IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Case No. 82626

PIERRE A. HASCHEFF,

Appellant/Cross-Respondent,

vs.

LYNDA L. HASCHEFF,

Respondent/Cross-Appellant.

Appeal From Special Order Entered After Final Judgment
Second Judicial District Court Case No. DV13-00656

RESPONDENT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NRAP 26.1 DISCLOSURE STATEMENT

The following law firms have lawyers who appeared on behalf of the Respondent/Cross-Appellant Lynda Hascheff or are expected to appear on her behalf in this Court:

Leonard Law, PC
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DATED December 15, 2021

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JURISDICTIONAL STATEMENT

The February 1, 2021 Order on appeal ("the Order") interpreted and declared the parties' respective rights and obligations under their Marital Settlement Agreement ("MSA"). The MSA was incorporated and merged into the parties' divorce decree entered on November 15, 2013. 1AA0080-81. As a result, the Order is a special order entered after final judgment. 4AA0711-0725. The Court has jurisdiction over the appeal and cross appeal under NRAP 3A(b)(8).

Notice of entry of the Order was filed on February 10, 2021. 4AA0726-0744. Appellant Pierre Hascheff filed his notice of appeal on March 10, 2021. 4AA0745-0746. Lynda Hascheff filed her notice of cross appeal on March 16, 2021. RA0001-0003.[1] The appeal and cross appeal were timely filed pursuant to NRAP 4(a)(1)-(2).

ROUTING STATEMENT

The appeal and cross appeal challenge a post-judgment order involving family law matters and are therefore presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7) and NRAP 17(b)(10).

[1] Pierre's counsel never conferred with Lynda's counsel as required by NRAP 30(a) regarding a joint appendix and omitted Lynda's Notice of Appeal from the appendix that he filed. Lynda's Notice of Appeal is provided in Respondent's Appendix filed concurrently herewith. RA0001-0003.

ANSWERING BRIEF ON APPEAL

ISSUES ON APPEAL

1. Did the district court correctly conclude that Lynda had no indemnification obligation to Pierre under the facts presented because:
    a. Pierre failed to demonstrate that the money he demanded was Lynda's responsibility under the plain language of MSA §40;
    b. Pierre was dilatory in making the demand, evasive, and acted in bad faith to Lynda's prejudice, in violation of the further assurances clause in MSA §37; and
    c. Laches warranted declaratory relief in Lynda's favor?
2. Because Pierre was not the prevailing party and did not comply with the pre-filing conditions in MSA §35.2, did the district court correctly deny his request for fees?

STATEMENT OF THE CASE

The parties' MSA, which was incorporated into their final divorce decree in 2013, contained a provision (§40) whereby Lynda must indemnify Pierre for half the fees incurred for a "defense and judgment" should a legal malpractice action be filed against him. 1AA0072. In January 2020, Pierre invoked MSA §40 to demand that Lynda indemnify him for $5,200.90, plus further bills he said would be forthcoming, that he purportedly incurred to defend against a malpractice action.

1AA0101-0105. He provided no documentation of the work performed to show that his demand came within the ambit of MSA §40. 1AA0101-0105.

Lynda requested information to evaluate Pierre's demand. Pierre refused to provide descriptions of the tasks performed by his lawyer, claiming they were protected by the attorney-client privilege. 1AA0164. Pierre insisted that Lynda simply had to pay him the money he demanded based on his contention that MSA §40 applied. 1AA0164.

Because Pierre was unyielding, Lynda was compelled to retain a lawyer to obtain the information she needed and understand her rights and obligations. 1AA0117-0125, 0130-0136, 0168. After months of Pierre's stonewalling, on June 16, 2020, Lynda filed a Motion for Clarification or Declaratory Relief regarding Terms of MSA and Decree ("DR Motion"). 1AA0082-0136. In her DR Motion, Lynda requested declaratory relief related to MSA §40's indemnification provision. 1AA0082-0094. Lynda further requested that Pierre pay the costs and fees she incurred in connection with her attempts to obtain information, respond to his demands and engage in the motion practice to establish her rights and obligations. 1AA0094. Although interpretation of the MSA's indemnification provision was already being briefed in Lynda's DR Motion, Pierre filed a Motion for Order to Show Cause, or in the Alternative, to Enforce the Court's Orders,

seeking to have Lynda held in contempt of court for allegedly violating the MSA ("OSC Motion"). 1AA0176-0205.

Following briefing and a hearing, at which the district court accepted documentary evidence and Pierre testified, the district court issued 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 Attorney's Fees and Costs ("the Order"). 4AA0711-0725.

Pierre appeals from the grant of the Lynda's DR Motion and denial of his OSC Motion. Lynda cross appeals from the portion of the Order that denied her request for fees and costs.

STATEMENT OF THE FACTS

A. The Marital Settlement Agreement

The parties were married for 23 years until Pierre filed for divorce from Lynda in 2013. 1AA0001-0004, 0061. Pierre is a former practicing lawyer who is now a judge in Reno Justice Court. 1AA0029-0030. Section 40 of the parties' MSA provided that Lynda must indemnify Pierre for "the costs of any defense and judgment" "in the event [Pierre] is sued for malpractice" related to his former law practice. MSA §40, 1AA0072.

Two additional terms of the MSA are pertinent to this appeal. First, MSA §37 contains a "further assurances" clause, which provides:

> Husband and Wife shall each execute and deliver promptly on request to the other any and all additional papers, documents, and other assurances, ***and shall do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement***. If either party fails or refuses to comply with the requirements of this paragraph ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

1AA0072 (emphases added).

> Second, MSA §35.1 contains a prevailing party fee and cost clause:
>
> 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.

1AA0071. To qualify for such an award, the prevailing party who brings the action or proceeding to enforce the MSA must first give the other party at least 10 days written notice that specifies:

> (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 for 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.

MSA §35.2, 1AA0071. The MSA was incorporated and merged into the parties' divorce decree entered on November 15, 2013. 1AA0080.

B. Pierre Made A Sizeable Monetary Demand Without Supporting Documentation To Show That Lynda Had Any Obligation To Pay It

Over six years after the parties divorced, on January 15, 2020, Lynda received an undated letter from Pierre demanding that she pay him $5,200.90 for legal fees he claimed to be incurring in an "on-going" malpractice action. 1AA0101. He provided portions of invoices from a law firm but omitted the time entries that described the work actually performed. 1AA0102-0104.

The invoices revealed that the work for which Pierre sought indemnification had commenced nearly a year and a half earlier in 2018. 1AA0102-0104. Pierre's January 15, 2020 demand was the first time Pierre had said anything to Lynda regarding any alleged malpractice claim. 1AA0101. The invoices also showed that part of the bill had been paid by Pierre's malpractice insurance carrier, but Pierre's demand to Lynda did not offset those amounts. 1AA0101-0104. In his demand letter, Pierre warned Lynda that he would be sending additional invoices as fees continue to accrue. 1AA0101.

C. Pierre Evaded Lynda's Attempts To Obtain Further Information And Never Provided Proof That The Fees He Sought Were Within The Scope Of MSA §40

Because Pierre is a lawyer and Lynda is not, to evaluate Pierre's demand, Lynda asked her sister, Lucy Mason, a former California lawyer, to review the demand and communicate with Pierre. 1AA0175; 2AA0404-0414. Ms. Mason

emailed Pierre on February 4, 2020, requesting the following documentation to assess his demand:

> 1. A copy of the insurance policy pursuant to which you have made a claim;
> 2. All correspondence with your insurance company and adjuster about the claim;
> 3. All detailed billings/invoices you have received to date from Lemons, Grundy or any other firm working on your behalf on this matter, including all time entries by attorneys working on the claim;
> 4. All proof of payment you claim you have made on any bills reflected in 3) above;
> 5. All relevant pleadings in this matter, including but not limited to your response to the complaint

1AA00175. She also noted that, although Pierre had known about the potential malpractice claim for over 16 months, he had failed to inform Lynda, which was a breach of his fiduciary duty. 1AA0175.

In response, Pierre provided a malpractice complaint and insurance policy but refused to provide the narratives of the time entries on his attorney's bills, asserting they "include attorney-client communications." 1AA0164. The complaint showed that Pierre was sued for malpractice on December 26, 2019 by his former client Todd Jaksick ("the Malpractice Action") just a few weeks before Pierre made his demand to Lynda, yet his demand to Lynda included fees that he supposedly incurred starting in September 2018. *Compare* 1AA0110 *to* 1AA0104. The Malpractice Action related to an estate plan that Pierre prepared for Todd's father, Sam Jaksick, and associated trust documents and agreements prepared for

Todd and his trusts. 1AA0110-0114. Todd had been sued by his siblings, Stanley Jaksick and Wendy Jaksick, regarding their father's estate ("the Jaksick Trust Action"). 1AA0110-0114.

Oddly, Todd's complaint alleges "Plaintiffs believe and allege herein that the Defendant proceeded at all times in good faith and with the best interests of the Plaintiffs and Samuel S. Jaksick, Jr. as his first priority." IAA0104. Nevertheless, Todd alleged, if he were deemed liable to his siblings, Pierre should be liable to him. IAA0114. Pierre email stated that "[t]he malpractice litigation is on hold until the underlying case is completed." IAA0164.

Pierre contended that his demand included fees that were billed starting in 2018 because he was subpoenaed in the Jaksick Trust Action as a percipient witness and asked to produce his file. IAA0164. According to Pierre, "there was a concern that a malpractice action would follow so I immediately retained a lawyer through the insurance company." IAA0164. He stated that he was deposed and testified at trial, and that "[m]y lawyer attended all sessions." IAA0164. Yet, Pierre never notified Lynda of these events when they were occurring, and hiding behind the attorney-client privilege, Pierre contended that Lynda had no right to know the services for which Pierre demanded she indemnify him. IAA0164; 4AA0696-0700. According to Pierre, he only had to "prove that I paid the bill" and that his ex-wife must simply trust his representation that the work performed was part of her

indemnity obligation. 1AA0164. He also reiterated that "[t]he litigation is continuing and the[re] will be more bills." 1AA0164.

After Ms. Mason was unsuccessful in obtaining the needed information from Pierre, Lynda retained lawyer Shawn Meador to assist her in assessing her indemnity obligation. On March 2, 2020, Mr. Meador emailed Pierre requesting unredacted invoices: "I need to determine what fees have actually been charged and paid, without contribution from insurance company, in the malpractice action that appears to be on hold. I cannot do that without seeing the actual bills and time entries." 1AA0168. He also requested correspondence Pierre and his counsel had with Todd Jaksick (the former client who sued Pierre) and Mr. Jaksick's counsel. 1AA0168. Pierre again refused, asserting the attorney-client privilege. 1AA0167.

In his response to Pierre, Mr. Meador stated:

> Lynda is prepared to honor her obligation to pay her share of the costs and fees incurred in the malpractice action that have not been covered by insurance. I do not have sufficient information on which to evaluate what she does or does not owe you at this time because you have objected to providing that information. Upon receipt of the requested documents and other information, I will evaluate your demands with Lynda and she will pay what she owes under the agreement your lawyer drafted.

1AA0119.

Pierre waited over six weeks before responding, at which time he informed Mr. Meador he had retained counsel. 1AA0121. Pierre again asserted attorney-client privilege as his basis for withholding the information Lynda requested.

1AA0121. Having been informed that Pierre was now represented by counsel, that same day (April 20, 2020), Mr. Meador emailed Pierre's lawyers pointing out why Pierre could not hide behind the attorney-client privilege yet demand that Lynda indemnify him based on his unsupported assertions that the fees he incurred were within the MSA §40 obligation:

> I have previously outlined the information I need to review in order to provide my client with thoughtful and informed advice. Judge Hascheff's insistence that my client must simply accept his demands and that she is not entitled to basic and fundamental information about the very fees he insists she must share, is not supported by the law or common sense. Upon receipt of the information I have requested I will be happy to review and evaluate Judge Hascheff's claims and demands in good faith and will respond promptly.
>
> * * *
>
> I continue to look forward to receipt of the information I have previously requested so that I can give my client appropriate advice.

1AA0124.

Another six weeks passed with no response. On May 29, 2020, Pierre's counsel delivered a letter to Mr. Meador that again provided redacted billing statements, rendering Lynda unable to evaluate Pierre's demand. 1AA0127-0128. He also provided a declaration from Todd Alexander, the lawyer representing Pierre related to the Jaksick Trust Action and Malpractice Action. 1AA0107-0108. Among other things, that declaration made clear that Mr. Alexander was solely representing Pierre's interests, not Lynda's. 1AA0107. Mr. Alexander also declared: "Any correspondence between Hascheff and my firm is protected by

attorney-client privilege and will not be produced. Similarly, any correspondence and all communications between my firm and Jaksicks' attorneys are also privileged and/or confidential and will not be produced." 1AA0108. In other words, Pierre asserted a privilege over the communications with his **adversary** in the Malpractice Action. 1AA0108.

Mr. Meador responded on June 2, 2020, pointing out that Pierre's lawyer failed to address any of the issues and concerns raised in the previous correspondence. 1AA0130-0133. He also noted that, because Mr. Alexander's declaration confirmed he was only protecting Pierre's interests, Lynda has no one protecting her from the risk that Todd Jaksick's malpractice claim might pose. 1AA0130-0131. Mr. Meador also raised a concern that Pierre appeared to have represented: (1) Todd Jaksick individually and as trustee and beneficiary of his father Sam's trust; (2) Sam Jaksick; (3) Sam's trust; and (4) Todd's family trust, presenting a web of potential conflicts for which Pierre may not have obtained written waivers. 1AA0131. If that were the case, Mr. Meador wrote, Pierre might have procured MSA §40 through fraud because he did not inform Lynda at the time she signed the MSA of this known professional negligence. 1AA0132.

Mr. Meador also observed that the insurance policy Pierre provided had a $10,000 deductible. 1AA0132. Yet Pierre's initial demand had exceeded Lynda's half of that, and Pierre repeatedly stated in his correspondence that she would be

responsible for additional bills in excess of that amount. 1AA0132; *see* 1AA0101; 1AA0164. Mr. Meador then reiterated:

> Ms. Hascheff remains prepared to pay her one-half of the total fees and expenses related to the malpractice action… However, I need to know what the fees and costs have been that are directly related to the malpractice action so that Ms. Hascheff can pay her share of the undisputed fees and costs.

1AA0131. Mr. Meador closed his letter with the following:

> Pursuant to paragraph 35.2 of the parties' MSA, if we have not been able to reach an agreement within ten days of the date of this letter my client will file a declaratory relief action so that the court can determine my client's liability under these facts. To assure there is no confusion, my client's position is that she is responsible for one-half of the fees and costs associated with the malpractice action, that she is not responsible for Judge Hascheff's fees and costs as a percipient witness and that if Judge Hascheff knew or should have known the facts on which the malpractice claim was premised, this part of their MSA was obtained by fraud.

1AA0133. Mr. Meador sent a follow-up letter on June 11, 2020, again asking for information, to which there was no response. 1AA0134-0135. As this correspondence shows, Lynda tried for months to get Pierre to be transparent about the basis of his indemnification demand, but Pierre repeatedly rebuffed her efforts, compelling Lynda to file the DR Motion on June 16, 2020. 1AA0082.

Importantly, in his opening brief, Pierre repeatedly mischaracterizes Lynda's attempts to get information as "refusing" to comply with MSA §40. AOB 2, 3, 16, 33, 34. This was the same assertion made by Pierre below and is patently false. 1AA0119; 1AA0124; 1AA0131. The record shows that the correspondence from

Lynda states persistently that she was prepared to perform her indemnity obligation once Pierre provided descriptions of the legal services for which he claimed she owed half. 1AA0118-0119, 0124-0125, 0130-0133, 0135-0136, 0168, 0175; 2AA0412-0413. In rejecting Pierre's request to have Lynda held in contempt of court, the district court readily saw through Pierre's fabrications. 4AA0721-0722.

Notably, the only reference to the record that Pierre can muster for his misrepresentation is the place in his OSC Motion where he perpetrated the same falsehood. AOB 16 ¶17, citing 1AA0178:21-23. This is not evidence. *See Phillips v. State*, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989). It was also contradicted by Pierre himself, who acknowledged under oath at the hearing that Lynda's counsel had confirmed she **would** pay her half if Pierre demonstrated that the money he demanded was within the scope of the indemnity language. 4AA0670. Because Pierre's appeal is premised on a misrepresentation of the record, his arguments must be rejected.

D. Pierre Demanded Fees And Costs That Were Outside The Scope Of MSA §40 And That He Had Not Even Incurred

In the course of her investigation, Lynda learned that even though Pierre's January 2020 demand sought fees and costs starting in September 2018, no malpractice action was even filed until December 2019. 1AA0101-0105; 3AA0427-0432. Moreover, the malpractice suit was almost immediately stayed such that no fees were being incurred to defend against that action. 1AA0164.

The fees Pierre sought for work prior to December 26, 2019 related to a deposition subpoena Pierre received on July 31, 2018 in the Jaksick Trust Action. 3AA0482-0544. Pierre was not a party to the Jaksick Trust Action, and there is no evidence that a malpractice action against Pierre was threatened simply because his percipient witness testimony was sought. 4AA0658(68:11-17), 0659-0667(69:10-77:10). Pierre later testified as a percipient witness at trial in the Jaksick Trust Action. 4AA0658(68:16-17). No one contended in the Jaksick Trust Action that Pierre did anything wrong in his preparation of Sam's estate plan; rather the Jaksick Trust Action contended that Sam lacked capacity or that there was undue influence. 4AA0659-666(69:10-76:18). Nevertheless, Pierre chose to have a lawyer represent him in the Jaksick Trust Action, and his demand to Lynda included fees he incurred for that purpose. 1AA0107-0108; 3AA0528-0544.

As Lynda's counsel pointed out in his correspondence, the fees Pierre demanded were not incurred in the Malpractice Action, which had not even been filed at the time of the subpoena, deposition and trial in the Jaksick Trust Action, but rather arose out of Pierre's unilateral decision to retain a personal lawyer to represent him individually in his role as a percipient witness. 1AA0118, 0124; 3AA0528-0544. The lawyer Pierre retained insisted that he did not represent Lynda's interests but rather just Pierre's. 1AA0107. Moreover, the insurance company had paid some of the fees Pierre demanded. 1AA0104; 3AA0526.

E. The District Court Agreed With Lynda That Pierre Was "Not Transparent," Failed To Provide Documentation To Support His Demand, And "Ignored" Lynda's Requests For Information To Her Detriment

After Lynda filed the DR Motion, Pierre filed his OSC Motion asking the district court to hold Lynda in contempt of court. 1AA0176-205. The parties briefed both motions. 1AA0082-2AA0286. The district court held a hearing at which, in addition to hearing arguments from counsel, the district court considered documentary evidence from both sides and live testimony from Pierre. 4AA0591-0702. After taking the matter under submission, the district court issued an order that granted Lynda's DR Motion, denied Pierre's OSC Motion, and declined to award fees to Lynda pursuant to MSA §35.2, even though she was the prevailing party. 4AA0711-0725.

In the Order, the district court found "troubling" the fact that Pierre waited over a year to notify Lynda of the malpractice action. 4AA0722-0723. Regarding this and Pierre's conflicting positions as to whether Lynda was truly responsible for the fees he demanded, the district court found that Pierre "was not transparent about his request for indemnification" and failed to inform Lynda "that he was seeking indemnification for fees and costs related to a collateral trust action." 4AA0721-0722. The district court characterized Pierre's conduct as "conscious disregard and selective enforcement of MSA §40." 4AA0723.

The district court also found that Pierre "failed to provide a complete and transparent accounting" and was inconsistent in the amount that he demanded. 4AA0722. As noted by the district court, Pierre and his counsel "unilaterally imposed redactions" on his attorney's billing statements, "thereby obfuscating the true amount" of what would be within the scope of MSA §40. 4AA0722. The district court likewise found that Lynda's requests for information were "ignored." 4AA0722. In other words, Pierre not only belatedly demanded payment from Lynda, obstructing her ability to mitigate her financial exposure, but also failed to inform Lynda what the demanded payment was for. 4AA0721-0723.

F. Timeline Of Pertinent Events

To assist the Court, Lynda provides the following summary timeline of the events pertinent to this appeal:

Event	Date	Appendix Reference
Pierre closes his private law practice and becomes a justice of the peace.	January 2013	1AA0029, 0039
Pierre and Lynda divorce pursuant to the MSA, which contains a provision by which Lynda will indemnify Pierre for one half of a "defense and judgment" in a malpractice action.	November 15, 2013	1AA0072, 0079-0081
Wendy Jaksick sues her brother Todd regarding their father Sam's trust and estate (the "Jaksick Trust Action")	December 2017	1AA0112

Event	Date	Appendix Reference
As part of the Jaksick Trust Action, Wendy subpoenas Pierre for his file regarding Sam's estate plan and to sit for a deposition. Pierre does not notify Lynda.	July 2018	3AA0482-0544; 4AA0624, 0696-0700, 0704-0705
Pierre notifies the carrier of his tail malpractice policy and retains counsel to represent him as a witness in the Jaksick Trust Action but does not notify Lynda.	August 2018 (approx.)	4AA0698-0700
Pierre starts to incur fees related to his testimony in the Jaksick Trust Action but does not notify Lynda.	September 2018	1AA0104; 4AA0698-0700
Todd files the Malpractice Action against Pierre. Pierre does not notify Lynda.	December 26, 2018	1AA0110-0114
Todd and Pierre immediately stay the Malpractice Action. Pierre does not notify Lynda.		1AA0164
Pierre sends Lynda a handwritten letter demanding $5,200.90, which he contended she owed him under MSA §40. This was the first time Pierre informed Lynda of the Jaksick Trust Action or the Malpractice Action.	January 15, 2020	1AA0101-0105; 4AA0700
Pierre refuses to provide Lynda with descriptions of the legal tasks for which he demanded indemnification, as well as other information for Lynda to evaluate his demand, causing Lynda to retain an attorney and incur fees.	February-June 2020	1AA0117-0135, 0164
Lynda files her Declaratory Relief Motion asking the district court to determine the parties' relative rights and obligations related to the dispute and the MSA.	June 16, 2020	1AA0082-0136

Event	Date	Appendix Reference
Pierre files his Motion for Order to Show Cause asking the district court to hold Lynda in contempt of court for not acceding to his unsupported demand and forcing Lynda to incur additional fees to address the same issue already briefed in Lynda's DR Motion.	July 8, 2020	1AA0176-0205; 2AA0221-0231
The District Court grants Lynda's DR Motion and denies Pierre's OSC Motion but does not award Lynda her fees.	February 1, 2021	4AA0711-0725

SUMMARY OF THE ARGUMENT

Although the district court decided in Lynda's favor based on laches, the Court need not even reach that issue because the plain language of the MSA required the same result. The indemnification obligation in MSA §40 was limited to the "defense and judgment" in a malpractice action. Pierre failed to meet his burden to demonstrate that the sums he demanded from Lynda were incurred for that limited purpose and that he actually paid the amount he sought. To the contrary, Pierre readily acknowledged his demand exceeded that scope and amount.

Moreover, the record in this case clearly shows that Pierre did not comply with the "further assurances" clause found in MSA §37, which required him, when requested by Lynda, to promptly deliver "additional papers, documents, and other

assurances, and [to] do any and all acts and things reasonably necessary or proper" to allow Lynda "to carry out [her] obligations under this Agreement." The district court found that Pierre did the exact opposite: he delayed in responding to Lynda, was not transparent, and obfuscated the tasks for which he demanded fees. Having held a hearing at which the parties submitted documentary evidence and Pierre testified, the district court was in the best position to make these factual findings, and the Court should not disturb them on appeal.

Even should the Court look beyond the contract language, Pierre's conduct justified the application of laches. The record shows that Pierre's failure to timely inform Lynda of the malpractice action deprived her of the ability to mitigate her potential liability. His failure to timely provide the documents requested by Lynda or to disclose the information she needed to evaluate whether the sums he demanded were her obligation required Lynda to retain an attorney who ultimately had to seek and obtain declaratory relief because of Pierre's stonewalling. Whether laches is warranted in any particular case is fact specific, and the district court properly exercised its discretion to find that Pierre's conduct was grounds for laches.

Because Pierre did not prevail below and failed to satisfy the contractual prerequisites for a fee award under MSA §35.2, he cannot recover fees under the MSA. Rather, as discussed in the opening brief on cross appeal *infra*, Lynda

should recover her fees as the prevailing party pursuant to MSA §35.1 and for Pierre's violation of the further assurances clause in MSA §37. As a result, Lynda respectfully requests that the Court affirm the grant of her DR Motion but reverse and remand for the district court to award her fees and costs.

ARGUMENT

A. Standard Of Review

Contract interpretation and, specifically, the interpretation of a contractual indemnity clause, is a question of law that is reviewed *de novo*. *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 481, 376 P.3d 151, 155 (2016); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 339, 255 P.3d 268, 274 (2011).

"[W]hether a determination is proper in an action for declaratory relief is a matter within the trial judge's discretion that will not be disturbed on appeal unless abused." *El Capitan Club v. Fireman's Fund Ins. Co.*, 89 Nev. 65, 68, 506 P.2d 426, 428 (1973). An appellate court will generally uphold a district court's rulings in a divorce matter "that were supported by substantial evidence and were otherwise free of a plainly appearing abuse of discretion." *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

"The appropriate standard of review of a determination of whether laches applies in a particular case is abuse of discretion." *In re Beaty*, 306 F.3d 914, 921

(9th Cir. 2002). "The operation of laches generally is a question of fact for the judge, and a judge's finding as to laches will not be overturned unless clearly erroneous." 30A C.J.S. Equity § 160.

An appellate court will not disturb a correct district court decision, even though the district court relied on erroneous reasons or did not address the correct reasons. *Dynamic Transit Co., v. Trans Pac. Ventures, Inc.*, 128 Nev. 755, 760 n.3, 291 P.3d 114, 117 n.3 (2012) (citing *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981)); *see also Ford v. Showboat Operating Co.*, 110 Nev. 752, 755–56, 877 P.2d 546, 548–49 (1994) (holding that a respondent may advance any argument in support of a judgment or order that is raised and supported by the record below even if the district court rejected the argument or did not consider it).

B. The MSA's Plain Language Warrants Affirmance Of Declaratory Relief In Lynda's Favor

1. MSA §40 Limits Lynda's Indemnification Obligation To Half The Costs of Any Defense And Judgment In A Malpractice Action, Not Collateral Costs Pierre Chose To Incur

Although the district court decided the matter based on laches, the Court need not even reach that issue and may affirm based on the plain language of the MSA. *See Ford*, 110 Nev. at 755–56, 877 P.2d at 548–49. "Generally, when a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. 1, 7, 341

P.3d 646, 650 (2015) (*quoting Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005)). An indemnity clause must "be strictly construed" and enforced according to the terms stated within "the four corners of the contract." *Reyburn*, 127 Nev. at 339, 255 P.3d at 274, quoting *George L. Brown Ins. v. Star Ins. Co.*, 126 Nev. 316, 324-25, 237 P.3d 92, 97 (2010); *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 673, 289 P.3d 221, 226 (2012).

a. By Keeping Secret The Actual Tasks His Attorney Performed, Pierre Failed To Meet His Evidentiary Burden For Indemnification Under MSA §40

By using the attorney-client privilege as both a sword and shield, Pierre failed to demonstrate that the sums he demanded from Lynda were her indemnity obligation. The party who seeks to recover under a contract has the burden of proof to demonstrate that the performance demanded is required by the contract. *Forsyth v. Heward*, 41 Nev. 305, 170 P. 21, 24 (1918); *Ferguson v. Rutherford*, 7 Nev. 385, 390 (1872); *see Cont'l Cas. Co. v. Summerfield*, 87 Nev. 127, 131, 482 P.2d 308, 310 (1971).

Here, the plain language of MSA §40 indicates that Lynda was only obligated to indemnify Pierre once he was "sued for malpractice," and the scope of the indemnification was only for costs "of any defense and judgment." 1AA0072. In other words, to recover from Lynda under the indemnification provision of the MSA, it was Pierre's burden to demonstrate that: (1) he had been sued for

malpractice; and (2) the costs he sought to recover were incurred in defense of the malpractice action. 1AA0072. Pierre failed in both respects because nearly all the fees he demanded were incurred before the Malpractice Action was filed (when no one was accusing him of any wrongdoing), and he never disclosed descriptions of the actual services his attorney performed. 3AA0524-0544.

As the district court noted with dismay at the hearing:

> [The billing] is redacted to the point we don't even know – it doesn't even – telephone call with, and the rest is redacted, the entire section of that is redacted. I mean everything from that … we have two things that [are] redacted out in totality. We don't know whether or not it's [a] telephone call, whether it was an appearance, whether it was a review, whether it was a draft, we don't even know the simplistic aspect of what the work was.

4AA0610, *citing* 3AA0524-0544.

In his opening brief, Pierre contends that he was allowed to withhold privileged communications.[2] However, a party cannot use the privilege as both a sword and a shield. *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 381, 399 P.3d 334, 346 (2017). Having put the subject matter of his attorney's services at issue, Pierre waived the privilege as to what his attorney did. *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995).

[2] Notably, Pierre asserted the privilege over conversations he and his attorney had **with opposing counsel**. 1AA0108; 4AA0640-0641, 0654. These are not protected under NRS 49.095 or NRCP 26(b)(3).

Pierre's choice to keep secret the services his attorney performed necessarily meant either: (1) he failed to meet his burden of proof or (2) he waived the privilege and had to produce unredacted invoices in order to meet his burden of proof. *See Forsyth*, 41 Nev. at 305, 170 P. at 24; *Wynn*, 133 Nev. at 381, 399 P.3d at 346. He cannot have it both ways. *See id.* Because Pierre chose to hide behind the privilege, he failed to meet his evidentiary burden.

b. Fees Incurred In A Collateral Matter To Which Pierre Was Not A Party Are Not Lynda's Obligation

Disregarding the MSA's plain language, Pierre demanded from Lynda fees and costs he incurred in connection with his role as a percipient witness in a lawsuit to which he was not a named party. 1AA0101; 4AA0658(68:16-17). A plain language analysis leads to the unavoidable conclusion that a collateral suit does not qualify as the "defense and judgment" when Pierre is "sued for malpractice." 1AA0072.

At the time Pierre drafted MSA §40, he knew that a malpractice claim may be preceded by collateral litigation. Indeed, he argues in his opening brief that this is a common occurrence. AOB 12-15.[3] Given that Pierre contends collateral

[3] It is unclear from the opening brief whether Pierre contends he had counsel represent him as a percipient witness in the Jaksick Trust Action based on his belief that issues decided in that action would be subject to issue and claim preclusion in a subsequent malpractice suit. AOB 15. Because Pierre is not a party or privy to the Jaksick Trust Action, however, he would not be barred from raising defenses in the Malpractice Action. 4AA0658(68:16-17).

litigation is to be expected, had he wished Lynda's indemnity obligation to encompass collateral matters that are outside an actual malpractice suit, he could have drafted the MSA with broader language. He chose not to, and a court cannot rewrite the contract to impose new obligations or include terms that the parties did not use. *See Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 483, 133 P.3d 251, 254 (2006).

That Pierre may have thought it "reasonable" and "prudent" to retain counsel to represent him as a percipient witness in the Jaksick Trust Action does not alter the plain language of the MSA. 1AA0072. To expand Lynda's indemnity obligation, Pierre would have to fully advise her of the circumstances, obtain her consent in advance, and execute a written amendment to the MSA for approval by the district court. *See Griffin*, 122 Nev. at 483, 133 P.3d at 254. Absent express authority in the MSA – which does not exist – Pierre could not make a unilateral decision to retain counsel for a collateral matter and then impose the resulting fees on Lynda. *See id.*

This is particularly so where, as here, MSA §40 requires Lynda to indemnify Pierre for Pierre's own negligence. An indemnification clause in which a party is indemnified for his own negligence must unequivocally express that intent and be strictly construed. *George L. Brown Ins.*, 126 Nev. at 324-25, 237 P.3d at 97; *Reyburn*, 127 Nev. at 339, 255 P.3d at 274. MSA §40 shows that the parties only

intended for Lynda to indemnify Pierre in the limited circumstances stated in the MSA: fees and costs incurred in the "defense and judgment" of a malpractice suit. 1AA0072. Strict construction of this language means the Court must limit the indemnity solely to that which the parties expressly stated in the MSA. *See Reyburn*, 127 Nev. at 339, 255 P.3d at 274. Contrary to Pierre's assertion (AOB 18), the indemnity was not "self-executing" to encompass everything and anything he wanted it to.

c. Lynda's Indemnity Obligation Does Not Include Fees And Costs Paid By The Malpractice Carrier

As he admitted in the district court, Pierre demanded more money from Lynda than his total potential liability. 2AA0235. A right of indemnity for damages only accrues when the indemnitee proves actual payment. *Jones v. Childs*, 8 Nev. 121, 125 (1872). This means an indemnitee cannot recover from the indemnitor more than the amount for which the indemnitee is liable. *See id.*

In his original demand, Pierre insisted that Lynda pay him $5,200.90 and that more bills would be forthcoming. 1AA0101. Pierre reiterated in his email to Ms. Mason that "the[re] will be more bills." IAA0164. In various correspondence, he vacillated on the actual amount of the demand, contending it was $4,675.90, then $4,924.05. 1AA0117; 1AA0154. But he indicated that the fees Lynda would have to pay would continue to accrue. 1AA0121, 0164.

Many months after making his demand, in a misleading effort to make Lynda look unreasonable for having filed the DR Motion, Pierre asserted in briefing below that because the tail insurance policy had a $10,000 deductible, the most Lynda would be obligated to pay him would be $5,000, even though his initial demand exceeded that amount. *Compare* 2AA0235 *to* 1AA0101. That was the first time Pierre informed Lynda that he believed there was a cap on her potential liability, and it contradicted the position he had taken in his earlier correspondence. 1AA0101, 0121, 0164; *see also* 4AA0698(108:15-17).

Moreover, in opposing Lynda's DR Motion, Pierre stated that the carrier of his malpractice tail policy "picked up the defense and paid defense fees in the trust litigation of $2500, although not required under the policy…." 1AA0144. The invoices confirm the malpractice carrier paid such fees, yet Pierre's demands did not offset the carrier's payments. 1AA0101-0105, 3AA0524-0544. As the district court correctly found, Pierre never provided a clear accounting of what he purportedly paid and what the carrier paid. 4AA0739. MSA §40 does not allow Pierre to recover a windfall from Lynda. *See Jones*, 8 Nev. at 125.

2. The MSA's Further Assurances Provision Obligated Pierre To Timely Inform Lynda Of A Malpractice Claim And Provide Her Information To Justify His Indemnity Demand

Declaratory relief in Lynda's favor can likewise be affirmed based on the plain language of the MSA's further assurances clause. MSA §37 required the parties to:

> ***do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement***. If either party fails or refuses to comply with the requirements of this paragraph ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

1AA0072 (emphases added). Generally, a further assurances clause requires a contracting party to take all such actions that are necessary to effectuate the core commitments in a contract. *See In re Winer Fam. Tr.*, No. 05-3394, 2006 WL 3779717, at *3 n.6 (3d Cir. Dec. 22, 2006) (characterizing purpose of further assurances clause as "ensur[ing] that the parties would not obstruct each other's efforts to comply with their specific obligations."). The breach of a further assurances clause constitutes a breach of contract. *See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn.*, 84 A.3d 840, 855 (Conn. 2014).

Pierre's opening brief accuses the district court of writing a notice provision into the MSA that does not otherwise exist. AOB 20. Yet MSA §37 clearly obligated Pierre to "do any and all acts and things reasonably necessary or proper

to carry out [his] obligations" and for Lynda to carry out her obligations under the MSA. 1AA0072. The district court found that depriving Lynda of critical information that could affect her potential liability under MSA §40 for over a year, failing to be transparent, and engaging in delay tactics was improper and prejudicial. 4AA0721-0723.

Although the district court concluded that these facts gave rise to laches, the same facts demonstrate Pierre's breach of MSA §37 because the information withheld by Pierre was "reasonably necessary" for Lynda to evaluate her risk and liability. Having failed to comply with MSA §37, Pierre could not enforce MSA §40 against Lynda. *See Laguerre v. Nevada Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011) (noting that, under Nevada law, a plaintiff's own performance under a contract is an essential element of a breach of contract claim).

In light of MSA §37, the cases Pierre cites for the supposed proposition that an indemnitee has no obligation to notify an indemnitor of a settlement are of no consequence. AOB 20-24. The only Nevada decision he cites is an unpublished disposition from 2013, which NRAP 36(c)(3) prohibits him from citing. AOB 23. That non-authoritative case, and the other cases to which Pierre points, do not have the facts that exist here: an indemnitee who seeks indemnification for his own negligence under a contract that strictly confines the indemnification obligation to limited circumstances and requires the indemnitee to "do any and all acts and

things reasonably necessary or proper" for the parties to carry out their contractual obligations. 1AA0072. Unlike in the cases cited by Pierre, this case does not involve a settling indemnitee; it involves an indemnitee who, for a year and half, intentionally kept secret from the indemnitor the facts and circumstances of a malpractice claim, thereby depriving her of the ability to mitigate her potential liability. This violated not only the language but also the spirit of MSA §37.

C. The District Court Correctly Applied Laches To Pierre's Prejudicial And Dilatory Conduct

Although this case can be decided in Lynda's favor based purely on the contract language, the facts as viewed and weighed by the district court also soundly supported the conclusion that laches warranted declaratory relief in Lynda's favor.

1. The District Court Could Recognize A Laches Defense In A Declaratory Relief Action

Pierre erroneously argues that the district court was barred from invoking laches in a contract action. AOB 29. This argument disregards that the matter involved declaratory relief to interpret the respective rights and obligations in the MSA (sought by Lynda) and for contempt proceedings (sought by Pierre). "[T]he declaratory judgment and injunctive remedies are equitable in nature and other equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105

(1977). "Declaratory and injunctive relief are equitable remedies and may thus be barred by laches." *Sierra Club v. U.S. Dep't of Transp.*, 245 F. Supp. 2d 1109, 1114 (D. Nev. 2003); *see also Lincoln Benefit Life Co. v. Edwards*, 243 F.3d 457, 462 (8th Cir. 2001) ("A court of equity has inherent power to restore justice between contracting parties"); *Andersen, Meyer & Co. v. Fur & Wool Trading Co.*, 14 F.2d 586, 589 (9th Cir. 1926) ("As the subject-matter here involved belongs to the class of cases of which a court of equity has jurisdiction, the objection so made to the jurisdiction in equity because of an adequate remedy of law will be disregarded."); *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019) (recognizing a laches defense to a case at law). Laches can apply to bar a request to hold a party in contempt. *See McGuffin v. Springfield Hous. Auth.*, 662 F. Supp. 1546, 1550 (C.D. Ill. 1987).

As these authorities demonstrate, the fact that the district court was tasked with interpreting a contract did not prevent it from invoking laches. *See id.*; *Abbott Labs.*, 387 U.S. at 155. While *Reyburn* has language that "[w]hen the duty to indemnify arises from contractual language it ***generally*** is not subject to equitable considerations," the use of the word "generally" indicates that this is not a hard and fast rule. *See* 127 Nev. at 339, 255 P.3d at 274. Since the exception applies here to both declaratory relief and contempt proceedings, the district court properly

invoked laches to determine that Pierre's egregious conduct warranted declaratory relief in Lynda's favor. *See Abbott Labs.*, 387 U.S. at 155.

2. The Facts Found By The District Court Satisfy The Requirements For Laches

Having reviewed the evidence and observed Pierre's testimony, the district court was best situated to find that the facts presented a case for laches.

> Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable. To determine whether a challenge is barred by the doctrine of laches, this court considers (1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others.

Miller v. Burk, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008) (quoting *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992)). "Applicability of the laches doctrine depends upon the particular facts of each case." *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997), citing *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). As the trier of fact, "the district court is in the best position to adjudge the credibility of the witnesses and the evidence" and should not be second-guessed by the reviewing court. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006), quoting *State v. McKellips*, 118 Nev. 465, 469, 49 P.3d 655, 658 (2002).

As the district court correctly concluded, the facts here justified ruling against Pierre on the basis of laches. 4AA0719-0721. Pierre waited a year and a half before he first informed Lynda of a potential malpractice claim. 1AA0101; 4AA0698(110:14-17). He then withheld pertinent information from her, which prompted months of requests that he denied. 1AA0164-0165, 0175. Pierre's position was that his former wife had no choice but to trust him that the indemnity provision applied and send him a check simply because he demanded one. 1AA0164. Having reviewed the evidence and heard Pierre's testimony, the district court found his conduct "troubling," "not transparent," and incomplete and that Lynda was thereby prejudiced. 4AA0721-0723.

In his opening brief, Pierre erroneously contends that testimony from Lynda was needed for the district court to find she was prejudiced. AOB 40. The documentary evidence, however, speaks for itself. By keeping Lynda in the dark, notwithstanding Pierre's contention that the defense of the malpractice action was a joint obligation, Pierre deprived her of the opportunity to exercise what should have been her equal and equivalent right to participate in management of the litigation. 1AA0124.

Because Pierre's attorney said he represented Pierre's interests alone, Lynda could have retained her own counsel to observe the Jaksick Trust Action and evaluate whether it called into question the legal services provided by Pierre.

1AA0124, 00130-0131. Had she been given the opportunity to retain counsel, her lawyer could have observed Pierre's testimony in the Jaksick Trust Action for content and credibility, evaluated how Pierre's potential conflicts of interest related to the Jaksick family might constitute professional negligence, and participated in the strategy decisions that Pierre made unilaterally. 1AA0125, 00130-0131. Not being a lawyer, Lynda's interests in obtaining legal advice were greater than Pierre's. 1AA0132.

Pierre also contends the district court purportedly "misinterpreted [his] accounting of his fees and costs." AOB 39. Yet to back that up, he makes multiple assertions that lack any citation to the record whatsoever. AOB 40. Where he does cite the record for the proposition that he provided "a complete account substantiating his indemnity claim," his references actually undermine, rather than support, him. AOB 40. First, he cites portion of a bill from August 27, 2019 that purports to show some payments being made by "Allied World" and some by "PAH Limited LLC." AOB 40, citing 1AA0144. But Pierre's demand included fees that post-dated that time. 3AA523-0524. So, the portion of that bill was neither "complete" nor an "account[ing]." *See id.*

Second, Pierre pointed to a chart that his lawyer included in the Opposition to Lynda's DR Motion. AOB 40, citing 1APP0154. This is not evidence. *See Phillips*, 105 Nev. at 634, 782 P.2d at 383. Even if it were, the chart is plainly

wrong because, in it, Pierre claims fees incurred "after [the] malpractice suit" starting in January 2019 when Todd Jaksick's Malpractice Action was not filed until December 26, 2019, nearly a year later. *Compare id. to* 1AA0110. Given that this is the only thing to which Pierre could point for his supposed "accounting," the district court correctly found that it was inadequate. 4AA0722.

In sum, Pierre's delay and failure to provide basic and complete information precluded Lynda from mitigating her potential risk posed by Pierre's professional negligence. 1AA0124-0125. It materially impaired her from protecting herself against a potential judgment for which she might be 50% responsible. 1AA0125. It also precluded her from determining whether Pierre had procured MSA §40 through fraud because he knew of conflicts of interest among the Jaksick family members that he represented. IAA0131. The issue of prejudice is an issue of fact, and the district court was best positioned to make these factual findings and conclude that they give rise to laches. *See Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 127 Nev. 548, 558, 256 P.3d 958, 965 (2011).

In an analogous case involving delay and obfuscation in notifying an indemnitor that his indemnity obligation might be triggered, thereby prejudicing the indemnitor's position, the Supreme Court invoked laches to conclude that "[i]t would … be inequitable to permit the [indemnitee] to proceed with its indemnity claim." *Erickson v. One Thirty-Three, Inc., & Assocs.*, 104 Nev. 755, 758, 766

P.2d 898, 900 (1988). The same is true here. Under the facts and circumstances, applying laches to enter declaratory relief in favor of Lynda was appropriate.

D. Pierre Breached The Covenant Of Good Faith And Fair Dealing Implied In The MSA And His Fiduciary Duty That Arises From It

Pierre's decision to withhold information from Lynda likewise breached the covenant of good faith and fair dealing implied in the MSA and his fiduciary obligation to act in good faith. A party to the contract who "deliberately contravenes the intention and spirit" of a contract breaches the implied covenant of good faith and fair dealing. *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991). "A 'confidential or fiduciary relationship' exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982). "A fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another." *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 700, 962 P.2d 596, 602 (1998), *opinion modified on denial of reh'g*, 115 Nev. 38, 979 P.2d 1286 (1999) (upholding jury instruction with this language). Even in the absence of a fiduciary relationship, fiduciary-like duties may arise "when one party gains the confidence of the other and purports to act or advise with the other's interests in mind." *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337-38 (1995).

Pierre had such duties to Lynda because of his advantaged and entrusted position regarding any malpractice claims. As between Pierre and Lynda, he had sole control over the events that might give rise to a malpractice action and whether he engaged in professional negligence. In other words, whether or not Lynda's indemnity obligation gets triggered turns on Pierre's adherence to his professional duties, over which Lynda had no control.

Moreover, Pierre held all the information related to: (1) how he practiced law; (2) potential liability for malpractice claims arising from his law practice, including those arising from any conflicts of interest;[4] (3) the Jaksick Trust Action proceedings; (4) the Malpractice Action filed by Todd Jaksick; (5) payments he allegedly made; and (6) coverage by the insurance carrier. Lynda was in the dark. Pierre alone would know if a malpractice action were threatened or filed. Given their unequal positions, Pierre had a duty to act in good faith to provide information to Lynda so she could evaluate her potential liability and take steps, if possible, to mitigate it. *See Perry*, 111 Nev. at 947, 900 P.2d at 337-38. He failed to do so.

[4] When reviewing the Malpractice Action complaint, Lynda learned of potential conflicts of interest among individuals in the Jaksick family. 1AA0110-0114. Lynda requested discovery below into whether Pierre had obtained conflict waivers so she could assess whether he failed to disclose critical information to her at the time §40 was included in their MSA. 1AA0092. Should the Court not simply affirm declaratory judgment in Lynda's favor, remand to the district court so that Lynda can investigate whether Pierre procured MSA §40 through fraud is warranted.

E. Pierre Is Not Entitled To His Fees In This Action Because He Was Not The Prevailing Party And Did Not Comply With MSA §35.2

As the losing party, Pierre was not entitled to fees under Section 35 of the MSA, which provides:

> 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.

1AA0071. Pierre lost below. 4AA0711-0725. As a result, the district court correctly denied his request for fees. *See id.* Pierre's argument that his fees and costs were part of Lynda's indemnity obligation is circular and contrary to the plain language of MSA §§35.2 and 40. 1AA0071-0072. If the fees and costs are not covered under a strict construction of the contract language, he cannot recover them.

The relief sought by Pierre was for the district court to hold Lynda in contempt of court. 1AA0176-0205. In seeking a contempt order, the moving party must make a *prima facie* showing that the non-moving had the ability to comply with the court order and that the violation of the order was willful. *Rodriguez v. Dist. Ct.*, 120 Nev. 798, 809, 102 P.3d 41, 49 (2004). For contempt to be found, the court order "must be clear and unambiguous, and must spell out the details of compliance in clear, specific, and unambiguous terms so that the person will

readily know exactly what duties or obligations are imposed on him." *Cunningham v. Dist. Ct.*, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986). In his opening brief, Pierre does not even analyze the requirements for a contempt order or point to any error in the district court's conclusion that no contempt of court occurred, thereby waiving this argument. *See Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006) (declining to consider issues not raised in appellant's opening brief). In light of this waiver, Pierre cannot be deemed the prevailing party.

Even had he prevailed, Pierre still could not recover his fees for this litigation because he failed to comply with the pre-filing conditions set forth in MSA §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 for 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.

1AA0071. Pierre contends that his March 1, 2020 email gave the requisite notice. AOB 16-17. In that email, however, all Pierre said was if Lynda did not pay his

demand, he would "proceed accordingly." 1AA0117; 4AA0674(84:12-86:2). His lawyer's May 26, 2020 letter said Pierre would "seek enforcement of the MSA indemnity provision" after 10 days. 2AA0357. He did not say he would seek to have Lynda held in contempt of court, which is what he ultimately did. 1AA0117, 0176-0205. As a result, he did not comply with MSA §35.2, and even had he prevailed, could not recover litigation fees from Lynda. 1AA0071.

OPENING BRIEF ON CROSS APPEAL

ISSUE ON CROSS APPEAL

Did the district court abuse its discretion by denying Lynda's request for attorney's fees and costs where the plain language of the MSA provided that the party who prevails in a proceeding to enforce the MSA is entitled to reasonable fees and costs, and Lynda prevailed?

SUMMARY OF THE ARGUMENT

Lynda was the prevailing party and complied with the pre-filing obligations in MSA §35.2. Whether under MSA §35.1 or §37, she was entitled to recover the fees and costs she incurred to request information from Pierre, seek declaratory relief regarding the parties' respective rights, and defend against his attempt to have her held in contempt of court. The district court's failure to award her fees was an abuse of discretion.

ARGUMENT

A. Standard Of Review

Interpretation of a contract's prevailing party fee provision is reviewed *de novo*. *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). A district court's failure to provide rationale for denying a fee award under a contract is an abuse of discretion. *Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 651, 503 P.2d 1219, 1221-22 (1972).

B. The Unambiguous Language Of The MSA Required An Award Of Fees And Costs To Lynda As The Prevailing Party

Because the district court ruled in Lynda's favor on the merits, the MSA required the district court to award Lynda the reasonable costs and fees she incurred in securing declaratory relief. Where the language of a contract is "clear and unambiguous" that "the prevailing party is entitled to attorney fees incurred in defense or prosecution of the action," the district court must award fees. *Davis v. Beling*, 128 Nev. 301, 322, 278 P.3d 501, 515 (2012). Refusal to award fees to the prevailing party under the clear terms of a contract is reversible error. *See Mackintosh v. California Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 405-06, 935 P.2d 1154, 1162 (1997).

Here, the MSA has two provisions that warranted an award of fees and costs to Lynda. First, MSA §35.1 contains a prevailing party fee clause, which provides:

> 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.

1AA0071 (emphasis added). The word "shall" meant that an award of fees and costs to the prevailing party was not discretionary. *See Adkins v. Oppio*, 105 Nev. 34, 37, 769 P.2d 62, 64 (1989).

Second, MSA §37 also authorizes Lynda to recover fees, providing:

> If either party fails or refuses to comply with the requirements of [the further assurances requirement] ***in a timely manner***, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach.

Prior to seeking declaratory relief, Lynda's counsel sent correspondence that complied with MSA §35.2. 1AA0130-0133. In her DR Motion, Lynda noted that Pierre's evasiveness, obstinance and failure to provide her the information necessary to back up his demands forced her to incur significant legal fees and costs. 1AA0082-0136. She requested that the district court award such fees. 1AA0094.

The district court expressly found that Pierre failed to provide Lynda information in a timely manner that he should have provided. 4AA0723. The district court also expressly found that Lynda complied with the pre-filing

obligations found in MSA §35.2. The district court granted Lynda's DR Motion, making her the prevailing party. 4AA0711-0725.

Nevertheless, the district court failed to apply the MSA's plain language to award her fees. Instead, the district court's order inexplicably states:

> The Court DENIES the parties' respective requests for attorneys' fees and costs associated with the MSA Motion and OSC Motion. The Court notes MSA § 35 addresses the payment of future attorneys' fees and costs to a prevailing party upon providing, inter alia, at least 10-day written notice before filing an action or proceeding. This Court is assured both parties have satisfied their obligations under MSA § 35. See MSA Motion, Ex. 4-8. For example, counsel for Judge Hascheff and Ms. Hascheff undisputedly provided their MSA § 35 notices on May 29, 2020 and June 2, 2020, more than 10-days prior to the filing of the MSA Motion and OSC Motion. MSA Motion, Ex. 7-8. Further, the Court finds there was a reasonable basis for litigating the arguments presented by both parties in their respective motions. Therefore, the Court declines to award attorneys' fees and costs.

4AA0724.

Lynda incurred significant legal fees to have her lawyer repeatedly seek information that Pierre would not provide and to brief and argue the motion for declaratory relief and opposition to Pierre's OSC Motion. 1AA0132. Having ruled in Lynda's favor, the district judge should have awarded her fees and costs under the plain language of the MSA. Failure to do so, without any explanation why, was an abuse of discretion. *See Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 651, 503 P.2d 1219, 1221-22 (1972). The district court could not rewrite the parties'

contract to remove the fees and costs provisions. *See Griffin*, 122 Nev. at 483, 133 P.3d at 254.

CONCLUSION

The district court's grant of declaratory relief in Lynda's favor should be affirmed based on the plain language of the MSA, the doctrine of laches, and Pierre's breach of the covenant of good faith and fair dealing and his fiduciary duty to timely inform Lynda of the malpractice action that was filed against him. As the prevailing party, Lynda was entitled to recover her fees and costs.

As a result, Lynda respectfully asks the Court to affirm that Lynda had no indemnification obligation to Pierre under these facts and reverse and remand to the district court to award Lynda the fees and costs she incurred related to this matter.

Should the Court reverse the district court's declaratory relief, Lynda requests that it remand for discovery into whether Pierre procured MSA §40 through fraud.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED December 15, 2021

LEONARD LAW, PC

By: /s/ Debbie Leonard

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 10,621 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion 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 understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED December 15, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on December 15, 2021, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). The following participants who are registered as E-Flex users will be served by the EFlex system upon filing. All others will be served by first-class mail.

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