IN THE SUPREME COURT OF THE STATE OF NEVADA

PIERRE A. HASCHEFF,

Appellant/Cross-Respondent,

vs.

LYNDA HASCHEFF,

Respondent/Cross-Appellant.

Supreme Court No. 82626

District Court Case No. DV13-00656

APPELLANT'S OPENING BRIEF

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STATEMENT REGARDING DISTRICT COURT ORDER SEALING PROCEEDINGS

The District Court entered an Order Sealing proceedings on October 14, 2013. *See* Order Sealing File, Appendix Volume 4, 747-749 (4 AA 747-749). Respondent has requested by two motions that these proceedings remain sealed so as to comply with this order. These motions were not granted. Respondent is not waiving or relinquishing the sealing of these records by seeking an appeal and filing this Brief and Supporting Appendix.

DATED this 18th day of November, 2021.

GORDON, REES, SCULLY, MANSUKHANI, LLP

By: _____

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STATEMENT OF JURISDICTION

A. Appellate Court Jurisdiction. This Court has jurisdiction under Rule 3A(b)(1) of the Nevada Rules of Appellate Procedure.

B. Timeliness of Appeal.

On February 1, 2021, the district court entered its Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs (4 AA 711-725), which was a final and appealable order. On February 10, 2021, Respondent served upon Appellant her written Notice of Entry of the Court's February 1, 2021, Order (4 AA 726-744). On March 10, 2021, Appellant filed his Notice of Appeal (4 AA 745-746), which was within thirty (30) days after Respondent served upon Appellant her February 10, 2021, written Notice of Entry of the Court's February 1, 2021, Order.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the district court commit error of law in using the doctrine of laches to re-write a contractual indemnity provision in the parties' Marital Settlement Agreement (1 AA 057-078), which provision did not require notice of

any claim, so as to require a notice of claim, when the parties did not agree to such a provision in the Marital Settlement Agreement?

B. Did the district court err by using the doctrine of laches and other equitable considerations to permanently defeat Judge Hascheff contractual indemnity rights, and when there was no evidence of prejudice or harm from delay in providing notice of a claim or action to Ms. Hascheff?

C. Did the district court err in not awarding attorney's fees and costs to Judge Hascheff, where Ms. Hascheff refused her specific indemnity obligations requiring court enforcement, when there was an attorney's fee and cost provision in the Marital Settlement Agreement?

D. Did the district court err in concluding that Judge Hascheff was not transparent, thereby breaching his fiduciary duty and implied covenant of good faith and fair dealing, based upon (1) the district court's misinterpretation of Judge Hascheff's malpractice insurance policy, and (2) Judge Hascheff failure to immediately notify and provide documents to Ms. Hascheff so she could decide whether she should pay her contractual share of the claim.

STATEMENT OF THE CASE

A. Nature of the Case.

The parties' Marital Settlement Agreement (the "MSA") (1 AA 057-078) required Respondent, Lynda Hascheff ("Ms. Hascheff") to indemnify Appellant, Pierre A. Hascheff ("Judge Hascheff"), for attorney's fees and costs he incurred related to professional liability claims and proceedings. Judge Hascheff sought reimbursement for attorney's fees and costs incurred after a malpractice action was filed against him. Ms. Hascheff refused to indemnify him. Motions were filed by the parties: (1) the Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree, filed June 16, 2009 (the "MSA Motion) (1 AA 082-136), by Ms. Hascheff; and (2) the Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders, seeking reimbursement of fees filed July 8, 2020 (the "OSC Motion") (1 AA 176-205), by Judge Hascheff.

In her June 16, 2020, MSA Motion, Ms. Hascheff asked the district court to enter an Order clarifying MSA §40 that she was not responsible for fees incurred in a malpractice action against Judge Hascheff because he took too long to notify her of the action. Further, she argued that she was not responsible for the fees or costs he incurred to have personal counsel protect his interest when he was served with a subpoena in an underlying trust action, and for his attorney's fees and costs incurred in producing documents and testifying in the underlying trust lawsuit

between trust beneficiaries in anticipation of a claim being filed against him by one of the beneficiaries which did occur.

In his July 6, 2020, OSC Motion, Judge Hascheff moved the district court to issue an order for Ms. Hascheff to show cause as to why she intentionally disobeyed the Decree; to enforce the terms of the parties' incorporated MSA, and to order the indemnification of his attorney's fees and costs.

On December 21, 2020, the District Court conducted a hearing. As reflected in the hearing transcript 4 AA 591-702, only Judge Hascheff testified. Ms. Hascheff did not testify. Ms. Hascheff did not testify to establish any prejudice or harm resulted to her from the alleged late notice.

After a hearing, the Court entered its February 1, 2021, Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorney's Fees and Costs. 4 AA 711-725. The district court's February 1, 2021, Order concluded: (1) that all of Judge Hascheff's fees incurred were reimbursable under the contractual indemnity provision in both the underlying trust litigation and malpractice action (4 AA 721, ll. 16-18); (2) that this indemnity provision by its specific terms, did not contain or require any advance notice to invoke

indemnity (4 AA 721, ll. 18-21); and (3) unambiguous contractual indemnity agreements preclude a court from considering equitable remedies (4 AA 721, ll. 21-23). However, in spite of that, the district court, inappropriately applying the remedy of laches against Judge Hascheff, precluded him from receiving indemnity and reimbursement because of his alleged late notice, effectively nullifying the parties' MSA contractual indemnity agreement, wherein the parties agreed to indemnity with no notice requirement (4 AA 721-724); and erroneously denying both parties' respective requests for attorney's fees and costs (1 AA 724, ll. 3-11). Finally, the district court misinterpreted the malpractice insurance company's payments towards the outstanding attorney's fees and the deductible amount. 4 AA 722, ll. 1-21.

B. Course of Proceedings.

1. On April 15, 2013, Judge Hascheff filed his Verified Complaint for Divorce. 1 AA 001-004.

2. On June 14, 2013, Ms. Hascheff filed her Answer and Counterclaim 1 AA 016-020.

3. On September 30, 2013, the parties' filed their Marital Settlement Agreement. 1 AA 057-078.

4. On November 15, 2013, the district court entered its Findings of Fact, Conclusions of Law, and Decree of Divorce. 1 AA 079-081.

5. Over six and one-half years later, on June 16, 2020, Ms. Hascheff filed her Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree. 1 AA 082-136.

6. On July 6, 2020, Judge Hascheff filed his Opposition to Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree. 1 AA 137-171.

7. On July 8, 2020, Judge Hascheff filed his Errata to Opposition to Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree (1 AA 172-175), and his Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders (1 AA 176-205).

8. On July 13, 2020, Ms. Hascheff filed her Opposition to Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders. (2 AA 221-231).

9. On July 24, 2020, Judge Hascheff filed his Reply to Opposition to Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders. 2 AA 232-286.

10. On December 17, 2020, Judge Hascheff filed his Hearing Statement (2 AA 294-325), his Notice of Exhibits (2 AA 326-398), and his Errata to his Hearing Statement (2 AA 399-414).

11. On December 17, 2020, Ms. Hascheff filed her Notice of Hearing Witnesses and Exhibits. 3 AA 415-570.

12. On December 18, 2020, Ms. Hascheff filed her Hearing Statement. 3 AA 571-590.

13. On December 21, 2020, an Evidentiary Hearing was held before the district court. 4 AA 591-702.

14. On January 4, 2021, the district court entered its Minutes of Evidentiary Hearing. 4 AA 703-710.

15. On February 1, 2021, the district court entered its Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs. 4 AA 711-725.

16. On February 10, 2021, Ms. Hascheff filed her Notice of Entry of Order. 4 AA 726-744.

17. On March 10, 2021, Judge Hascheff filed his Notice of Appeal. 4 AA

745-746.

C. Standard of Review.

1. Most decisions of family law issues are reviewed for an abuse of discretion. *See, Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009).

2. Generally, a district court abuses its discretion when it makes a factual finding that is not supported by substantial evidence or is clearly erroneous. *See, Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) ("The district court's factual findings will not be set aside if supported by substantial evidence."); *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994) ("The district court's findings of fact will not be set aside unless those findings are clearly erroneous."); *Real Estate Division v. Jones*, 98 Nev. 260, 264, 266, 65 P.2d 1371, 1373-74 (1982) ("Our task on appeal has been to search the record for a foundation of substantial evidence upon which to validate the rulings of the Commission...[¶]The decision of the Commission both initially and as later modified does not meet the substantial evidence test.").

3. This Court generally reviews a district court's award of attorney's fees for an abuse of discretion. *See, Rivero, supra*, 125 Nev. at 440-41, 216 P.3d at 234; *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727 (2005).

4. A district court's open and obvious error of law can also be an abuse of discretion. *See, Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979), *quoting, Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 205, 207 (1951) ("'(E)ven within the area of discretion where the court's discernment is not to be bound by hard and fast rules, its exercise of discretion in the process of discernment may be [g]uided by such applicable legal principles as may have become recognized as proper in determining the course of justice. A clear ignoring by the court of such established guides, without apparent justification, may constitute abuse of discretion.'").

5. A district court's failure to exercise discretion when required to do so can also be an abuse of discretion. *See, Massey v. Sunrise Hospital*, 102 Nev. 367, 371, 724 P.2d 208, 210 (1986) ("A court's failure to exercise discretion (when available) is error.").

6. A district court's exercise of personal judgment can also be an abuse of discretion, especially when no reasonable judge could reach the conclusion reached under the particular circumstances. *See, Franklin, supra*, 95 Nev. at 562-63, 598 P.2d at 1149.

7. A question of law may be found whenever the core dispute concerns

review of the district court's conclusions of law rather than its findings of fact. *Bopp, supra*, 110 Nev. at 1249, 885 P.2d at 561 ("The district court's conclusions of law, however, are reviewed de novo.").

SUMMARY OF ARGUMENT

A. Concise Statement of Relevant Facts

1. On September 30, 2013, the parties filed their Marital Settlement Agreement. 1 AA 057-078.

2. The Marital Settlement Agreement (1 AA 057-078) contained the following provisions:

> **"Payment of Attorney Fees and Costs**
>
> "35.1 If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party.
>
> "35.2 A party intending to bring an action or proceeding to enforce this Agreement shall not be entitled to recover attorney fees and costs under this provision unless he or she first gives the other party at least 10 [days'] written notice before filing the action or proceeding. The written notice shall specify (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement; (2) the reasons why the moving party believes the

subsequent action or proceeding is necessary; (3) whether there is any action that the other party may take to avoid the necessity of the subsequent action or proceeding; and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action. The first party shall not be entitled to attorney fees and costs if the other party takes the specified action within the time specified in the notice.

"....

"Release of All Claims

"38. Except for the obligations contained in or expressly arising out of this Agreement, each party releases the other from all interspousal obligations, and all claims to the property of the other or otherwise. This release extends to all claims based on rights that have accrued before or during marriage, including, but not limited to, property and support claims and claims sounding in tort except Wife's obligation to defend and indemnify Husband for any malpractice claims.

"...

"Indemnity and Hold Harmless

"40. Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceedings, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or

proceeding. The warranting party shall also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action. In the event Husband is sued for malpractice, Wife agrees to defend and indemnify Husband for one half (1/2) the costs of any defense and judgment. Husband may purchase tail coverages of which Wife shall pay one half (1/2) of such costs." 1 AA 071-072 (emphasis added).

3. At the December 21, 2020 hearing, *See* transcript 4AA 591-702, it was clear from the District Court's questioning of Judge Hascheff, that her focus was on the length of time when Judge Hascheff had knowledge of the potential malpractice claim to the date when he notified Ms. Hascheff. (4 AA 695-702). This focus imposed a notice condition and time condition not in the parties' agreement. More importantly, there was no evidence of prejudice to Ms. Hascheff from the date the notice was provided.

4. On November 15, 2013, the district court entered its Findings of Fact, Conclusions of Law, and Decree of Divorce (1 AA 079-081), which ratified, approved, and adopted, and merged and incorporated the parties' September 30, 2013, Marital Settlement Agreement into the Decree of Divorce.

5. In late July, 2018, Judge Hascheff received a 41-page subpoena requiring his response in a trust litigation dispute between beneficiaries for which

Judge Hascheff as a lawyer had prepared an estate plan and had rendered legal advice to Samuel Jaksick (the "underlying trust litigation"). 1 AA 178, ll. 1-3.

6. The subpoena received by Judge Hascheff requested information that clearly created a potential malpractice claim against him. 1 AA 178, ll. 3-5.

7. Through his legal malpractice insurance carrier, Judge Hascheff retained counsel, Todd Alexander, Esq., of Lemons, Grundy, and Eisenberg, to represent his interests in the underlying trust litigation. 1 AA 178, ll. 6-7.

8. On December 26, 2018, one of the beneficiaries in the underlying trust litigation filed a legal malpractice complaint against Judge Hascheff, relating to his legal advice to Samuel Jaksick. 1 JA 178, ll. 13-16.

9. The malpractice action filed by the beneficiary in the underlying trust litigation was stayed, pending the outcome in the underlying trust litigation. *See, Kopicko v. Young*, 114 Nev. 1333, 1337 n. 3, 971 P.2d 789, 791 n. 3 (1998) ("We now conclude that, in the context of transactional legal malpractice, the presence of separate litigation regarding the transaction as of the commencement of the malpractice action will compel a stay of the malpractice action pending the resolution of the underlying action."). 1 AA 178, ll. 16-18.

10. Before a malpractice action is filed, the plaintiff will generally

proceed with the underlying litigation first to determine the outcome, and if the plaintiff loses in the underlying litigation, it will then have a sufficient factual basis to proceed against the attorney whose advice caused damage to the plaintiff in the malpractice action. 1 AA 161, ll. 26-28. Therefore, Judge Hascheff was not just a percipient witness in the underlying litigation. He was there to substantiate his advice was accurate and met the standard of care. 1 AA 152, ll. 22-24. To argue that Ms. Hascheff is not liable for his testimony for four (4) days and countless hours of preparation is ridiculous.

11. The required elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from negligence. *See, Sorensen v. Pavlikoski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (1978). *See also*, NRS 11.207, which provides the statute of limitations will not commence to run against an attorney malpractice cause of action until the claimant sustains damages. Therefore, the attorney's action or inaction must be the proximate and actual cause of the damages to the

client.

12. Several Nevada cases hold that the underlying litigation must conclude, including appeals, when the legal malpractice action alleges errors in the course of the underlying litigation. *See, Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002); *Semenza v. Nevada Med. Liab. Ins. Co.,* 104 Nev. 666, 668, 765P. 2d 184, 186 (1998) (for the purpose of the litigation malpractice tolling rule is to prevent malpractice litigation where the underlying damage is speculative or remote, since the apparent damage may vanish with a successful prosecution of an appeal and ultimate vindication of the attorney's conduct by the appellate court); *Kopicko, supra*, 114 Nev. at 1336, 971 P.2d at 791 (1998) (the malpractice action did not accrue until dismissal of the appeal on the underlying litigation because no legal damages had yet been sustained as a result of the alleged negligence). As a result, if at the commencement of the malpractice action in the context of transactional legal malpractice there is a presence of a separate litigation regarding the transaction, the malpractice action will be stayed pending the resolution of the underlying action. It should also be noted that the stay is effective for purposes of the 2- and 5-year provisions under NRCP 41(e).

13. The reason Judge Hascheff engaged counsel and invested substantial

resources in the underlying trust litigation was in order to show that his advice and the documents he prepared were correct and in the best interest of his client. 1 AA 152, ll. 22-24. *See, Khan v. Mowbray*, 121 Nev. 464, 117 P.3d 227 (2005) (whenever any issues, claims, or facts are decided in the prior underlying litigation, they are collaterally barred from relitigation, even if a claim of legal malpractice had not yet accrued discussing the applicability of collateral estoppel, issue and claim preclusion, i.e., res judicata). It should be noted in *Khan, supra*, that the Court concluded that most of the issues involved in the malpractice suit were not actually and necessarily litigated in the prior underlying action; therefore, the Court allowed the malpractice action to proceed. However, the Court made it very clear that if the issues and facts were the same, or potentially said matters could have been brought up in the underlying litigation, the claimant would be barred in a subsequent malpractice action

14. In early 2019, Judge Hascheff was deposed and testified at trial in the underlying trust litigation. 1 AA 161, ll. 21-23.

15. At the jury trial in the underlying trust litigation, Judge Hascheff's testimony generated a favorable outcome for Todd Jaksick, the defendant in that litigation, regarding his prior legal advice to Samuel Jaksick. 1 AA 147, ll. 23-28.

16. However, as of April 10, 2020, there still were equitable claims asserted in the underlying trust litigation that remained under submission awaiting judicial determination, and the malpractice action remained stayed. 1 AA 148, ll. 1-5; 1 AA 157. Equitable claims eventually were decided by the trial court, and both parties appealed, which determination now is pending.

17. On or about January 15, 2020, Judge Hascheff contacted Ms. Hascheff, informed her of the indemnification required under Section 40, requested the indemnity payment from Ms. Hascheff, and included the invoices from his attorney. 1 AA 178, ll. 19-21.

18. Ms. Hascheff refused to indemnify him. 1 AA 178, ll. 21-23.

19. Instead, on February 4, 2020, Judge Hascheff was contacted by Ms. Hascheff's sister, Lucy Mason, Esq. (also an attorney), regarding the indemnification, disputing Ms. Hascheff's obligation to indemnify. 1 AA 178-179.

20. On February 4, 2020, Ms. Mason requested that Judge Hascheff provide her with several documents and information regarding the indemnification due from Ms. Hascheff. 1 AA 178, ll. 25-26.

21. On February 5, 2020, Judge Hascheff promptly provided Ms. Mason

with all of the documents and information she had requested from him, and again requested (through Ms. Mason) that Ms. Hascheff reimburse him for one-half of the attorney's fees and costs he had incurred in the underlying trust litigation, in the amount of $4,675.90 (one-half of $9,351.80). 1 AA 178-179.

22. After Judge Hascheff emailed Ms. Mason all of the documents and information she had requested, Ms. Mason instructed him to contact Ms. Hascheff's lawyer, Shawn B. Meador, Esq. 1 AA 179, ll. 6-10.

23. On March 1, 2020, in order to comply with the requirements of Section 35, Judge Hascheff emailed Mr. Meador the following written notice:

> "I was informed by Lucy Mason that I need to contact you regarding my reimbursement for attorney fees and costs incurred pursuant to section 40 of the settlement agreement dated September 1, 2013. The amount owed to date by Lynda is $4,675.90. I provided all the documentation that Lucy requested which I assume you have which includes the billing invoices. I intend to enforce the settlement agreement because I've been sued for malpractice. A subsequent action or set off is necessary because Lynda has refused to indemnify me pursuant to section 40. We can avoid this action by her simply making the payment referenced above within 10 days of the notice. If the payment is not made within the 10 day I will proceed accordingly.
>
> "Thank you for your consideration in this matter." 1 AA 179-180.

B. CONCISE STATEMENT OF ARGUMENT ON APPEAL

1. The district court's February 1, 2021, Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs (4 AA 711-725) is unprincipled in the original sense of that term, in that it is entirely lacking in, and is not based upon, any legal principles or authority.

2. The evidence established that Judge Hascheff provided written notice in accordance with Section 35, allowing Mrs. Hascheff at least ten (10) days to take corrective action on January 15, 2020, *see*, Hearing Exhibit 1 (2 AA 330-334); on February 5, 2020, *see*, Hearing Exhibit 2 (2 AA 336-348); on March 1, 2020, *see*, Hearing Exhibit 3 (2 AA 350-351); on April 20, 2020, *see*, Hearing Exhibit 4 (2 AA 353-354); and on May 26, 2020, *see*, Hearing Exhibit 5 (2 AA 356-357). Therefore, Judge Hascheff complied with the Section 35 notice requirements multiple times. Also important, like most indemnities, MSA Section 40 includes a self-executing indemnification which entitles the indemnitee by its express terms to attorney's fees and costs as part of his claim for indemnity without any notice. Obviously, this includes the fees incurred in

the underlying trust litigation and the malpractice litigation (noted by the district court's order (4 AA 721, ll. 16-18), and the fees incurred enforcing the right of indemnity. This is the only way an indemnitee can be made whole (the primary reason for indemnification).

3. The evidence established that Judge Hascheff initially sent the Complaint and MSA on January 24 and 26, 2020, *see*, Hearing Exhibit 6 (2 AA 359-360), to Lucy Mason, Esq.; and that on February 4, 2020, Lucy Mason, Esq., Mrs. Hascheff's sister and an attorney, requested additional information and documentation from Judge Hascheff. 1 AA 178-179. On February 5, 2020 Judge Hascheff provided all the documents requested and more. 1 AA 198-199. Judge Hascheff did not provide correspondence between himself and his attorney in the underlying litigation due to attorney-client privilege. 1 AA 195, paras. 10-11, ll. 1-10. Judge Hascheff initially provided his attorney's invoices on January 12, 2020, and later provided his attorney's detailed billing entries and descriptions with only the attorney-client privilege entries redacted. 1 AA 195, paras. 10-11, ll. 1-10. Judge Hascheff continues to assert that providing communications with his lawyer is not required as a condition precedent to exercising his right of

indemnity as provided below, and more importantly, would waive the privilege and would be extremely imprudent, given the pending equitable claims at the time, and the malpractice action against him.

4. In its February 1, 2021, Order, the district court correctly found and concluded that "the legal fees incurred by Judge Hascheff as a witness in the collateral trust action and the stayed malpractice lawsuit where he is sued individually are encompassed by MSA § 40"; that, "as a matter of law, MSA § 40 does not contain express and unambiguous language requiring Judge Hascheff to have provided immediate, or any notice, for that matter, of either the collateral trust action or the malpractice action to Ms. Hascheff"; and that "this Court is barred from applying equitable considerations including laches regarding MSA § 40's contractual language." 4 AA 721, ll. 16-23.

ARGUMENT

I

THE DISTRICT COURT ERRED IN USING THE DOCTRINE OF LACHES TO RE-WRITE A CONTRACTUAL INDEMNITY PROVISION IN THE PARTIES' MARITAL SETTLEMENT AGREEMENT (1 AA 057-

078), WHICH PROVISION DID NOT REQUIRE NOTICE OF A CLAIM, SO AS TO REQUIRE A NOTICE OF CLAIM, WHEN THE PARTIES DID NOT AGREE TO SUCH A PROVISION IN THE MARITAL SETTLEMENT AGREEMENT

1. An indemnitee's duty, if any, to provide notice to an indemnitor arises from the express and unambiguous language of the indemnity agreement. *See, In re RFC and RESCAP Liquidating Trust Action,* 332 F. Supp 3d 1101, 1155 (D. Minn. 2018), *citing, United States v. Schwartz*, 90 F.3d 1388, 1392-93 (8th Cir. 1996) (an indemnitee need not provide notice where the contract does not unambiguously require it); *Fontenot v. Mesa Petroleum* Co., 791 F.2d 1207, 1221 (5th Cir. 1986) (where the indemnity agreement does not require notice courts will not infer or insert a notice requirement as a condition precedent to a right to recover on the indemnitee contract); *Premier Corp. v. Economic Research Analysts, Inc.*, 578 F. 2d 551, 554 (4th Cir. 1978) (notice is unnecessary unless the indemnity contract requires it); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 580 F. 2d 1222, 1230 (4th Cir. 1978) ("We know of no authority to support the proposition that notice to a primary obligor of the basic claim, and an invitation to

defend the same, is a condition precedent to the obligation of a primary obligor to indemnify a secondary obligor, who has paid the basic claim."); *Boston & M.R.R. v. Bethlehem Steel Co.*, 311 F. 2d 847 (1st Cir. 1963) ("Unless the indemnity agreement so specifies, neither Massachusetts, nor any other court that we have been able to discover, requires an indemnitee to notify an indemnitor to come in and defend. Indeed, he need not even give notice of the claim."); *Ultramed, Inc. v. Beiersdorf-Jobst, Inc.*, 98 F.Supp.2d 609, 611 (1998) (failure to give notice does not collaterally estop or waive the right to indemnity).

2. The line of authority is clear. Courts will not imply that notice is required when not expressly and unambiguously required under the contract. To find otherwise creates a de facto rewriting of the agreement and affects the substantial rights of the parties. As the Hascheff MSA merged into the Decree of Divorce, the Court is precluded from changing the parties' agreement in a way which affects their substantial rights. *See*, NRS 125.150(7); *Kramer v. Kramer*, 96 Nev. 759, 762-63, 616 P.2d 395, 397-98 (1980) (district court lacked jurisdiction to modify a divorce decree's property distribution more than six months after the decree was entered); *Royal Indem. Co. v. Special Service Supply*

Co., 82 Nev. 148, 150, 413 P.2d 500, 502 (1966) (court cannot insert or imply new terms into an agreement).

3. As the authority above points out, in the absence of a specific contractual provision, no obligation is imposed on an indemnitee to notify the indemnitor of a claim, litigation, or settlement. However, one subtle exception exists that only applies at the settlement stage. If an indemnitee settles the claim without notifying the indemnitor, the indemnitee must establish that the settlement was reasonable and in good faith. Further, courts generally hold that settlements are presumptive evidence of liability of the indemnitee, but the amount of liability may be overcome by proof from the indemnitor that the settlement was unreasonable; that is unreasonable in amount and entered into collusively or in bad faith; or the indemnitee was not reasonable in belief that he or she had an interest to protect. *See*, *Peter Culley & Associates v. Superior Court*, 10 Cal.App.4th 1484, 13 Cal.Rptr.2d 624, 632-33 (Cal.App. 1992); *Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 280-81 (Tex.App. 1992); *Salt Lake City School Dist. v. Galbraith & Greene, Inc.*, 740 P. 2d 284, 287 (Utah.App. 1997) (determining that an indemnitee who settled with a third-party

plaintiff without giving notice to the indemnitor must prove its liability for the settlement by a preponderance of the evidence). However, proof of payment and the indemnitee's potential liability to the third-party plaintiff are not required in order to support the policy favoring settlement. *See*, Restatement (Third) of Torts: Apportionment of Liability § 22 cmt. c (2000); *Damanti v. A/S Inger,* 153 F.Supp. 600, 601 (E.D.N.Y.1957).

4. The above-listed cases were cited by *Charlie Brown Const., Inc. v. Hanson Aggregates Las Vegas, Inc.,* 129 Nev. 1104, 2013 WL 3272508 (decided May 31, 2013) (unpublished decision). Nevada follows the general rule that notice is not required at any time, including settlement of the underlying claim; however, in the case of settlement, the indemnitee must offer some proof that his settlement was in good faith and reasonable. The purpose of this rule is to prevent an indemnitee from using his claim of indemnity as an open checkbook requiring the indemnitor to pay 100% of his claim without any notice, as most indemnity provisions typically require the indemnitor to pay 100% of the judgment or settlement amount. This clearly is not the case, as Judge Hascheff possesses a vested interest in keeping the fees and costs as low as possible to

avoid a judgment, since he will be required to pay one-half. In addition, the pending malpractice action has been stayed until the collateral trust action is resolved on appeal.

5. Even when notice is contractually required, in order to defeat a claim of indemnity, the contract must expressly state that notice is a "condition precedent" to the indemnitor's liability. However, failure to comply within the stipulated time for notice does not work a forfeiture in the absence of prejudice, unless the contract states that notice not only constitutes a condition precedent, but also that noncompliance without waiver or excuse defeats recovery. *See, State Farm Mut. Auto Ins. Co. v. Cassinelli,* 67 Nev. 227, 615 P.2d 606 (1950), *superseded by regulation as stated in, Las Vegas Metropolitan Police Dept. v. Coregis Ins. Co.*, 127 Nev. 548, 556-57, 256 P.3d 958, 964 (2011). The MSA did not include these mandatory terms, and the district court's decision also is contrary to the *Cassinelli* case.

6. Consistent with those rulings, courts routinely hold that the indemnitor has no right to question or demand information or proof that the indemnitee was negligent or not negligent before an indemnitee is entitled to

indemnification. *See, Minton v. American Sur. Co. of N.Y.*, 184 Okla. 602, 88 P.2d 883 (Okla. 1939) (the indemnitee is entitled to recover upon becoming liable and there is no requirement that such liability shall be judicially determined as a prerequisite to an action on the indemnity contract). As a result of the foregoing authority, Ms. Hascheff has no right to any discovery on conflict waivers, proof that Judge Hascheff was actually concerned about a malpractice action being filed during or after the trust litigation, or any other information as a condition to her obligation to indemnify.

7. As the Court noted in its order, Judge Hascheff's fees incurred both in the trust action and malpractice action are included in Section 40 of the MSA. 4 AA 721, ll. 16-18. This finding is consistent with a majority of jurisdictions including Nevada. Nevada is in accord with this majority rule. *See, Royal Indem. Co., supra,* 82 Nev. at 150, 413 P.2d at 502 (1966) (court should give effect to every word and should not insert or disregard the language used by the parties; and court is not at liberty either to disregard words used by the parties, or to insert words which the parties have not made part of the indemnity, or used and if one interpretation would lead to an absurd conclusion such interpretation should be

abandoned in favor of one which would be in accordance with reason and probability); *Urban v. Acadian Contractors, Inc.,* 627 F.Supp.2d 699, 710 (D.La. 2007). *See also, Enterprise Leasing Co. of Houston v. Barrios,* 156 S.W.3d 547, 549 (Tex. 2004).

II

THE DISTRICT COURT ERRED BY USING THE DOCTRINE OF LACHES AND OTHER EQUITABLE CONSIDERATIONS TO DEFEAT JUDGE HASCHEFF'S INDEMNITY PERMANENTLY, WHEN THERE WAS NO EVIDENCE OF PREJUDICE OR HARM FROM DELAY IN PROVIDING NOTICE OF A CLAIM OR ACTION PRESENTED BY MS. HASCHEFF

1. Unless specifically required under contract, there is no notice requirement, and failure to provide immediate notice cannot, as a matter of law, breach the implied covenant of good faith and fair dealing and/or any fiduciary duty. Issues of good faith, fair dealing, and/or fiduciary duties do not arise, as a matter of law, simply because the indemnitee exercises his right to indemnity. *See, Harvey v. United Pacific Ins. Co.*, 109 Nev. 621, 623, 856 P.2d 240, 240-41

(1993) (jury rejected the indemnitor's claims for bad faith, breach of a fiduciary duty, and breach of the implied covenant of good faith and fair dealing); *Nelson v. Heer,* 123 Nev. 217, 224-25,163 P. 3d 420, 425-26 (2007) (purchaser sued seller for breach of the implied covenant of good faith and fair dealing for failure to disclose water damage; however, the court determined that, because there was no contractual duty to notify or disclose the same, there could be no breach of the implied covenant for failure to notify). *See also, Insur. Co. of the West v. Gibson Tile Co., Inc.,* 122 Nev. 455, 463, 134 P.3d 698, 703 (2006) (no bad faith as matter of law, and fiduciary duty instruction is prejudicial and erroneous).

2. Liability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship, and when one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are denied, damages may be awarded. *See, United Fire Ins. Co. v. McClelland,* 105 Nev. 504, 511, 780 P.2d 193, 197 (1989); *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.,* 107 Nev. 226, 234, 808 P.2d 919, 923 (1991); *Geyson v. Securitas Sec. Service USA, Inc.*, 322 Conn. 385, 399-400, 142 A.3d 227, 237-38

(Conn. 2018).

3. However, reasonable expectations are determined by various factors and special circumstances that shape these expectations. When one party to the contract deliberately contravenes the intention and the spirit of the contract, a breach may arise.

4. However, bad faith means more than mere negligence; it involves dishonesty. A covenant cannot be breached by an honest mistake, bad judgment, or negligence. The covenant cannot be breached for conduct amounting to a series of mistakes that were not the result of a corrupt or sinister motive, and absent a dishonest purpose, a breach of the covenant is legally insufficient. *See, Renown Health v. Holland & Hart, LLP*, 437 P.3d 1059, 2019 WL 1530161, at *1-2 (decided April 5, 2019) (unpublished decision).

5. Fiduciary obligations of undivided loyalty and confidentiality impose substantially more demanding duties than the implied covenants. The implied covenant of good faith is not a fiduciary duty and narrower in scope than a fiduciary duty. *See, Renown Health, supra*, 2019 WL 1530161, at *2.

6. Finally, familial relationships may impose a fiduciary duty.

However, Judge Hascheff and Ms. Hascheff are former spouses. A fiduciary relationship is particularly likely to exist when there is a family relationship. *See, Perry v. Jordan,* 111 Nev. 943, 947, 900 P.2d 335, 337-38 (1995). However, a mother-son relationship, standing alone, does not establish a confidential relationship. *See, Liapis v. Dist. Ct.*, 128 Nev. 414, 421-22, 282 P.3d 733, 738 (2012). As former spouses, the law will not impose any fiduciary duty on the parties, as they have no relationship. Nor has Judge Hascheff breached any covenant of good faith and fair dealing.

7. Having once correctly found and concluded that the language of Section 40 of the MSA did not require Judge Hascheff to provide notice of either the collateral trust action or the malpractice action to Ms. Hascheff, and that it was barred from undertaking equitable considerations regarding Section 40's language (4 AA 721, ll. 16-23), the district court then inconsistently employed the equitable doctrine of laches to rewrite the language of Section 40 in order to require Judge Hascheff to provide notice of both the collateral trust action and the malpractice action to Ms. Hascheff. 4 AA 721-724. The district court then, in error and without supporting evidence, as Ms. Hascheff did not testify, found that "Judge

Hascheff's conscious disregard and selective enforcement of MSA § 40 [was] comparable to a claim for laches" (4 AA 723, ll. 4-9); that "Ms. Hascheff [was] prejudiced by Judge Hascheff's actions due to his deliberate delay in invoking his rights under MSA § 40" (4 AA 723, ll. 9-11); and that, "[a]lthough immediate notice [was] not explicitly required in MSA § 40, Judge Hascheff's delay prejudiced Ms. Hascheff (4 AA 723, ll. 11-12). The district court then arbitrarily and capriciously, and without supporting evidence, concluded that "Ms. Hascheff has been prejudiced by Judge Hascheff's actions to the point where granting Judge Hascheff's requested relief would be inequitable" (4 AA 723, ll. 18-21; and that, "had Judge Hascheff exercised his rights and obligations under the MSA in a timely fashion and without obfuscation, Ms. Hascheff would not have been prejudiced" (4 AA 723, ll. 21-24).

8. However, Ms. Hascheff did not testify, so there is no evidence in the record of any conscious disregard and selective enforcement, obfuscation, or that Ms. Hascheff was prejudiced or harmed in any way by Judge Hascheff's alleged delay in providing notice of either the malpractice claim or the malpractice action. *See* hearing transcript 4 AA 591-702. Furthermore, as the district court correctly

found and concluded, "as a matter of law, MSA § 40 does not contain express and unambiguous language requiring Judge Hascheff to have provided immediate notice of either the collateral trust action or the malpractice action to Ms. Hascheff." 4 AA 721, ll. 18-21.

Therefore, not only was Judge Hascheff not required by the language of Section 40 of the MSA, or otherwise, to provide notice to Ms. Hascheff of either the malpractice claim or the malpractice action, but Ms. Hascheff was not prejudiced or harmed in any way by Judge Hascheff's delay in providing notice of either the collateral action or the malpractice action.

9. Furthermore, as more fully appears from the Declaration of Todd R. Alexander, Esq., Judge Hascheff's counsel in the underlying trust litigation, "[i]t was prudent on Hascheff's part to retain counsel immediately because the information requested clearly was aimed at undermining his estate plan and advice which could lead to a malpractice action depending on the jury verdict" (1 AA 194, para. 3, ll. 10-13); "[i]t was clear that Hascheff was being accused of malfeasance and mishandling of the Jaksick estate, resulting in certain beneficiaries receiving less of what they perceived was their share of the estate" (1

AA 194, para. 4, ll. 13-16); "[t]here was also a possible claim by another beneficiary that Hascheff provided incorrect advice to that beneficiary which would result in said beneficiary being sued by his brother and sister with a substantial damage claim against him" (1 AA 194, para. 5, 16-19); that "Hascheff was clearly at risk depending on the outcome of the underlying litigation" (1 AA 194, para. 6, ll. 19-21); that "[t]he fees and costs incurred [in the underlying trust litigation] were necessary and reasonable to protect Hascheff's interests" (1 AA 194, para. 8, ll. 23-24); and that "[a]n adverse result to Hascheff could have resulted in a multi-million dollar claim against him outside the coverage limits of his applicable insurance policy" (1 AA 194, para. 8, ll. 24-26).

10. Therefore, but for Judge Hascheff's prudent action in retaining counsel and defending himself in the underlying trust litigation, Ms. Hascheff now would be faced with the prospect of paying one-half of the enormous costs of the defense of the December 26, 2018, malpractice action filed by the beneficiary in the underlying trust litigation, as well as paying one-half of a potential multi-million-dollar malpractice judgment. As previously noted, the district court previously found and concluded (correctly) that "the legal fees incurred by Judge

Hascheff as a witness in the collateral trust action and the stayed malpractice lawsuit where he is sued individually are encompassed by MSA § 40." 4 AA 721, ll. 16-18.

11. The district court also concluded (erroneously) that redacting a few privileged communications defeated Judge Hascheff's indemnity right because, somehow, Ms. Hascheff was entitled to view all his attorney's billing entries. *See, Katz v. Incline Village General Improvement District*, 452 P.3d 411, 2019 WL 6247743, at *3 (decided Nov. 21, 2019) (unpublished decision) (a court can determine if the fees are reasonable without billing records, and the opposing party is not entitled to see an itemization on all entries on the invoices).

Further, rather than permanently eliminating Judge Hascheff's indemnity rights, the district court had the power to award fees and costs for those billing entries that were not redacted.

12. The Court has made it clear that contractual indemnities are not subject to equitable considerations; rather, they are enforced in accordance with the terms of the parties' agreement. *See, United Rentals Hwy. Techs v. Wells Cargo,* 128 Nev. 666, 673, 289 P.3d 221, 226 (2012), *quoting, Prince v. Pacific*

Gas & Elec. Co., 45 Cal.4th 1151, 90 Cal.Rptr.3d 732, 202 P.3d 1115, 1120 (Cal. 2009).

III

THE DISTRICT COURT ERRED BY NOT AWARDING ATTORNEY'S FEES AND COSTS TO JUDGE HASCHEFF, WHERE MS. HASCHEFF REFUSED HER SPECIFIC INDEMNITY OBLIGATIONS REQUIRING COURT ENFORCEMENT, AND THERE WAS AN ATTORNEY'S FEE AND COST PROVISION IN THE MARITAL SETTLEMENT AGREEMENT

1. An indemnitee is not "held harmless" pursuant to an express or implied indemnity agreement if it must incur costs and attorney's fees to vindicate its rights. *See, Transamerica Premier Ins.* Co. *v. Nelson,* 110 Nev. 951, 878 P.2d 314 (1994), *quoting, Piedmont Equipment* Co., *Inc. v. Eberhard Mfg.* Co., 99 Nev. 523, 528, 665 P.2d 256, 259 (1983). Judge Hascheff should have been awarded his fees and costs incurred in enforcing the indemnity in this action consistent with the *Transamerica* and *Piemont* cases. Ms. Hascheff refused to pay one-half the deductible under the malpractice policy. A decision otherwise renders the indemnification meaningless and is clearly at variance with the

holding in *Transamerica* and *Piedmont.* It will cost Judge Hascheff more to enforce the indemnity than the fees incurred in the underlying action. Now that the deductible/retention amount is exhausted, the insurance company is obligated to pay all additional costs and fees. *See, Harvey, supra*, 109 Nev. at 624, 856P. 2d at 241 (indemnity includes all costs and fees incurred in enforcing the indemnitee's rights under the indemnity agreement); *Lund v. Eighth Judicial Dist. Court, ex rel. County of Clark,* 127 Nev. 358, 362, 255 P.3d 280, 283 (2011) (defendant is permitted to defend the case and at the same time assert his right of indemnity against the party ultimately responsible for the damage; indemnity is restitutionary in nature and the indemnitee is not made whole unless it recovers the costs and fees in enforcing the indemnity), *quoting, Reid v. Royal Insurance Co.*, 80 Nev. 137, 140, 390 P.2d 45, 46-47 (1964); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc.*, 127 Nev. 331, 255 P.3d 268 (2011). The Section 40 indemnity language itself clearly also includes attorney fees and costs.

IV

THE DISTRICT COURT ERRED BY CONCLUDING THAT JUDGE HASCHEFF WAS NOT TRANSPARENT, THEREBY BREACHING HIS

FIDUCIARY DUTY AND THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, BASED UPON (1) THE DISTRICT COURT'S MISINTERPRETATION OF JUDGE HASCHEFF'S PAYMENTS TO HIS ATTORNEY UNDER THE MALPRACTICE INSURANCE POLICY AND (2) JUDGE HASCHEFF'S FAILURE TO IMMEDIATELY NOTIFY AND PROVIDE DOCUMENTS TO MS. HASCHEFF SO SHE COULD DECIDE WHETHER SHE SHOULD PAY HER CONTRACTUAL SHARE OF THE CLAIM

1. On March 1, 2020, in order to comply with the requirements of Section 35.2, Judge Hascheff emailed Mr. Meador the following written notice:

> "I was informed by Lucy Mason that I need to contact you regarding my reimbursement for attorney fees and costs incurred pursuant to section 40 of the settlement agreement dated September 1, 2013. The amount owed to date by Lynda is $4,675.90. I provided all the documentation that Lucy requested which I assume you have which includes the billing invoices. I intend to enforce the settlement agreement because I've been sued for malpractice. A subsequent action or set off is necessary because Lynda has refused to indemnify me pursuant to section 40. We can avoid this action by her simply making the payment referenced above within 10 days of the notice. If the payment is not made within the 10 day I will proceed accordingly.
>
> "Thank you for your consideration in this matter." 1 AA 179-180.

2. Unless specifically required under contract, there is no notice requirement, and failure to provide notice cannot, as a matter of law, create a breach of the implied covenant of good faith and fair dealing and/or any breach of fiduciary duty. Issues of good faith, fair dealing, and/or fiduciary duties do not arise as a matter of law simply because the indemnitee exercises its right to indemnity. *See, Harvey, supra*, 109 Nev. at 623, 856 P.2d. at 240-41 (jury rejected the indemnitor's claims for bad faith, breach of a fiduciary duty, and breach of the implied covenant of good faith and fair dealing); *Nelson, supra,* 123 Nev. at 224-25, 163 P. 3d at 425-26 (purchaser sued seller for breach of the implied covenant of good faith and fair dealing for failure to disclose water damage; however, the court determined because there was no contractual duty to notify or disclose the same, there could be no breach of the implied covenant for failure to notify). *See also, Insur. Co. of the West v. Gibson Tile Co., Inc.,* 122 Nev. at 463, 134 P.3d at 703 (no bad faith as matter of law, and fiduciary duty instruction is prejudicial and erroneous).

3. Liability for bad faith is strictly tied to the implied-in-law covenant

of good faith and fair dealing arising out of an underlying contractual relationship, and when one party performs a contract in a manner that is unfaithful o the purpose of the contract and the justified expectations of the other party are denied, damages may be awarded. *See, United Fire Ins. Co., supra,* 105 Nev. at 511, 780 P.2d at197; *Gibson Hotels Corp., supra.,* 107 Nev. at 234, 808 P.2d at 923; *Geyson, supra*, 322 Conn. at 399-400, 142 A.3d at 237-38. However, reasonable expectations are determined by various factors and special circumstances that shape these expectations. When one party to the contract deliberately contravenes the intention and the spirit of the contract a breach may arise. However, bad faith means more than mere negligence; it involves dishonesty. A covenant cannot be breached by an honest mistake, bad judgment, or negligence. The covenant cannot be breached for conduct amounting to a series of mistakes that were not the result of a corrupt or sinister motive, and absent a dishonest purpose, a breach of the covenant is legally insufficient. *See, Renown Health, supra*, 2019 WL 1530161, at *1-2.

4. Fiduciary obligations of undivided loyalty and confidentiality impose substantially more demanding duties than the implied covenants. The implied

covenant of good faith is not a fiduciary duty and narrower in scope than a fiduciary duty. *See, Renown Health, supra*, 2019 WL 1530161, at *2.

5. Finally, familial relationships may impose a fiduciary duty. However, Judge Hascheff and Ms. Hascheff are former spouses. A fiduciary relationship is particularly likely to exist when there is a family relationship, *See, Perry, supra,* 111 Nev. at 947, 900 P.2d at 338 (1995). However, a mother-son relationship, standing alone, does not establish a confidential relationship. *See, Liapis, supra*, 128 Nev. at 421-22, 282 P.3d at 738. As former spouses, the law will not impose any fiduciary duty on the parties, as they have no relationship.

6. Having once correctly found and concluded that the language of Section 40 did not require Judge Hascheff to provide notice of either the collateral trust action or the malpractice action to Ms. Hascheff, and that it was barred from undertaking equitable considerations regarding Section 40's language, the district court then inconsistently employed the equitable doctrine of laches to rewrite the language of Section 40 in order to require Judge Hascheff to provide immediate notice of both the collateral trust action and the malpractice action to Ms. Hascheff. 4 AA 721-723. The district court then, in error and without supporting

evidence, as Ms. Hascheff did not testify, found that "Judge Hascheff's conscious disregard and selective enforcement of MSA § 40 [was] comparable to a claim for laches" (4 AA 723, ll. 3-9; that "Ms. Hascheff [was] prejudiced by Judge Hascheff's actions due to his deliberate delay in invoking his rights under MSA § 40" (4 AA 723, ll. 9-11); and that, "[a]lthough immediate notice [was] not explicitly required in MSA § 40, Judge Hascheff's delay prejudiced Ms. Hascheff" (4 AA 723, ll. 11-12). The district court then arbitrarily and capriciously, and without supporting evidence, concluded that "Ms. Hascheff ha[d] been prejudiced by Judge Hascheff's actions to the point where granting Judge Hascheff's requested relief would be inequitable" (4 AA 723, ll. 18-21"; and that, "had Judge Hascheff exercised his rights and obligations under the MSA in a timely fashion and without obfuscation, Ms. Hascheff would not have been prejudiced" (4 AA 723, ll. 21-24).

Finally, the Court misinterpreted Judge Hascheff's accounting of his fees and costs, and the payments by his malpractice carrier. 4 AA 722, ll. 1-20. Pursuant to the policy, Judge Hascheff was required to pay the first $14,000 of fees, because of the deductible. However, the insurance company decided to pay

$2,500 toward his defense, even though they had no obligation under the policy. In addition, the $10,000 deductible did not apply until the malpractice complaint was filed against Judge Hascheff, so he had to pay the fees and costs incurred prior to the filing of the Complaint, which were not applied toward the deductible. Judge Hascheff provided the Court with a complete account substantiating his indemnity claim account in the papers filed with the district court multiple times. 1 AA 144, ll. 10-21; 1 AA 154, ll. 1-24. Yet the district court concluded that he failed to provide a complete and transparent accounting, and that he was required to authorize his attorney to share privileged communications and strategy with Ms. Hascheff's counsel.

V

MS. HASCHEFF OFFERED NO EVIDENCE TO SUPPORT HER ARGUMENT THAT JUDGE HASCHEFF ACTED IN BAD FAITH OR THAT SHE WAS PREJUDICED

Ms. Hascheff did not testify at the December 21, 2020, Hearing. 4 AA 591-702. As such, Ms. Hascheff offered no evidence to support her argument that Judge Hascheff acted in bad faith or that she was prejudiced. Thus, there was no

evidence to support a finding that Judge Hascheff acted in bad faith or that she was prejudiced.

The district court's decision (4 AA 711-725) turns on the conclusion that Judge Hascheff acted in bad faith (4 AA 721-723), causing prejudice to Ms. Hascheff:

> "Based on Judge Hascheff's testimony, the Court finds Ms. Hascheff has been prejudiced by Judge Hascheff's actions due to his deliberate delay in invoking his rights under MSA § 40. Although immediate notice is not explicitly required in MSA § 40, Judge Hascheff's delay prejudiced Ms. Hascheff...." 4 AA 723, ll. 9-13.

In order to establish prejudice, it would seem that Ms. Hascheff would at least need to testify and say what Judge Hascheff did and why she was prejudiced.

CONCLUSION

The district court's February 1, 2021, Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for Attorneys' Fees and Costs (4 AA 711-725) had the effect of imposing a notice and time requirement for the indemnity agreement that did not exist and in effect, applied

laches without evidence of prejudice, defeating entirely the indemnity provision.

Therefore, the Court should reverse the district court's February 1, 2021, Order and remand this case to the district court with instructions to deny Ms. Hascheff's June 16, 2020, Motion for Clarification or Declaratory Relief Regarding Terms of MSA and Decree (1 AA 082-136), and to grant Judge Hascheff's July 8, 2020, Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders (1 AA 176-205), including, but not limited to, enforcing the terms of the parties' incorporated Marital Settlement Agreement (1 AA 057-078); ordering the payment of $4,675.90 indemnification by Ms. Hascheff to Judge Hascheff, pursuant to Sections 35 and 40 of the parties' Marital Settlement Agreement; and ordering Ms. Hascheff to pay Judge Hascheff's attorney's fees and costs incurred in enforcing the terms and provisions of Sections 35 and 40 of the parties' Marital Settlement Agreement.

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AFFIRMATION

The undersigned hereby declares that the within document does not contain the Social Security Number of any person.

DATED this 18th day of November, 2021.

GORDON, REES, SCULLY,
MANSUKHANI I, LLP

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CERTIFICATE OF COMPLIANCE

1. I hereby 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 this brief has been prepared in a proportionally spaced typeface using Word Perfect X4 in Arial Font.

2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7), because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced and contains 9,625 words.

3. Finally, I hereby certify that I have read this appellate 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 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 the accompanying brief is not in conformity

with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of November, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(b) of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of Gordon Rees Scully Mansukhani and that on this date, I served a true and correct copy of the attached document as follows:

_____ By placing the document(s) in a sealed envelope with first-class US. Postage prepaid, and depositing for mailing at Reno, Nevada, addressed to the person at the last known address as set forth below.

__✓__ Electronic Filing states that the attached document will be electronically mailed; otherwise, an alternative method will be use.

_____ By personally delivering the document(s) listed above, addressed to the person at the last known address as set forth below.

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DATED this 19 day of November, 2021.

Holly Mitchell

Holly Mitchell