IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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APPEAL

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

NRAP 26.1 Disclosure

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

SUMMARY OF ARGUMENTS

This Appeal centers on one stark reality with legal and policy considerations that are far reaching and stifling: SIMON'S SLAPP seeks to punish VANNAH, in their role as *lawyers*, for filing a lawsuit, for filing papers and pleadings, for making arguments in court, and for filing briefs before the Nevada Supreme Court. Appellants' Joint Appendix (AA) Vol. I at 000038-56; AA Vol. V at 000995-1022; *see also* SIMON'S Brief. That is the sole intent of SIMON'S SLAPP, all in a nutshell. *Id*. The recent case of *Williams v. Lazer*, 137 Nev., Adv. Op. 44 (2021),

provides compelling authority to dispose of this matter in favor of VANNAH. The parallels to this appeal are striking and the result should be the same. *Id*.

In presenting a bite to his arguments, SIMON represents to this Court that VANNAH accused SIMON of theft, extortion, blackmail, and/or unethical behavior. *See* SIMON'S Brief at pp. 23-25. That is patently false. AA Vol. IV at 000860-884. SIMON has not cited to one iota of evidence that VANNAH made such assertions, ever. VANNAH'S Opening Brief addressed this issue, yet SIMON again resorted to reiterating this claim without any proof. *Id*. There is no reason for that.

To date, SIMON has not made one allegation in his SLAPP, has not made one *cited* argument in the several oppositions he filed in district court, and has not demonstrated by any measure of *cited* and *admissible* evidence in his Brief (or Appendix) to this Court, that either Mr. Vannah or Mr. Greene said anything to anyone about SIMON about this matter outside of court papers or proceedings. AA Vol. I at 000038-56; Vol. V at 000995-1022; Vol. XV at 002879-2982; Vol. XVIII at 003585-3611; *see also* SIMON'S Brief.

Unlike other published cases, there is nothing in SIMON'S SLAPP, motion practice, or Brief that VANNAH ever sent a text (*Williams*), circulated a petition (*Omerza*), gave a press release (*Jacobs*), posted anything on the internet (*Shapiro* and *Abrams*), ran an ad (*Rosen*), spoke with, or did/said anything to or with a third-party, concerning SIMON. *Id*.; AA Vol. IV at 000860-884. As can be clearly seen

in the SLAPP, which SIMON has failed to rebut with admissible evidence, all of SIMON'S claims stem strictly from VANNAH'S use of the courts to redress wrongs on behalf of a mutual client. *Id*. This reality is uncontroverted and SIMON failed to produce any admissible evidence in this matter to the contrary. *Id*.; *see also* SIMON'S Brief.

Instead, SIMON has filed his SLAPP against VANNAH for the derivative tort claims of wrongful use of civil proceedings, civil conspiracy, and negligent hiring, supervision, and retention (See SIMON'S Brief at pp. 1-2), all due solely to the use of the courts by VANNAH, *as lawyers*, for the Edgeworths. AA Vol. I at 000038-56; Vol. IV at 000860-884; and, Vol. V at 000995-1022.

As the sworn affidavits of VANNAH state "…the decisions to file pleadings with the claims made, the arguments presented in briefs, in court, and all other judicial proceedings…" were made "…after a thorough review of the law pertaining to these claims…." AA Vol. IV at 000860-884. The affidavits state further that the statements constitute "…a good faith belief that all of the written and oral communications made to the court are accurate and well-founded in the law, and not done for any ulterior or improper motive." *Id*.

It was the opinion of VANNAH that these acts constituted conversion under Nevada law that had been (at that time) on the books for over six decades (*see namely*, *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958); and, *Bader v. Cerri*,

96 Nev. 352, 609 P.2d 314 (1980), *overruled on other grounds by Evans*, 116 Nev. at 608.), as well as a breach of contract and a breach of the covenant of good faith and fair dealing. AA Vol. IV at 000860-884. As a basis for that opinion, VANNAH argued in their Opening Brief that *Bader* gave a compelling example of conversion where one asserts an unfounded lien. *Bader*, 96 Nev. at 356, 609 P.2d at 317 (1980), among other cases. The factual basis for the opinion that the Edgeworths had viable claims against SIMON are set forth in VANNAH'S Opening Brief at pages 6 through 11.

The appellate record here (including AA Vol. IV at 000860-884) supports a finding that it was SIMON, and not VANNAH, who did the following: 1.) agreed to be retained as counsel for the Edgeworths, though SIMON never reduced the attorney-client relationship to any form of written fee agreement; 2.) from May 27, 2016, through early January 8, 2018, charged and billed the Edgeworths at an hourly rate of $550 per hour for legal work he performed; 3.) produced four invoices to the Edgeworths, all of which were paid by them in full; 4.) produced the four invoices to defense counsel in discovery; 5.) included the four invoices as items of damages in NRCP 16.1 disclosures; 6.) made representations to defense counsel on the record in late September of 2017, that all of the invoices for legal services had been produced. *Id*.

Furthermore, it was SIMON, and not VANNAH, who: 7.) cashed checks from the Edgeworths for nearly $500,000, of which over $386,000 was for attorney's fees billed at the hourly rate of $550; 8.) was asked by his client, Brian Edgeworth, to present a fifth invoice, but refused to do so; 9.) held a meeting with the Edgeworths in November of 2017, where SIMON presented an initial fee agreement that was not based on hourly rate terms; 10.) sent a letter and the fee agreement to the Edgeworths in the later part of November of 2017, which also threatened "a billing review" that could result in $1.5M of additional hourly billings; 11.) invited the Edgeworths to seek counsel from a lawyer. *Id.*

It was also SIMON, not VANNAH, who: 12.) served an attorney's lien in early December of 2017 for an unspecified amount; 13.) served an amended attorney's lien on January 2, 2018, in an amount that constituted approximately 40% of the settlement amount with the flood defendants; 14.) never had a signed contingency fee agreement with the Edgeworths, though served an attorney's lien for the standard contingency fee percentage; and, 15.) served a superbill in late January of 2018, for $692,120, comprising fees computed at an hourly rate of $550 per hour. *Id.* The appellate record is also clear that fourteen of these fifteen events occurred before VANNAH filed the complaint against SIMON alleging conversion, breach of contract, and breach of the implied covenant of good faith and fair dealing on behalf of the Edgeworths, which happened on January 4, 2018. *Id.*

VANNAH'S sworn affidavits support a finding that the "…preponderance of the evidence demonstrates that the gist of the story, or the portion that carries the sting of the (statement), is true." *Id*.; *Williams*, 137 Nev., Adv. Op. 44, at p.9 (2021), citing *Rosen v. Tarkanian*, 135 Nev. 436, 441, 453 P.3d 1220, 1224 (2019). Which simply means that the remaining alleged statements of VANNAH, when made, were truthful or made without the knowledge of their falsehood. *Williams*, 137 Nev., Adv. Op. 44, at p.9 (2021); *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (2019). It also means that VANNAH'S opinions on the viability of the claims filed, by definition, cannot be false, as there is no such thing as a false opinion. *Williams*, 137 Nev., Adv. Op., at p.7 (2021); *Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020).

Therefore, not only are all of the alleged opinions and statements deemed protected communications under Nevada's anti-SLAPP law found in NRS 41.660, the sworn affidavits show that VANNAH has met their burden of showing that the opinions and statements were made in good faith. *Id*.; *Williams*, 137 Nev., Adv. Op. 44, at p.9 (2021). Therefore, VANNAH has satisfied their burden under the first prong of the anti-SLAPP framework. *Id*. The burden was then shifted to SIMON, who failed to meet his. *Williams*, 137 Nev., Adv. Op. 44, at p. 9-15 (2021).

Here, SIMON failed to "…show by prima facie evidence a probability of prevailing on his claims." *Williams*, 137 Adv. Op. 44 at p. 14. He hasn't produced

any evidence through the present date to support his three claims against VANNAH, or to rebut the arguments made in VANNAH'S Opening Brief. *See* SIMON'S Brief in total. In special anti-SLAPP motions to dismiss, evidence and facts precede the claims, not visa versa. *Williams*, 137 Adv. Op. 44 at p. 9-15.

As the case law clearly holds, the three claims that SIMON made against VANNAH are barred by the absolute litigation privilege, making VANNAH immune from all civil liability. *Williams*, 137 Nev., Adv. Op. 44, at pp. 10, 13-14 (2021); *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). Not only does the absolute litigation privilege protect VANNAH from any legal repercussions from all of the communications as alleged by SIMON (*Id*.; AA Vol. I at 000038-56; Vol. V at 000995-1022), this also means that SIMON didn't and can't meet his burden under prong two of the law. *Id*.; NRS 41.665(2); *Williams*, 137 Nev., Adv. Op., at pp. 10, 13-14 (2021).

Finally, the plain language of SIMON'S SLAPP shows that it was clearly and solely brought in response to the legal use of the courts by VANNAH on behalf of mutual clients to redress wrongs. AA Vol. I at 000038-56; AA Vol. V at 000995-1022. Using *Williams* as a model, since all of SIMON'S claims derive from statements made in court proceedings, which are protected by the absolute litigation privilege, SIMON cannot show by prima facie evidence a probability of prevailing on his claims. *Williams*, 137 Nev., Adv. Op., at pp. 14 (2021).

This includes SIMON'S three claims against VANNAH, which are all non-defamation torts. *Asia Invs. Co., Ltd v. Borowski*, 184 Cal. Rptr. 317, 324 (Ct. App. 1982). The court in *Asia* did not include an exhaustive list of non-defamation torts that would be barred by the absolute litigation privilege, instead opting for the word "like" in beginning its list of examples. *Id*. Certainly, SIMON'S non-defamation torts of wrongful use of civil proceedings, civil conspiracy, and negligent hiring, retention, and supervision are also barred, as they are functionally the same as abuse of process, intentional infliction of emotional distress, slander of title, and intentional interference with prospective economic advantage. *Id*.; *Williams*, 137 Nev., Adv. Op. 44, at pp. 14 (2021).

Furthermore, SIMON failed in his Brief to legally or factually rebut the extensive arguments made, and the law cited, in VANNAH'S Opening Brief concerning the lack of factual and legal merit to SIMON'S claims, as there is none. Permitting this case to go forward would not only be counter to the plain terms of the anti-SLAPP statute and the First Amendment, it would incentivize precisely this type of retaliatory litigation that the anti-SLAPP statute is meant to discourage.

LEGAL ARGUMENT

I. STANDARD OF REVIEW—*DE NOVO*

On appeal, the Supreme Court conducts a *de novo* review of the decision on the anti-SLAPP motion to dismiss. *Williams*, 137 Nev., Adv. Op. 44 at p. 5 (2021).

In *Williams*, this Court stated:

> We review de novo a decision to grant or deny an anti-SLAPP special motion to dismiss. *Rosen v. Tarkanian*, 135 Nev. 436, 438, 453 P.3d 1220, 1222 (2019). A court must grant an anti-SLAPP special motion to dismiss where (1) the defendant shows, by a preponderance of the evidence, that the claim is based on a good faith communication in furtherance of…the right to free speech in direct connection with an issue of public concern" and (2) the plaintiff fails to show, with prima facie evidence, a probability of prevailing on the claim. NRS 41.660(3). *Id.*

II. THE UNCONTROVERTED EVIDENCE SHOWS THAT ALL OF VANNAH'S STATEMENTS WERE MADE IN GOOD FAITH, THUS SUBJECTING THEM TO ANTI-SLAPP PROTECTION

It has been written that to be covered under Nevada's anti-SLAPP statute, the statement at issue must have been made in good faith. NRS 41.650. "Good faith" is statutorily defined in part as a statement "which is truthful or is made without knowledge of its falsehood." NRS 41.637. As has been shown through this appellate record by VANNAH, including their sworn affidavits, all of VANNAH'S statements were made in good faith, and there is no cited evidence in SIMON'S Brief or record that controverts this factual reality. AA Vol. IV at 000860-884, *see also* SIMON'S Brief.

A. The Affidavits of Mr. Vannah and Mr. Greene Show That All of Vannah's Alleged Statements Are In Good Faith Pursuant To The Criteria In *Williams.*

The statements attributed to VANNAH, as contained in SIMON'S SLAPP (AA Vol. I at 000038-56; AA Vol. V at 000995-1022), are either non-actionable

opinions, true, or made without knowledge of falsehood. *Williams,* 137 Nev., Adv. Op. 44, at p. 5 (2021); *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (2019). The basis for the statements made are set forth in the sworn affidavits of Mr. Vannah and Mr. Greene. AA Vol. IV at 000860-884. As such, they meet their burden of proof as set forth under Nevada law. *Williams,* 137 Nev., Adv. Op. 44, at p. 5 (2021); *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (2019).

SIMON failed to present <u>any</u> admissible and cited evidence in his SLAPP, in his extensive motion practice before the district court, in his voluminous Brief to this Court, or in his appendix, that VANNAH knew the opinions or statements were false when they were made. AA Vol. I at 000038-56; Vol. V at 000995-1022; Vol. XV at 002879-2982; Vol. XVIII at 003585-3611. According to the law of Nevada, "…a defendant's affidavit affirming her statements were true or statements of opinion, in the absence of contradictory evidence to the contrary, is sufficient to show good faith." *Williams*, 137 Nev., Adv. Op. 44, at pp 6-7(2021)(*Citing Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020)).

Again, as stated in *Williams*, the VANNAH affidavits "…explained every statement (they) made was true as well as the basis for that belief…." *Williams,* 137 Nev., Adv. Op. 44, at p. 8 (2021); AA Vol. IV at 000860-884. This, per *Williams*, "…is sufficient to show that (their) statements were truthful or made without knowledge of their falsehood. *Id*.; *Stark*, 136 Nev. at 43-44, 458 P.3d at 347 (2020).

Again, SIMON failed to present any admissible evidence to demonstrate that VANNAH *knew* the statements were wrong when they were made. *Williams,* 137 Nev., Adv. Op. 44, at p. 8 (2021); *see also* SIMON'S Brief.

Furthermore, on page 10 of his Brief, SIMON quotes Mr. Vannah's response to a question on the claim for conversion, where he states "we just think it's a good theory." SIMON has thus underscored VANNAH'S belief and opinion of the merits of the lawsuit that VANNAH filed, *as lawyers*, on behalf of clients. AA Vol. IV at 000860-884. As this Court reemphasized in *Williams,* 137 Nev., Adv. Op. 44, at p. 7 (2021), "…we have previously observed, opinion statements are incapable of being false, as 'there is no such thing as a false idea.'" *Id*; (citing *Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020)).

Here, VANNAH has met their burden of showing that the statements made were in good faith. *Williams*, 137 Nev., Adv. Op. 44, at p. 9 (2021).

B. Simon and Judge Crockett Focused On The Wrong Time Frame And A False Finding

It is clear from reading SIMON'S Brief, and the Order Denying the Special Motion of VANNAH (which SIMON'S counsel drafted), that they both focused on the wrong time line and a false fact. AA Vol. XXI 004232-4240. Each focused exclusively on what Judge Jones ultimately decided about the merits of the claims brought against SIMON, and ignored the proper standard, which instead requires the

analysis to focus on the mindset *when the statements were made*. *Williams,* 137 Nev., Adv. Op. 44, at p. 8 (2021)(*Emphasis Added*.)

Additionally, the Order that was drafted and submitted by SIMON'S counsel, and signed by Judge Crockett, contains a material error. In paragraph 4 of that Order, SIMON misquoted Judge Jones' Decision and Order Granting in Part and Denying in Part, Simon's Motion for Attorney's Fees and Costs, and *erroneously* wrote that Judge Jones found that "the conversion claims…were not *filed* and/or maintained on reasonable grounds." (*Emphasis added*.)

When SIMON'S counsel drafted the Order for Judge Crockett to sign, he was aware that there is *no* language in the Judge Jones' Decision and Order on Motion to Dismiss NRCP 12(b)(5) where she ever found that the claim for conversion was not *filed* on reasonable grounds. That's just false. Similarly, since SIMON'S counsel drafted the Decision and Order Granting in Part and Denying in Part, Simon's Motion for Attorney's Fees and Costs, he is also well aware that there is *nothing* in that Order stating or finding that the claim for conversion was not *filed* on reasonable grounds. Since he either drafted the Orders and/or read them, why would he misrepresent such a materially incorrect finding to Judge Crockett, and to this Court?

In the Decision and Order Granting in Part and Denying in Part, Simon's Motion for Attorney's Fees and Costs, Judge Jones did make mention that the claim

for conversion was not "*maintained* on reasonable grounds," basing her finding on the belief that SIMON'S exclusive possession of the funds was required to maintain such an action. (*Emphasis added*.) However, that was a finding made at, and pertaining to, the *conclusion* of the case, not at or pertaining to *the time any alleged statements were made*. In any event, in their Opening Brief, VANNAH demonstrated the case law and basis for the opinion that the claims made against SIMON, including conversion, were made in good faith. *See* VANNAH'S Opening Brief at pp. 14-16.

In fact, the record reflects that Judge Jones found that "The Third Claim for Relief is for conversion based on the fact that the Edgeworths *believed* that the settlement proceeds were solely theirs and Simon asserting an attorney's lien constitutes a claim for conversion." (*Emphasis added*); AA Vol. I 0000034, lines 6-8. VANNAH shared this belief. AA Vol. IV 000860-884. Again, as this Court reemphasized in *Williams,* 137 Nev., Adv. Op. 44, at p. 7 (2021), "…we have previously observed, opinion statements are incapable of being false, as 'there is no such thing as a false idea.'" *Id*; (citing *Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020)).

And, there is also no evidence in the record that Judge Crockett focused on the proper time line, either, instead focusing on end results, not the mindset when alleged statements were made. Regardless, the relevant time line is "…that a

statement is made without knowledge of falsehood if 'the declarant (is) unaware that the communication is false at the time it was made.'" *Williams*, 137 Nev., Adv. Op. 44, at p. 8 (2021), citing *Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 267 (2017).

The sworn affidavits of Mr. Vannah and Mr. Greene clearly meet this standard. *Id.*; AA Vol. IV 000860-884.

III. ALL OF VANNAH'S ALLEGED STATEMENTS WERE MADE IN COURT PROCEEDINGS AND THUS INVOLVE MATTERS OF PUBLIC CONCERN

A. It Is Uncontroverted That All of Appellants' Statements Were Made In Connection With Issues Before And Under Consideration By A Judicial Body

SIMON has not made any allegation in his SLAPP, did not make even one argument in the several Oppositions he filed before the district court, did not rebut with any admissible evidence in his appendix, and did not make any evidence-based and cited arguments in his Brief before this Court that either Mr. Vannah or Mr. Greene said anything to anyone about SIMON outside of court papers or proceedings. AA Vol. I at 000038-56; Vol. V at 000995-1022; Vols. VI-VII at 001023-1421; Vols. X-XI at 001840-2197; Vol. XIII at 002520-2624; and, Vol. XVIII 003554-3611. And all of SIMON'S Counts/claims are centered solely on the claim for conversion brought against him, a claim that was simply filed, with no discovery allowed whatsoever prior to its dismissal by the district court. *Id.*; AA Vol. IV at 000860-884.

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

Again, VANNAH'S burden under this step is easily satisfied, as there is no disputing that every allegation made by SIMON against VANNAH pertains exclusively to matters presented to judicial bodies. AA Vol. I at 000038-56; Vol. V at 000995-1022; Vol. XV at 002879-2982; Vol. XX at 004103-4175. *See, e.g. LHF Prods., Inc. v. Kabala*, No. 216CV02028JADNJK, 2018 WL 4053324, at *3 (D. Nev. Aug. 24, 2018), in which the Court held that "demand letters, settlement negotiations ***and declarations*** are clearly made in direct connection with a

complaint, which is 'under consideration by a judicial body' so as to carry defendant's burden under the first step of the Anti-SLAPP analysis (emphasis added).

Further, all communications by VANNAH about SIMON were strictly limited to written complaints, filed with the court, to papers and pleadings filed with the court, and to oral arguments made in the courtroom. AA Vol. I at 000038-56; Vol. V at 000995-1022; Vol. XV at 002879-2982; Vol. XX at 004103-4175. At no point has SIMON offered any cited and admissible evidence that VANNAH ever published any comment about SIMON—to anyone—outside the courtroom. *Id.*; AA Vol. IV at 000860-884; Vols. X-XI at 001840-2197; Vol. XIII at 002520-2624; and, Vol. XVIII 003554-3611.

VANNAH has shown by a preponderance of the evidence, under the first prong of the anti-SLAPP statute, that all communications by VANNAH were strictly contained within written complaints, filed with the court, in papers and pleadings filed with the court, and oral arguments made strictly within the courtroom, and were, by definition, made in direct connection with an issue under consideration by a judicial body, and that the statements and opinions were truthful or made without knowledge of their falsehood. NRS 41.637(3); *Williams*, 137 Nev., Adv. Op. 44, at pp. 7, 9 (2021). Therefore, they are protected communications. *Id.*

As a result, VANNAH has "…satisfied their burden under the first prong of the anti-SLAPP framework." *Id*.

IV. UNDER PRONG TWO, SIMON DID NOT AND CANNOT MEET OR CARRY HIS BURDEN OF PROOF

A. Pursuant To *Williams*, The Litigation Privilege Bars All of Simon's Claims Against Vannah

Having shown that VANNAH'S complained of communications are protected speech under the first prong of the Nevada anti-SLAPP statutes, the burden then shifts to SIMON to demonstrate with *prima facie* evidence a probability of succeeding on any of his other claims. *Williams*, 137 Nev., Adv. Op. 44, at p. 10 (2021); *Rosen*, 453 P.3d at 1223 (2019). In order to avoid dismissal under the second prong of the Nevada Anti-SLAPP statutes, SIMON has the burden to demonstrate that: 1.) his SLAPP suit is legally sufficient to state a cause of action, and, 2.) the cause of action is supported by a *prima facie* showing of facts sufficient to sustain a favorable judgment. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006).

All of SIMON'S claims against VANNAH must fail, as all of VANNAH'S communications giving rise to SIMON'S claims for relief are protected under the absolute litigation privilege. AA Vol. I at 000038-56; Vol. IV at 000828-923; Vol. V at 000993-1022; *Williams*, 137 Nev., Adv. Op. 44, at p. 13 (2021). Furthermore, SIMON did not show a likelihood of success in proving any of his claims for relief

against VANNAH under the second step or prong of the anti-SLAPP analysis, because VANNAH is immune from suit under the absolute litigation privilege. *Id*.

This Court has recently held that "…the absolute litigation privilege applies to the second prong of the anti-SLAPP analysis because a plaintiff cannot show a probability of prevailing on his claim if a privilege applies to preclude the defendant's liability." *Williams*, 137 Nev., Adv. Op. 44, at p. 10 (2021).

The absolute litigation privilege is broadly construed as an absolute bar to lawsuits based on statements made in contemplation of or during litigation. *Williams*, 137 Nev., Adv. Op. 44, at p. 13 (2021); *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014); *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983); *Bull v. McCuskey*, 96 Nev. 706, 712, 615 P.2d 957, 961 (1980). The absolute litigation privilege is used as part of the SLAPP analysis, specifically under the second step to show a party will not be able to prevail on his claims based on the underlying protected speech. *Id*.

The policy underlying the absolute litigation privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege for making false and malicious statements." *Circus Circus Hotels*, 99 Nev. at 60 (1983). *See also*, *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15 (Cal.App. 4th 1997) (the reason behind

the absolute litigation privilege is to give "litigants and witnesses 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.'" *Id*.

In other words, the absolute litigation privilege is intended to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes, without being chilled from exercising this right by the fear that they may subsequently be sued in a derivative tort action arising out of something said or done in the context of the litigation. *Williams*, 137 Nev., Adv. Op. 44, at pp. 12-13 (2021); *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014); *Fink v. Oshins*, 49 P.3d 640, 643-44 (Nev. 2002) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980).

The conclusion that the absolute litigation privilege applies here is clear, with an assist via SIMON'S own allegations in his SLAPP. AA Vol. I at 000038-56; Vol. V at 000995-1022. It is plain to see that everything that SIMON has alleged as it pertains to VANNAH seeks to punish VANNAH, *in their role as lawyers*, for filing a lawsuit, for filing papers and pleadings, for making arguments in court, and for filing briefs before the Nevada Supreme Court. (*Emphasis added*.) *Id*.

Since absolutely all of VANNAH'S communications/statements were admittedly made in the course of litigation, and during various judicial proceedings,

together with the filing of pleadings, briefs, and other legal materials, they "are absolutely privileged" and VANNAH "is immune from civil liability." *Williams,* 137 Nev., Adv. Op. 44, at pp. 14 (2021); *Jacobs v. Adelson*, 130 Nev. 408, 412-413, 325 P.3d 1282, 1285-1286 (2014); *Greenberg Traurig, LLP v. Frias Holding Company*, 130 Nev. 627, 331 P.3d 901, 903 (2014)(quotation omitted); *Fink v. Oshins*, 118 Nev. 428, 432-33, 49 P.3d 640, 643 (2002); and, *Bull v. McCuskey*, 96 Nev. 706, 711-713, 615 P.2d 957 (1980).

Since absolutely all of SIMON'S claims in his SLAPP "derive" strictly from statements by VANNAH, in their role as lawyers in the manner so described, and since all of the claims in SIMON'S SLAPP are statements "protected by the absolute litigation privilege," SIMON cannot make any showing by "prima facie evidence" of a probability of prevailing on his claims. *Williams,* 137 Nev., Adv. Op. 44, at pp. 14 (2021). Therefore, his SLAPP must be dismissed.

CONCLUSION

It is clear to see that SIMON'S SLAPP is designed to punish VANNAH, in their role as lawyers, and their mutual clients, the Edgeworths, for filing a lawsuit, for filing papers and pleadings, for making arguments in court, and for filing briefs before the Nevada Supreme Court. AA Vol. I at 000038-56, Vol. IV 000860-884, and Vol. V at 000995-1022. That's all that the evidence shows, and SIMON has not presented any *evidence* to the contrary. VANNAH'S Opening Brief laid out in a

comprehensive way the good faith basis for the claims brought against SIMON, which then lead to SIMON'S retaliatory SLAPP. *See* VANNAH'S Opening Brief, incorporated by this reference.

There are plentiful and detailed reasons why the Appellants believed, as they believed, and took the legal recourse that they took. This is addressed, among other places, at pages 6 through 11 of VANNAH'S Opening Brief. As the Appellate record shows, the words and actions of SIMON lead the Appellants to believe that viable claims for relief existed against SIMON. *See primarily* AA Vol. IV 000860-884. When they resorted to the courts for a remedy, they were thereafter served with a summons and a SLAPP. *Id*. Then an Amended SLAPP was filed and served. AA Vol. V at 000995-1022.

VANNAH has met their burden under the law, as all of their communications were protected speech under NRS 41.637(3), immune from civil liability under NRS 41.650, and barred by the absolute litigation privilege. *Williams*, 137 Nev., Adv. Op. 44, at pp. 14 (2021); *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (2014); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). On the other hand, SIMON did not, and cannot, meet his burden. Therefore, SIMON'S SLAPP must be dismissed under Nevada's anti-SLAPP law.

Not only is SIMON'S suit a SLAPP, it is the type of action that will most assuredly open the floodgates of retaliatory litigation against any lawyer who has

the temerity to bring any sort of action on behalf of a client.

For example, SIMON and/or VANNAH, as personal injury lawyers, could allege negligence, recklessness, or an intentional act against a defendant, have a judge or jury disagree, then face a lawsuit from that defendant who would perceive to have the green light to make the same or similar derivative tort claims raised in SIMON'S SLAPP. Similar complaints could be filed by all aggrieved defendants against any opposing lawyer, be it in a breach of contract matter, a copyright infringement case, a divorce, a custody matter, a criminal matter, or any type of claim.

Imagine the chilling effect on lawyers if SIMON'S SLAPP is not summarily dismissed. There is no such thing as a slam dunk case, especially not with eight jurors in the box. Plus, the law in this state is often not settled, or may not seem or be just. If a lawyer has to worry that her/his role as an advocate for a client or a cause could be met with a SLAPP suit such as SIMON'S after the proverbial dust of an underlying case has settled, why then take the case, make the argument, or push for change? This is not, and cannot, be the intent or the application of Nevada's anti-SLAPP law.

Additionally, in relation to the relief requested below, SIMON made a remarkable assertion in his Brief at p. 16, lines 19-20, about why we are still litigating after all these years. He states: "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…." Id. The Appellants tried to do the former, but SIMON forced the latter. AA Vols. I-IV at 000761-763; Vol. IV at 000860-884, paragraphs 20 & 21.

For example, on October 31, 2018, and again on November 19, 2018, the Edgeworths (through VANNAH) sent letters to SIMON, clearly stating that they agreed to be bound the Decision and Order on Motion to Adjudicate Lien of Judge Jones and to refrain from all appeals, including the dismissal of the Amended Complaint. *Id*. This means that the Edgeworths agreed in 2018 to pay all the fees and costs that Judge Jones awarded to SIMON in that Order and put *all* of this behind everyone. *Id*.

Yet SIMON refused to respond to either letter, thus subjecting himself (and everyone else) to the appeal in the underlying matter, to the alleged ongoing harm that he claims in his SLAPP that was filed, the significant motion practice below, as well as this appeal. *Id*.

Flipping the script, had SIMON simply responded to either letter and agreed to resolve this matter for what he now claims in his Brief would have been the right thing to do in 2018, we wouldn't be here before this Court and none of this would have been necessary. That's a prime and ongoing example of SIMON'S invited error. *Carstarphen v. Milsner*, 128 Nev. 55, 270 P.3d 1251(2012).

Finally, there is nothing in SIMON'S Brief to properly counter or rebut VANNAH'S arguments and authority in their Opening Brief that neither the facts nor the law supports any finding that either issue preclusion or accord and satisfaction apply.

For the foregoing reasons, and pursuant to *Williams v. Lazer*, 137 Nev., Adv. Op. 44 (2021), this Court should reverse the district court's order dismissing VANNAH'S special anti-SLAPP motion to dismiss and remand with instructions that the district court grant the special motion.

DATED this 25th day of October, 2021.

Respectfully Submitted,

PATRICIA A. MARR, LLC

/s/Patricia A. Marr, Esq.

PATRICIA A. MARR, ESQ.

CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

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

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 32(a)(7)(ii) because it does not exceed half the type volume specified for an opening brief (i.e. 7,000 words). This brief is 6750 words in length.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because it contains 6754 words.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 25th day of October, 2021, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: VANNAH APPELLANTS' OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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