237 (1965), comment d.

Vannah also argues *M.C. Multi-Family Development, LLC v. Crestdale Assoc., Ltd*., 124 Nev. 901, 911, 193 P.3d 536, 543 (Nev. 2008), is a niche case and should not apply. Vannah Opening Brief at p.17. However, this case existed ten (10) years prior to their frivolous action. The Vannah/Edgeworth team knew the fabricated conversion claim was an impossibility yet still chose to accuse Simon of

theft, extortion, blackmail and unethical conduct while at the same time seeking an order that Simon was "paid in full." AA000119:6-8; AA000482:21-AA000483:21**.** They also asked the district court in Simon I for full blown discovery and a jury trial to avoid lien adjudication. These acts wreak of bad faith and the admissions already made during the lien adjudication proceedings confirm it all.

The Vannah lawyers cite to a deposition of Mr. Edgeworth in which Simon said all invoices were provided to the defense in the underlying case suggesting Simon was already paid in full in September, 2017. This same statement was cited in their false complaints seeking relief that Simon was paid in full when the complaint was filed January 4, 2018. Also, Mr. Edgeworth falsely makes this statement to the district court in Simon I in an affidavit to the Court in February, 2018. AA001346-1354. The Vannah lawyers also assert this fallacy in their opening brief. Vannah Opening Brief at p.8. Consistent with their pattern of abuses, the Edgeworth/Vannah team intentionally omit a portion of the same deposition where Simon made it clear that the attorney's fees and costs were continuing to accrue. RA000294:17-19. Simon was owed for the continuing work on the case long after the September deposition. It is unclear why this deposition is cited when the Vannah attorneys' stated at the evidentiary hearing **"we always knew he owed Simon money.** RA000532:20-25; AA003659:1-AA003660:3

G. THE VANNAH PARTIES ENGAGED IN ABUSIVE CONDUCT LONG AFTER THE INITIAL FILING OF THE CONVERSION COMPLAINT

Vannah suggests that because the case was dismissed without discovery it is akin to a mere filing of a complaint. *Laxalt v. McClatchy, 622 F. Supp. 737 (1985).* As long as there is a subsequent act to the filing of the complaint that misuses the process, abuse of process action is proper. *Id*. Prosser, Law of Torts, P. 856 (4th Ed. 1971). *Laxalt, Supra.* Quite the opposite of *Laxalt* is the Vannah Parties relentless pursuit of their frivolous claims. To demonstrate, there was an amended complaint filed without permission from the trial judge. There was substantial motion practice. False affidavits were filed with the Court. A five-day evidentiary hearing was conducted. At the hearing, the Vannah lawyers advanced the extortion, blackmail, contingency fee, bonus, oral contract, breach of fiduciary duties, unethical conduct and conversion claims. Many witnesses testified and substantial evidence admitted into evidence. The Vannah lawyers requested information and Simon provided it, including phone records. The Court reviewed over 80 exhibits. Post hearing briefs were filed and more motions were conducted. The order dismissing the frivolous complaint was only made after an extensive evidentiary hearing on all matters. AA000028-37.

Notwithstanding the extensive litigation surrounding the false claims, more abusive conduct involved several appeals with the Vannah Parties advancing the

same false statements aimed at Simon. The Edgeworth parties have now filed two motions to reconsider this Court's final rulings in the District Court in *Simon I*, all of which, have been denied. *See*, Motions to Reconsider and Orders Denying Reconsideration in Simon I at RA001140-1170; RA001205-1206; RA001232-1249; RA1330-1334. These orders have now been appealed. The abusive conduct extends far beyond the mere filing of a complaint, and their malicious acts even extend through today.

VI.

ARGUMENT

Boldly suggesting that even intentionally false statements are entitled to the protections of the anti-SLAPP statutes and litigation privilege, the Vannah Parties assert Simon's claims are barred. In so doing, the Vannah Parties ask this court to ignore that NRS 41.637 only protects 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. More specifically, the anti-SLAPP statutes only immunize a communication made in "good faith," which is "true or made without knowledge of its falsehood." *See also, Delucchi v. Songer*, 133 Nev. Adv. Rep. 42, 396 P.3d 826 (2017). Here, the Vannah Parties cannot get past the good faith requirement. The lack of good faith was already adjudicated by the district court in Simon I and

affirmed by this Court on December 30, 2020 and is a final determination. AA004257-4267.

The Vannah Parties further fail to demonstrate by a preponderance that their allegations against Simon were ***truthful or made without knowledge of [their] falsehood."*** NRS 41.637(4) (Emphasis added) The Vannah Parties, not Simon, must first make such a showing – these are burdens the Vannah Parties can never meet. In short, neither the statutory anti-SLAPP, nor litigation privilege protections apply here.

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

The Vannah Parties incorrectly assert that NRS 41.637(3) merely codifies the litigation privilege and then attempts to confuse the application of the litigation privilege with Anti-SLAPP protection. When framing everything under the litigation privilege, they also step over the two-prong analysis required for absolute immunity. The anti-SLAPP statutes require the communication to be made in "good faith" and also be "true or made without knowledge of the its falsehood."

The Vannah Parties and the Edgeworth parties all seek Anti-SLAPP protection for having made knowingly false statements, and then cite to the litigation privilege cases that allow some false statements for defamation claims

only in hopes the court will gloss over the distinction. The Vannah Parties then attempt to extend the application of the litigation privilege beyond their statements to insulate their conduct, which is contrary to the Nevada law. *Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980). The instant appeal only concerns the application of the Anti-SLAPP statutes to this case. Notably, the district court denied the Vannah Parties' motion to dismiss in all other respects, and therefore, any issue outside of NRS 41.660 is not appealable at this stage of the proceedings. *Kirsch, supra.*

1. <u>The Vannah Parties' Contradictory Affidavits Underscore Their Inability To Show Good Faith Or Truthfulness</u>

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." The Nevada Supreme court has also confirmed that sham affidavits are insufficient to avoid liability. *Yeager, supra*

The self-serving affidavits presented by the Vannah Parties in an effort to demonstrate good faith and secure dismissal are contrary to their own prior representations and filings in Simon I. This case presents the unique circumstance where the prior admissions and filings has already established Simon's case. This Court is not to weigh the evidence, but should accept Simon's submissions as true

and only consider whether any contrary evidence from the Vannah Parties establishes its entitlement to prevail as a matter of law. *Coker v. Sassone*, *135 Nev. Adv. Op. 2, 432 P.3d 746, 749 (2019)*. The cases that discuss believability of affidavits do not involve an underlying litigated case containing damning admissions and final court rulings.[3]

Specifically, Vannah, in a sworn affidavit, states: "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. Greene repeats this false statement. AA002927-2928. Vannah and Edgeworth both knew the proceeds had not even been received when the initial lawsuit was filed on January 4, 2018, therefore, no justiciable claim existed. Other changing reasons were: 1) Simon would not give a lien amount; 2) The full proceeds were the Edgeworths; 3) Simon was paid in full, this then morphed into; 4) Simon's lien was too big; 5) Simon put his name on the settlement check; and 6) Simon

[3] Pursuant to this Courts' final order dated December 30, 2020, the adjudicated facts of the district court in Simon I became final. Notably, the Vannah Parties' opening briefs were filed long after the final orders and it is sanctionable to argue the same false facts as if the orders do not exist. *Yeager v. Boulin,* 693 F.3d 1076 (9th Cir. 2012).

would not deposit funds into Vannah's account. All of these non-sensical explanations fly in the face of the real reason – to punish Simon.

More falsehoods include the express oral contract. Vannah/Edgeworth have now given a third version about how the fabricated contract was formed proving the prior versions as intentionally false. AA002910-2921. Incredibly, the Vannah Parties adopted these same false statements in their affidavits in this case in an attempt to present their good faith and truthfulness. AA002928. Vannah also falsely states Simon presented the Edgeworth's with a contingency fee agreement. AA002915. The Vannah Parties again falsely state they reviewed conversion authority prior to filing the complaints. Since they never cited a single case to the district court in Simon I in the underlying conversion case prior to dismissal this cements their bad faith and untruthfulness. Even more disturbing is that in complete defiance of this Court's order, the Vannah lawyers still argue Simon committed conversion. Vannah Opening Brief at p.16.

When setting the sinister language aimed at Simon aside and reviewing this case objectively, it is clear the frivolous complaints were riddled with false allegations known to the parties at the time they were filed. The district court considered all briefing, arguments and evidence presented and determined the Vannah Parties and the Edgeworth Appellants lacked the requisite good faith when making their frivolous filings. Absent good faith, the communications are not

protected speech and the litigation privilege does not apply. Because the Vannah Parties cannot meet their initial evidentiary hurdle, the burden never shifts to Simon to provide prima facie evidence of a likelihood of success.

Although the district court found that the Vannah Parties lacked good faith and their statements were untruthful, it went on to clarify that if the court had needed to reach the second prong, Simon has made a prima facie case. AA004247.

2. Retaliatory Complaints are Not Protected Free Speech

The frivolous conversion complaints riddled with false allegations were only filed in retaliation to Simon's valid attorney lien. The retaliatory complaints are not free speech contemplated by NRS 41.660, and Anti-SLAPP protection is not available. *Bonni v. St. Joseph Health Sys.,* 2021 WL 3201090 (Cal. July 29, 2021). Since Angela Edgeworth admitted to the real purpose for filing the complaint (punishment), and this reason was adopted by the Vannah attorneys, the lack of good faith is admitted and no further inquiry is necessary.

Simon is in a unique position to have learned the true reason for the conversion complaint from the under-oath testimony of the Edgeworths. The real reason for the conversion complaint was the ulterior purpose to punish Simon. AA003942:21-23**;** AA000995-1022 ¶¶26-27, 75-78. The Vannah team adopted the reason as testified to by their client and was intimately involved in the abuses. Since the Vannah team never rebuked the reason given by their clients, this is an

admission by acquiescence. *United States v. Sears*, 663 F.2d 896, 904 (9th Cir. 1981) (To constitute an admission by silence, the statement must be made in the defendant's presence and hearing, and the defendant must actually understand what was said and have an opportunity to deny it. *United States v. Moore*, 522 F.2d 1068, 1076 (9th Cir. 1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976).)

The Vannah lawyers were present in court when the testimony was given by the Edgeworths and Simon has quoted this testimony in his multiple briefs. Most notably, the Vannah lawyers do not deny the reasons to "punish" in their self-serving Anti-SLAPP affidavits, and continue to advance the false narratives already rejected by the district court in Simon I as if the district court orders do not exist. The Vannah Parties still argue Simon's asserted attorney liens constitute conversion under Nevada law that had been at that time on the books for over sixty years. Vannah Opening Brief at p.5 and p.27. The Vannah Parties' complete defiance of these final orders is an attempt to establish false facts and is sanctionable. *Estate of Adams, by and through Adams v. Fallini* 132 Nev. 814, 386 P.3d 621 (2016). The acts of continuing to argue that a conversion exists and the Vannah Parties' ongoing attempt to assert false facts makes the abusive measures even worse.

The district court in Simon I and this Court confirmed the Vannah Parties never had a good faith belief they could ever prevail against Simon on a claim for

conversion. Punishing an attorney for filing a lawful attorney lien by filing and maintaining a retaliatory conversion claim coupled with false allegations of extortion, theft and blackmail does not meet the requirements for the conversion complaints to fall within the purview of NRS 41.660. *Bonni v. St. Joseph Health Sys.,* 2021 WL 3201090 (Cal. July 29, 2021).

Since the conversion complaint was filed in retaliation to Simon's valid attorney lien, anti-SLAPP protection does not apply.

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

If this Court were to conclude the district court erred in finding the Vannah 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 this Court gets that far in the analysis, and Simon shows a probability of prevailing on the claim, the denial of the anti-SLAPP Motion must still be affirmed. The summary judgement standard analysis gives Simon all reasonable inferences in their favor when analyzing this issue.

The Vannah Parties 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. The Vannah 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.

The recent case of *Delucchi v. Songer*, 133 Nev. Adv. Rep. 42, 396 P.3d 826 (2017), supports denial of the Vannah Parties' appeal. The *Delucchi* Court held that Delucchi and Hollis provided sufficient evidence showing that there was a genuine issue for trial regarding whether the Songer statements were true or made with a knowledge of falsehood:

> **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)

As a result, the *Delucchi* Court reversed the district court's decision granting the special motion to dismiss. Delucchi and Hollis presented sufficient evidence to create a genuine issue of material fact and, therefore, the Court instructed the district court to deny Songer's motion. *Id.*, at 834.

This case is similar to *Delucchi*. A five-day evidentiary hearing was conducted that established testimony that the Vannah parties and Edgeworth parties knew their statements about Simon stealing, extorting and blackmailing them were false. Further, the District Court issued findings of bad faith and that there was no merit to the conversion claims. This judicial decision by the district court in Simon I is at a bare minimum, the prima facie evidence needed to defeat the Anti-SLAPP motion. Undeniably, these false statements were made knowingly, but at the very

least, there is an issue of material fact for trial regarding whether they were true or made with a knowledge of falsehood, just as in *Delucchi*.

C. CLAIM AND ISSUE PRECLUSION CONCLUSIVELY ESTABLISH SIMON'S CLAIMS AND PRECLUDE THE APPLICATION OF ANTI-SLAPP AND THE LITIGATION PRIVILEGE

The Vannah Parties incorrectly assert that for claim preclusion to be triggered and applied, two lawsuits must have been filed by the offending party, one after the other and after the initial suit was dismissed or adjudicated on the merits with both suits seeking the same or similar relief. Vannah Opening Brief at p.45 Although these were the facts in *Five Star,* it is not a correct statement of the law. *Five Star* sets forth a four-part test to apply issue preclusion. Simon meets every part of the test and the district court's bad faith finding in Simon I is issue preclusion. The law is clear that facts and issues already litigated between the same parties cannot be re-litigated. It is of no consequence that the causes of action are different or that Simon is using issue preclusion offensively. All facts and claims that were brought or could have been brought are precluded from being re-litigated. *Five Star, supra.*

D. THE ISSUES ON APPEAL DO NOT PREVENT SIMON'S CLAIMS AGAINST THE DEFENDANTS FOR THEIR ABUSIVE CONDUCT

The Vannah Parties ignore that abuse of process claims will survive all motions to dismiss based on the conduct of the parties even if the court were to find

good faith somewhere. The Vannah Parties also step over the ruling in *Bull v. McCuskey* that clearly allows abuse of process claims to proceed, even against attorneys for filing frivolous complaints. To allow the anti-SLAPP or Litigation Privilege to immunize the Vannah Parties and Edgeworth Appellants, it would abolish abuse of process claims. These statutes were not enacted to reward frivolous litigators.

The Vannah Parties argue that if Simon is allowed to proceed, it would allow any party to file a complaint in retaliation to a complaint. This slippery slope argument is a fallacy. It will not spawn more litigation, because most cases don't have people telling the judge they brought a frivolous case to punish the other side. This admission is further corroborated by the legally impossible claim. Simply, this case stands on unique facts established by the party admissions and the final Court orders.

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

The Vannah Parties argue Simon cannot succeed on the merits based on the application of the litigation privilege. This is not true. The litigation privilege only applies to statements made, ***if in good faith***, and does not immunize the conduct of the parties, including attorneys. *Bull v. McCuskey*. The privilege equally does not apply to a proceeding not contemplated in "Good Faith." In *Jacobs v. Adelson*, 130

Nev. 408, 325 P.3d 1282 (2014), the Nevada Supreme Court analyzed the litigation privilege as it relates to defamation per se claims only, stating that "Nevada has long recognized the existence of an absolute privilege for defamatory statements made during the course of judicial and quasi-judicial proceedings." *Id.* at 412 (citations omitted). Notably, the Court held as follows:

> In order for the absolute privilege to apply to defamatory statements made in the context of a judicial or quasi-judicial proceeding, **"(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation."** Therefore, the privilege applies to communications made by either an attorney or a non-attorney that are related to ongoing litigation or future litigation contemplated in good faith…… **But we have also recognized that "[a]n attorney's statements to someone who is not directly involved with the actual or anticipated judicial proceeding will be covered by the absolute privilege only if the recipient of the communication is 'significantly interested' in the proceeding.**"

Id. at 413 (citations omitted) (emphasis added).

Regardless of the statements made, the litigation privilege does not immunize the Vannah Parties' **abusive conduct** under the facts of this case.[4] The proceeding

[4] In *Greenberg Traurig v. Frias Holding Co.,* 130 Nev. 627, 331 P.3d 901 (2014), the Court only addressed the malpractice conduct of lawyers, but confirmed the application is not absolute when refusing to apply the litigation privilege. The litigation privilege, if applied, only protects statements made in good faith, in court proceedings, as a defense to defamation and does not preclude Simon's claims of abuse of process, civil conspiracy, negligence, intentional interference with

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 the Vannah Parties did not "contemplate in good faith" the Conversion claim against Simon. Although Simon's complaint against the Vannah parties is not asserting defamation per se, the litigation privilege does not apply at all since the conversion complaint never had a legitimate purpose and the Vannah Parties never satisfy the good faith requirement.

Another way to view the "contemplated in good faith" component in determining whether to apply the litigation privilege is to determine whether the judicial proceeding had a "legitimate purpose." *See e.g., Herzog v. "a" Co.,* 138 Cal. App. 3d 656, 661-62,188 Cal. Rptr. 155, 158 (Cal. Ct. App. 4th Dist. 1982):

> In *Larmour v. Campanale, supra*, 96 Cal.App.3d 566, 568, the court stated: "…It is . . . well established legal practice to communicate promptly with a potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action.'" (Fn. omitted.) In a footnote, *Larmour* quoted comment e to the Restatement Second of Torts, section 586: **"As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding**

---

prospective economic advantage, as well as the defamatory statements made to third persons not interested in the outcome of the case.

> **might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." (*Larmour, supra*, 96 Cal.App.3d at p. 569, fn. 2.) We hold a communication not related to a potential judicial action contemplated for legitimate purposes is not protected by the privilege**

Id. (emphasis added)

Thus, the district court was tasked with assessing whether the Vannah 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). When taking the allegations in the Simon Complaint and Amended Complaint in the most favorable light for Simon, it is clear the Vannah 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 Vannah 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 U.S. Supreme Court has stated repeatedly that fee disputes should not become a "second major litigation." E.g., *Kirtsaeng v. John Wiled & Sons, Inc*., 136 S.Ct. 1979, 1988, 195 L.Ed. 2d 368 (2016); *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct.1933, 76 L.Ed.2d 40 (1983). The Vannah attorneys intentionally

created a second major litigation based on false facts for no legitimate purpose. Therefore, the lack of good faith precludes the application of the litigation privilege.

F. THE NRCP 12(B)(5) MOTION TO DISMISS WAS DENIED AND IS NOT APPEALABLE

The Vannah Parties moved to dismiss pursuant to NRCP 12(b)(5) and the court denied the Vannah Parties motion to dismiss. AA004226-4228. This is not an appealable order. *Kirsch v. Traber*, 134 Nev. 163 (2018). The district court determined the claims were properly plead and allowed discovery. Simon does not allege defamation against the Vannah Parties at this time so the litigation privilege is of no consequence. Notwithstanding the litigation privilege, the attempt to argue the merits under the guise of the Anti-SLAPP motion to dismiss is improper and should be summarily dismissed.

At this stage of the case, when taking the facts alleged in the Complaint in the light most favorable to Plaintiffs as true, it is clear that the privilege cannot 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). The record clearly supports that the Vannah 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 genuine issues of material fact to be decided by a jury. Irrespective of the statements made, it is the ***malicious conduct*** of the Vannah Parties that also preclude dismissal.

G. VANNAH PARTIES HAVE AN INDEPENDENT DUTY TO SIMON NOT TO SEEK FRIVOLOUS CLAIMS

The Vannah Parties have an independent duty to refrain from doing everything their clients want them to do when it violates their oath and ethical duties. NRPC 1.2, 3.1, 4.4, 5.1, 8.4. This Court has acknowledged this duty to third parties. *Achrem v. Expressway Plaza Ltd. Pshp*., 112 Nev. 737 (1996). Also confirmed in *Bull v. Mccuskey, supra.* The Vannah Parties also concede this duty.

The Vannah Parties did not have a good faith evidentiary basis to assert the conversion claim against Simon, much less continue to maintain it – it was a factual and legal impossibility. In an email dated December 28, 2017, Robert Vannah's message proves beyond a reasonable doubt he did not have the belief that Simon or his Law Office would steal the money. AA001268-1271. This belief was just a week before the actual filing of the complaint for conversion. Vannah invited the amount of the lien and never challenged the amount at the evidentiary hearing. AA003943:4-AA003946:2. Yet, he filed and maintained the action.

The Vannah attorneys also had a duty to Simon not to present false witnesses. The Vannah attorneys are well aware that filing an attorney lien is not theft, blackmail or extortion. They also knew Simon was not paid in full. Yet, they falsely told the court all of the money in the trust account was 100% the Edgeworths and sought relief Simon was paid in full. August 27, 2018 Transcript at 178:20-25; AA003659:1-AA003660:3; AA000119:6-8. The Vannah attorneys prepared the affidavits and presented the false testimony to keep the conversion claim alive to seek punitive damages. RA000399:14-15; RA000403:14-18.

The Vannah lawyers never rebuked the real reason – to punish. In fact, this damning admission is never addressed in any of the sham affidavits. Simon never had the funds when the initial conversion complaint was filed. The lack of truthfulness and abusive conduct to punish Simon are independent acts supporting Simon claims.

H. THE VANNAH ATTORNEYS CANNOT INSULATE THEIR OWN MALICIOUS CONDUCT THROUGH EDGEWORTH.

The Vannah Parties argue that generally, lawyers cannot be sued for pursuing claims in the course of the representation of their clients. This case involves exceptions to the general rule as the Vannah lawyers equally participated in the devised plan to punish Simon. Malice is proven when claims are so obviously lacking in merit that they "could not logically be explained without reference to the

defendant's improper motives." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252,259, 92 P.3d 882, 889 (App. 2004).

Attorneys representing clients pursuing frivolous claims are equally and separately liable. *Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980). In general, "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances." Restatement (Third) of the Law Governing Lawyers § 56 (Am. Law Inst. 2000). *See Dutcher v. Matheson*, 733 F.3d 980, 988-89 (10th Cir. 2013) (reversing district court order deeming a lawyer immune from liability in tort merely because the lawyer committed the tort alleged while representing a client; "like all agents, the lawyer would be liable for torts he committed while engaged in work for the benefit of a principal"); accord *Chalpin v. Snyder*, 220 Ariz. 413, 207 P.3d 666, 677 (Ariz. Ct. App. 2008) (noting that "lawyers have no special privilege against civil suit" and that "[w]hen a lawyer advises or assists a client in acts that subject the client to civil liability to others, those others may seek to hold the lawyer liable along with or instead of the client") (quoting *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020, 1025 (Ariz. 2005), and Restatement (Third) of the Law Governing Lawyers § 56 cmt. c.

While statements attorneys make representing clients in court are privileged, ***if in good faith***, and a third party ordinarily may not sue a lawyer for malpractice

committed against a client, these propositions do not immunize lawyers from liability in other settings.

> Lawyers are subject to the general law. If activities of a non-lawyer in the same circumstances would render the non-lawyer civilly liable or afford the non-lawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense.

Restatement (Third) of the Law Governing Lawyers § 56 cmt. b.

The person who initiates civil proceedings is the person who sets the machinery of the law in motion, whether he acts in his own name or in that of a third person, or whether the proceedings are brought to enforce a claim of his own or that of a third person. Restatement (Second) of Torts §674 (1986) may be liable. An attorney who acts without probable cause that the claim will succeed, and for an improper purpose is subject to the same liability as any other person. *Id.* An attorney who takes an active part in continuing a civil proceeding for an improper purpose and without probable cause is subject to liability. *Id.*

The Vannah Parties consistently argued that Simon extorted, blackmailed and stole their clients' money, despite knowing that was a legal and factual impossibility. The initial Vannah emails confirm the dialogue concerning the crime of theft. The Vannah/ Edgeworth team nevertheless presented these false claims to defend and support their frivolous conversion claim. The Vannah attorneys took an

active part in the initiation, continuation and/or procurement of the civil proceedings against Simon and neither the litigation privilege, nor anti-SLAPP statutes shield them from liability for these abuses.

I. SIMON HAS PROPERLY PLEAD ALL CAUSES OF ACTIONS IN THE AMENDED COMPLAINT

1. The Vannah Parties are liable for Abuse of Process.

Even if this Court was inclined to apply the litigation privilege (or anti-SLAPP protections) to the Vannah Parties' statements in the proceedings – which it should not at this stage of the case – that privilege does not thwart Simon's Abuse of Process claims against the Vannah Parties for their conduct. 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)).

This Court confirmed that abuse of process claims can go forward regardless of the litigation privilege. *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). In *Bull*, Dr. McCuskey was sued by attorney Samuel Bull for medical malpractice "for the ulterior purpose of coercing a nuisance settlement knowing that there was no basis for the claim of malpractice." *Id.* at 707. A jury returned a defense verdict in the underlying frivolous case. Then, Dr. McCuskey sued Bull for abuse of process and a jury returned a verdict in favor of Dr. McCuskey. The district court entered a judgment for the award of compensatory and punitive damages against the attorney and denied the attorney's post-trial motion for JNOV and for a new trial. The Attorney appealed. On appeal, this Court found that evidence the attorney willfully misused the process for the ulterior purpose of coercing a settlement supported the jury's verdict. In doing so, the court considered the application of the litigation privilege and confirmed it does not preclude an abuse of process claim when it upheld the judgment. *Id.*

The conduct of the Vannah Parties in this case if far more egregious than *Bull* or *Mastros*. The Vannah Parties invented the narrative of an express oral contract, and forwarded knowingly baseless theories of extortion, blackmail, and theft of

millions of dollars from a client. Undeniably, the Vannah parties and Edgeworth parties both made a conscious decision to pursue this plan together.

The Edgeworth and Vannah Parties filed the retaliatory conversion claim to refuse payment of attorney fees admittedly owed and to punish Simon. Their conduct was also aimed to harm Simon's practice, another ulterior purpose. They sued Simon personally to punish him. AA003942:21-25. They also sought to avoid lien adjudication by the filing of the conversion claim and intentionally caused substantial expense to defend the frivolous claims. This is also an ulterior purpose. *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (1982). The Vannah Parties attempt to dismiss all claims with the brush of a litigation privilege wand is contrary to Nevada law.

Simon has properly pled in the Complaint and Amended Complaint that the Vannah Parties have maintained the conversion claim for the ulterior purpose of punishing Simon and injuring his business and reputation causing substantial damages. These allegations are already proved based on the undisputed facts in the record, along with the Vannah Parties own admissions and prior judicial determinations. Discovery will likely reveal Vannah also discussed the facts of the case with members outside their firm. When looking at the abusive conduct of the Vannah parties and Edgeworth parties, the Court can also look to what the Vannah attorneys and Edgeworths did not do to prosecute the conversion claim.

The fact that the Vannah Parties never provided any expert or lay evidence at the five-day evidentiary hearing is further proof of their ulterior purpose. The Edgeworth/Vannah team could never provide any authority, which is still glaringly absent through today. They also wrongfully cite *Evans v. Dean Whitter Reynolds, Inc., 116 Nev. 598 (2000) and Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d.314, 317 (1980) as if it was actually reviewed prior to the conversion lawsuits. It is at best disingenuous to assert the Vannah Parties reviewed these cases prior to filing Simon I given they never cited to such authority in opposing dismissal of the conversion claims.

The facts in *Bull* are similar to the present case. The Vannah Parties knew prior to filing their lawsuit that an actual conversion never occurred and could never occur in the future. Success of conversion at trial was a legal impossibility. When viewing the malicious emails and testimony under oath, confirming the ulterior purpose of "punishment," the reasonable conclusion is that both the Vannah parties and Edgeworth parties never contemplated and certainly did not maintain the conversion claim in good faith. Thus, when taking these facts in the light most favorable to Simon, the district court's order denying the motion to dismiss should be affirmed.

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 Clarke 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 Vannah Parties do not cite the litigation privilege as a defense to this claim. Instead, the Vannah Parties contend that Simon has failed to plead specific prospective contractual relationships with third parties for their Intentional Interference with Prospective Economic Advantage cause of action. Because this argument is not based on any anti-SLAPP or litigation privilege, it would have fallen only under the purview of the NRCP 12(b)(5) motion, which was denied and is not appealable.

Regardless, the cases cited by the Vannah Parties to support their position are appeals from verdicts or summary judgment decisions and do not analyze the motion to dismiss standard required here. The Vannah 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) *Kahn v. Dodds (In re AMERCO Derivative Litg.),* 127 Nev. 196, 222-23, 252 P.3d 681, 699 (2011).

Furthermore, Simon properly pled the loss of prospective contractual relationships as a result of the Vannah Parties' conduct. Simon alleges "Plaintiffs 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 alleges: "The Defendants knew Plaintiffs regularly received referrals for and represented clients in motor vehicle accidents, slip and falls, medical malpractice and incidents involving other personal injuries." *Id*. at ¶ 49. 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). There is no need to plead with specificity the exact relationships. Simon has already established a prima facie case for this claim.

3. <u>Wrongful Use of Civil Proceedings Is Properly Pled</u>

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 on reasonable grounds, and thus certainly without probable cause. The Vannah Parties admit the claim was brought to punish Simon and his Law Firm. The District Court's finding of 'bad faith," was made final by this Court on December 20, 2020. Therefore, Simon has already established a prima facie case and likelihood of succeeding on this claim.

While the State of Nevada has not expressly adopted this tort via the Restatement, it has been adopted by several jurisdictions, including Arizona. *See e.g., Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1318 (Ariz. 1988)

and *Wolfinger v. Cheche*, 80 P.3d 783, 787 ¶ 23 (Ariz. App. 2003). The elements for this civil claim mirror the elements for malicious prosecution in criminal cases. Given the public policy to deter frivolous litigation, this claim is ripe to be recognized by this Court in the state of Nevada similar to our sister states.

4. <u>Negligent Hiring, Supervision and Retention Is Properly Pled</u>

In Nevada, the following are basic elements for a negligent hiring, supervision and retention claim:

1. The employer had a duty to protect the plaintiff from harm from their employment of an employee;
2. The employer breached that duty by hiring, retaining, or failing to train or supervise, the employee;
3. The employee committed a wrongful act that was the proximate cause of the plaintiff's injuries; and
4. As a result, the plaintiff incurred damages.

An employer has a duty to use reasonable care in training, supervision and retention of his employees to make sure that the employees are fit for their positions. *Hall v. SSF, Inc.,* 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996). Simon squarely meets every element of this claim. All lawyers have a duty to only advance meritorious claims so as not to harm the public, which naturally includes preventing the wrongful acts of abuse of process and conspiracies to harm third parties through the use of their privileged licenses.

The Vannah Parties argue negligent supervision does not apply because they did not have a relationship with Simon as attorney-client. In a roundabout way, the Vannah Parties suggest this claim is the same as a malpractice case against them. This is not the basis for Simon's negligent supervision claim. The Vannah and Vannah law firm have a duty of due care to third persons not to file and maintain frivolous claims that cause harm. The Vannah Firm has a duty to supervise its lawyers to ensure they are not engaging in wrongful conduct aimed to harm others, including Simon. The Vannah firm never reviewed or supervised this case to prevent the ongoing abuses and harm to Simon from the wrongful and tortious acts of Vannah and Greene.

A law firm has its own independent duty to protect third persons when the employees of the firm are participating in a conspiracy to destroy another's livelihood. It is the law firm that was also named on the filings and used to advance the false arguments while receiving the benefit of a large hourly fee from both Vannah and Greene.[5] Similar to a company hiring a reckless driver causing injury to others, the Vannah & Vannah firm has a duty of due care to Simon. Judge

[5] Edgeworth refuses to pay Simon $550 an hour for work actually performed as ordered by the district court in Simon I, but pays Vannah and Green $925 each to refuse payment and smear his name. RA000304.

Crockett concluded this claim was properly plead; therefore, it is not an appealable issue for purposes of Anti-SLAPP protection.

5. <u>Civil Conspiracy Is Properly Pled</u>

A claim for Civil Conspiracy is established when:

1. A defendant [The Vannah 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 Vannah 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 Edgeworth and Vannah Parties devised a plan to punish Simon, and the tortious acts of abuse of process, WUCP, IIPEA, and negligence are the wrongful acts that were performed with an unlawful objective to cause harm to Simon. It is unlawful to file legally impossible lawsuits and present false testimony of theft, extortion and blackmail to punish a lawyer. The Edgeworths and Vannah Parties 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. Vannah benefits to defame a competitor and is compensated handsomely. The conspiracy is based on the acts of the Vannah parties and Edgeworth parties and not merely the speech they allege is protected. All of the parties acting in concert cannot separate themselves from each other and the Vannah lawyers are not insulated merely because they are lawyers.

The Vannah Parties argue it cannot be a conspiracy if he is only representing a client while carrying out the devised plan to destroy Simon's livelihood. This is not true. Vannah downplays his role as if he was merely meeting with the clients to bring a meritorious action. When the action is frivolous and the parties admit it was filed to punish Simon, this claim is conclusively established. It was Vannah that prepared and filed the complaints. It was Vannah that prepared and filed the affidavits and carried out the smear campaign even through today. Vannah's own

email establishes his willful intent to punish Simon, which is right in line with the Edgeworth's reasons for the complaints. RA001043-1044. These abuses of the judicial process and legal profession used as a tool to punish Simon is not protected by any statute or rule. To the contrary, public policy mandates that this type of behavior be punished.

VII.

CONCLUSION

The Vannah Parties never made a good faith effort to resolve the lien prior to firing off a frivolous complaint accusing a lawyer of the most egregious acts a lawyer can commit – stealing, extorting and/or blackmailing a client for millions of dollars from a settlement. The Vannah Parties have not presented evidence sufficient to entitle them to the protections of the litigation privilege or anti-SLAPP statutes. By contrast, Simon has pled sufficient facts supporting all causes of action, especially when taking the pleaded facts in the light most favorable to the non-moving party as true. Finally, the order of the district court in Simon I and the party

/ / /

/ / /

/ / /

/ / /

admissions deprive the Vannah Parties of the protections sought. Therefore, Simon respectfully requests this Court Affirm the district court's order denying the Vannah Parties Special Motion to Dismiss Plaintiffs' Amended Complaint: Anti-SLAPP in its entirety.

Dated this 9th day of September, 2021.

CHRISTIANSEN LAW OFFICES

By _____
PETER S. CHRISTIANSEN, ESQ.
KENDELEE L. WORKS, ESQ.
Attorneys for Respondents

CHRISTIANSEN TRIAL LAWYERS

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 Parties' 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.

CHRISTIANSEN TRIAL LAWYERS

By _____
PETER S. CHRISTIANSEN, ESQ.
Nevada Bar No. 5254
KENDELEE L. WORKS, ESQ.
Nevada Bar No. 9611
710 S. 7th Street
Las Vegas, Nevada 89101
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that this SIMON RESPONDENTS' ANSWERING BRIEF TO VANNAH 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 13,628 words.

I hereby certify that I have read this SIMON RESPONDENTS' ANSWERING BRIEF TO VANNAH 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 VANNAH 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.

CHRISTIANSEN TRIAL LAWYERS

By _____

PETER S. CHRISTIANSEN, ESQ.
Nevada Bar No. 5254
KENDELEE L. WORKS, ESQ.
Nevada Bar No. 9611
710 S. 7th Street
Las Vegas, Nevada 89101
Attorneys for Respondents

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 VANNAH PARTIES' OPENING BRIEF on the following parties by electronic service pursuant to Nevada Rules of Appellate Procedure:

Patricia Marr, Esq.
PATRICIA A. MARR, LTD.
2470 St. Rose Pkwy, Ste. 110
Henderson, Nevada 89074
Attorney for Vannah Parties

Steve Morris, Esq.
Rosa Solis-Rainey, Esq.
MORRIS LAW GROUP
801 S. Rancho Dr., Ste. B4
Las Vegas, Nevada 89106
Attorneys for Edgeworth Appellants

An Employee of CHRISTIANSEN TRIAL LAWYERS

CHRISTIANSEN TRIAL LAWYERS