IN THE SUPREME COURT OF NEVADA

EDGEWORTH FAMILY TRUST; AND AMERICAN GRATING, LLC, Appellants, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, Respondents,	Supreme Court Case No. 83258 Consolidated with 83260 Dist. Ct. Case No. A-18-767242-C Consolidated with A-16-738444-C

EDGEWORTH APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a) that must be disclosed. These representations are made to enable the Justices of this Court to evaluate possible disqualification or recusal.

Edgeworth Family Trust is a trust formed under the laws of the State of Nevada. American Grating, LLC, is a Limited Liability Company formed under the laws of the State of the Nevada. American Grating, LLC is wholly owned by Brian Edgeworth and Angela Edgeworth, who are also the Trustees of the Edgeworth Family Trust. These Appellants were represented in the district court by the law firm of Vannah & Vannah, Messner Reeves LLP and Morris Law Group. These Appellants are represented in this appeal by Steve Morris, Rosa Solis-Rainey of Morris Law Group.

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I. JURISDICTIONAL STATEMENT

Appellants timely appealed from the June 18, 2021 order of the district court denying their motion, styled "Plaintiff's Renewed Motion for Reconsideration of April 19, 2021 Third-Amended Decision" that refused to comply with the mandate of this Court expressed in its Order of December 30, 2020 (Remittitur Issued April 13, 2021) in Case Nos. 77678/78176, (AA0879 – 85)[1] and the underlying April 19, 2021 order. AA0564-88.

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[1] This June 18, 2021 Third Amended Decision and Order of the district court could be potentially confusing because of the district court's issuance of orders prior to remittitur when it did not have jurisdiction. AA0879 - 85; *see Buffington v. State,* 110 Nev. 124, 126, 868 P.2d 643, 644 (1994); Nev. Rev. Stat. 177.155; Nev. Rev. Stat. 177.305. For example, the court's April 19, 2021 order (AA0564 -88), pertinent to this appeal, merely republished a void order on attorney fees that had been issued *sua sponte* without jurisdiction and without consideration of this Court's mandate to reconsider the award of attorney fees to Respondent Simon under the *Brunzell v. Golden Gate Nat. Bank,* 85 Nev. 345, 350, 455 P.2d 31, 33 (1969) factors. Because these earlier orders were void for lack of jurisdiction, the Edgeworths' effort to present that *Brunzell* issue on remand to the district court, as this Court directed, was styled "Motion for Reconsideration of Third Amended Decision and Order on Motion to Adjudicate Lien." That motion was the Edgeworths' *first effort* to bring to the district court's attention that she had not responded in her April 19, 2021 order to this Court's *Brunzell* mandate, which she also declined to do in her order of June 18, 2021 (AA0879 – 85), denying the Edgeworths' motion for reconsideration. As recognized by this Court's Order in this appeal dated December 13, 2021, at page 4, note 1, although the motion was imprudently captioned, this appeal challenges the district court's order adjudicating Simon's attorney lien on remand, without consideration of this Court's December order and remand, which

Appellants' notice of appeal was timely filed on July 17, 2021, AA0887 - 89) pursuant to the direct appeal provisions of Nev. R. App. P. 3A(b)(1). Therefore, this Court has appellate jurisdiction over all issues presented in this appeal.

II. ROUTING STATEMENT

The Nevada Supreme Court has jurisdiction over this appeal pursuant to Nev. R. App. P. 17(a)(12). The appeal arises out of the district court's failure, on remand, to adhere to this Court's mandate in Case Nos. 77678 and 78176. *Edgeworth Family Trust v. Simon*, 477 P.3d 1129 (Table) (unpublished) (Nev. 2020).

III. ISSUE PRESENTED

A. Did the district court err by wholly ignoring this Court's express mandate regarding the evidentiary basis under *Brunzell* to justify the quantum meruit award to respondent Simon for post-discharge services?

IV. STATEMENT OF THE CASE

Daniel Simon represented the Edgeworth Appellants in a property damage case in 2016 and 2017 (referred to herein as "Viking" action) until "the Edgeworths constructively discharged him on November 29, 2017." Simon continued to work, however, for a brief time after his discharge.

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is an appealable determination. *See Gumm v. Mainor*, 118 Nev. 912, 919, 59 P.3d 1220, 1225 (2002).

Prior to his discharge, Simon had billed the Edgeworths at the rate of $550 per hour in four invoices from inception of his representation to September 29, 2017, for a total of $367,606, which they paid along with almost $115,000 in invoiced costs.

The terms to settle the Viking case were agreed to on November 15, 2017, and the Edgeworths asked Simon to provide any unpaid invoices for his services and costs. Rather than do that, he summoned the Edgeworths to his office to discuss a retainer agreement he had just prepared to give himself $1.5 million beyond what they had already paid him for his services. AA0113 – 20. The Edgeworths refused to pay and retained the firm of Vannah & Vannah on November 29, 2017, to represent them. Simon then filed an attorney lien.

The district court adjudicated Simon's lien in 2018 and awarded him approximately $285,000 for services rendered from September 19 to November 29, 2017, at his implied-contract rate of $550 per hour and $275 per hour for his associates. The district court also awarded Simon $200,000 in quantum meruit for service he rendered for a short time after his discharge on November 29, 2017. An appeal by the Edgeworths followed.

On December 30, 2020, this Court decided the appeal and "vacat[ed] the district court's grant of $200,000 in quantum meruit for post-discharge work and remand[ed] for the district court to make findings regarding the basis of its award." *Edgeworth Family Trust*, 477 P. 3d 1129 at *2 (2020). The Court said "it is unclear whether the $200,000 [in quantum

meruit] is a reasonable amount to award for the work done after the constructive discharge." *Id.* The Court pointed out that the disputed award was based on findings "referencing work performed before the constructive discharge, for which Simon had already been compensated under the terms of the implied contract, [and] cannot form the basis of quantum meruit award." *Id.*

In her post-remand order of April 19, 2021 (reconsideration denied on June 18, 2021), the district court merely reiterated the findings that supported the award for services Simon performed ***before*** he was constructively discharged as the basis for the $200,000 quantum meruit award for his ***post***-discharge work. AA0581 – 85.

V. STATEMENT OF FACTS

A. SUMMARY OF THE FACTS IN THE UNDERLYING APPEAL

The extensive facts underlying this and prior appeals are part of this Court's records. Nev. Sup. Ct. Case Nos. 77176, 77678, and 79821. They are only briefly summarized here.

Attorney Daniel S. Simon represented the Edgeworth Family Trust and American Grating, LLC (collectively referred to as the "Edgeworths") in a property damage action caused by a defective product (referred to as the "Viking" action). AA0549 – 50. This appeal, like the proceedings referenced in Nev. Sup. Ct. Case Nos. 77176, 77678, and 79821,

arise from attorney lien adjudication proceedings initiated by respondent Simon that followed settlement of that action.

In the prior appeals, this Court affirmed the district court's attorney lien adjudication and its finding that Simon was constructively discharged by the Edgeworths on November 29, 2017. *Edgeworth Family Trust*, 477 P.3d 1129 at *2. The Court remanded to the district court for it to explain, consistent with *Brunzell*, the basis for awarding Simon $200,000 in quantum meruit for services rendered *post* discharge. *Id*. The Court pointed out that in arriving at $200,000, the district court could not consider work done by Simon pre-discharge to arrive at the value of his post-discharge services. *Id.* With respect to the $55,000 awarded for fees and costs under Nev. Rev. Stat. 18.010(2)(b) for unrelated motion practice, the Court directed the district court to demonstrate that it had considered the *Brunzell* factors in reaching its award of $50,000 for fees incurred to dismiss the Edgeworths' conversion claim against Simon (*id.* at *4), which the court did and is not challenged in this appeal.[2] AA0844 - 47.

The district court ignored, however, the mandate with regard to the $200,000 awarded for Simon's post-discharge work. Her April 19, 2021 amended order awarding the same $200,000 in quantum meruit without providing **any** explanation of its basis or its reasonableness under *Brunzell* as this Court expressly directed the district court to do. AA0581 – 85. In fact,

[2] The district court also remitted the $5,000 awarded in costs to $2,520, the actual amount of costs incurred. 5/24/21 Order. AA0847.

the district court's *Brunzell* analysis in its April 19, 2021 order is ***identical*** to the order that was the subject of the prior appeal and rejected by this Court. AA0017 – 21. It is based on "work performed before [Simon's] constructive discharge, for which Simon had already been compensated under the terms of the implied contract, [which] cannot form the basis of a quantum meruit award." *Edgeworth Family Trust,* 477 P.3d 1129, at *2; *compare* AA0017 – 21 (*Brunzell* analysis in 11/19/18 order) *with* AA0581 – 85 (*Brunzell* analysis in 4/19/21 order, incorporated into the June 18, 2021 order denying reconsideration).

This appeal challenges the district court's failure to follow the Court's mandate and, particularly, its consideration of Simon's fully compensated pre-discharge services in determining the reasonable value of his very limited post-discharge services.

VI. SUMMARY OF ARGUMENT

District Judge Tierra Jones erred in refusing to follow this Court's mandate to explain the reasonableness under *Brunzell* of the $200,000 quantum meruit award to Simon for post-discharge services he provided to the Edgeworths. The district court's entire *Brunzell* analysis on remand focused entirely on pre-discharge work – in fact, the 2021 analysis post-remand is identical to the district court's 2018 analysis that this Court rejected. AA0581 – 85. In her post-remand order of April 19, 2021, the district court tacked on one paragraph to her rejected order, apparently in an

attempt to respond to the Court's mandate regarding the reasonableness of the quantum meruit award under *Brunzell.* AA0585. However, the explanation provided referenced the ***pre***-discharge analysis. Thus the record before the court confirms that the $200,000 awarded for ***post***-discharge services is *not* reasonable under *Brunzell.*

VII. STANDARD OF REVIEW

This Court has previously and unequivocally held that "[w]hether the district court has complied with our mandate on remand is a question of law that we review de novo." *State Eng'r v. Eureka County*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) (*citing Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263, 71 P.3d 1258, 1260 (2003)). This Court's decision in the prior appeal that pre-termination services could not, under *Brunzell*, support the district court's quantum meruit award for post-termination services is now the law of the case, which the district court did not follow on remand. *Id.* (*citing LoBue v. State ex rel. Dep't of Highways*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976)). Because the district court clearly erred in entering an order that does not comply with this Court's mandate, the order should be reversed. *Id.*

VIII. ARGUMENT

A. THE DISTRICT COURT SHOULD HAVE CONSIDERED ONLY SIMON'S POST-DISCHARGE WORK, WHICH SIMON HIMSELF PROVIDED TO THE COURT, IN DETERMINING A REASONABLE FEE FOR THAT WORK.

The district court was bound to follow this Court's December 30, 2020 Order on remand. *LoBue*, 92 Nev. at 532, 554 P.2d at 260. The district court failed to do so, thus giving rise to this second appeal. In its December 30 Order, the Court specifically held that "[w]hile the district court stated that it was applying the *Brunzell* factors for work performed only after the constructive discharge, ***much of its analysis focused on Simon's work throughout the litigation.***" *Edgeworth Family Trust*, 477 P.3d 1129 at *2 (emphasis added). That defect remains.

In its Order remanding this issue, the Court said: "referencing work performed before the constructive discharge, for which Simon had already been compensated under the terms of the implied contract, cannot form the basis of a quantum meruit award." *Id.* Yet the district court did just that. Its order on remand is identical to the order that was appealed in 2018, save for one paragraph tacked on at the end:[3]

> In determining this amount of a reasonable fee, the Court must consider the work that the Law Office continued to provide on the Edgeworth's case, even after the constructive discharge. The record is clear that the Edgeworths were ready to sign and

[3] The district court also added eight non-substantive paragraphs that merely set out the appellate history. AA0569 - 70, ¶¶26 – 33; *compare with* AA0006 (Findings of Fact end at ¶26).

> settle the Lange claim for $25,000 but Simon kept working on the case and making changes to the settlement agreement. This resulted in the Edgeworth's recovering an additional $75,000 from Lange plumbing. Further, the Law Office of Daniel Simon continued to work on the Viking settlement until it was finalized in December of 2017, and the checks were issued on December 18, 2017. Mr. Simon continued to personally work with Mr. Vannah to attempt to get the checks endorsed by the Edgeworths, and this lasted into the 2018 year. The record is clear that the efforts exerted by the Law Office of Daniel Simon and Mr. Simon himself were continuing, even after the constructive discharge. In considering the reasonable value of these services, under quantum meruit, ***the Court is considering the previous $550 per hour fee from the implied fee agreement, the Brunzell factors, and additional work performed after the constructive discharge***.

AA0585 (emphasis added). Although the district court again justified the award by stating that it considered the *Brunzell* factors, the *Brunzell* analysis in the post-remand order is identical to the one this Court rejected in the prior appeal for its reliance on pre-discharge services, and that contradicts the law of this case. *See Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016) ("district court commits error if subsequent order contradicts the appellate court's directions.").

The district court also ignored the guidance this Court offered. Specifically, the Court pointed out that "[a]lthough there is evidence in the record that Simon . . . performed work after the constructive discharge, the district court did not explain how it used that evidence to calculate its award." *Edgeworth Family Trust*, 477 P.3d 1129 at *2. On remand, the district court still did not use this evidence to explain how the work performed ***after*** the constructive discharge was used to calculate the same $200,000 award that the district court previously entered. *See* AA0581 – 85. A review of that evidence demonstrates that even if all of the post-

discharge work detailed by Simon is credited and the implied contract rate is considered as the district court said, the reasonable value of that work is no more than $34,000, as the Edgeworths pointed out to an unreceptive district court. *See* AA0680 – 84; AA0686 – 88; AA0689 – 94. Specifically, the record demonstrates that Simon claims to have expended a total of 71.10 hours (51.85 for Simon and 19.25 for his associate) for post-discharge work. AA0694; *see also* AA0680 – 84; AA0686 – 88. These hours, if reasonable, times the rates in the implied contact justify fees of $33,811.25. AA0694. The $200,000 award reiterated by the district court is ***more than six times that amount*** and values the 71.10 hours at more than ***$2,800 per hour***.[4] AA0602. This amount is facially unreasonable; nothing in the district court's *Brunzell* analysis in its April 19, 2021 order explains otherwise.

Much of Simon's post-discharge work was administrative in nature, which did not require special skills to perform. AA0680 – 84; AA0686 – 88; AA0689 – 94. His post-discharge work can be summarized as follows:

SUMMARY OF POST-DISCHARGE WORK BILLED BY SIMON LAW	
Administrative tasks re Lange Settlement (co-defendant in Viking action)	21.55
Administrative tasks re Viking Settlement, including one hearing	26.65
Preparation of Attorney Lien	4.85
Opening Bank Account & Depositing Settlement Checks	7.25
Undetermined - not sufficient description	10.80

See AA0694.

[4] $200,000 / 71.10 = $2,812.94.

Over seven hours to open a single two-signature bank account at a local bank is not reasonable (AA0692 green entries); nor is charging nearly five hours to the client for preparing a short perfunctory attorney's lien. AA0693 – 94 (pink entries). And though Simon claims to have worked on the Viking settlement for over 26 hours and the Lange settlement for over 21 hours, the partial file he provided does not have any substantive correspondence or email on these subjects, calling into question whether this work was actually performed.[5]

The district court's own findings demonstrate that the post-discharge services Simon provided with respect to the Viking settlement were limited at best because the settlement was signed on December 1, 2017, two days after the court found Simon had been discharged. *See* AA0009:27 – AA0010:1 ("the [previously] negotiated terms [of the Viking settlement] were put into a final release signed by the Edgeworths and Mr. Vannah's office on December 1, 2017"); at AA0010:2-4 ("Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly identified as the firm that solely advised the clients about the settlement."); at AA0010:14-16 ("Simon was not present at the signing of these settlement documents and never explained any of the terms to the Edgeworths").

Simon's own testimony and documents demonstrate that the post-discharge work was minimal at best. His unequivocal testimony before

[5] Simon's refusal to turn over the Edgeworths complete client file will be separately addressed by way of a writ petition.

the district court was that all of the settlement negotiations were complete before the discharge date found by the court. AA0655 (testifying terms of settlement were "hammered out" . . . "before he was fired"); AA0653-54 (placing the date of these negotiations at 11/27/17). Simon emailed the "proposed" Viking settlement agreement to the Edgeworths at 8:39 a.m. on November 30, 2022 (AA0627), approximately an hour before he learned the Edgeworths had retained Vannah to assist them with finalizing the settlement. AA0624 - 25. Simon emailed the "final" draft of the settlement agreement at 5:31 p.m. that same day. AA0635. The Viking settlement was signed the next day. AA0009:27 – AA0010:1 And although his November 30th email said he spent "substantial time" negotiating terms in the few hours between his conversation with a Vannah attorney and his 5:31 p.m. email, those efforts are not credible given repeated and un-contradicted testimony to the district court that all negotiations were complete by November 27, 2017. AA0655. The "superbill" Simon submitted to the court (AA0680 – 84 and AA0686 – 88) includes time he claims he and his firm spent on negotiations he clearly testified had been completed days previously. AA0655. But even if this questionable work is considered, it is included in the 71.10 post-discharge hours Simon claims to have worked and thus does not change the fact he is not entitled to more than $34,000 for that work. *See* AA680 - 81; AA00686; AA0690.

The Lange settlement was also fully negotiated by November 30, 2017 (A0635), which the district court found was signed on December 7,

2017, just eight days after Simon's discharge. AA0006 ¶23; AA00010:26 - 11:5 (". . . it was established that the Law Firm of Vannah and Vannah provided advice to the Edgeworths regarding the Lange claim. Simon and . . . Vannah gave different advice on the Lange claim, and the Edgeworths followed the advice of . . . Vannah to settle the Lange claim. The Law Firm of Vannah and Vannah drafted the consent to settle for the claims against Lange Plumbing").

The district court should have considered the evidence in the record (AA0680 – 84; AA0686 – 88) and explained how she used that evidence to determine the reasonableness and value of Simon's post-discharge work at $2,800 per hour. *See also* AA0689 – 94. Even ignoring the fact that some of the time Simon billed as post-discharge work is facially unreasonable, the district court does not explain how an award that is six times the calculated value of the alleged services performed -- based on the rates she says she considered – is reasonable under *Brunzell*. Merely stating that she considered the *Brunzell* factors is not sufficient to show how she did so to justify paying Simon $2,800 per hour, especially when the analysis the district court set forth in her post-remand order is nothing more than her analysis for Simon's pre-discharge work. AA0581 - 85.

The Court should reverse the district court's findings and instruct her to enter an order awarding no more than $34,000 for Simon's post-discharge services.

IX. CONCLUSION

The Edgeworths respectfully ask this Court to REVERSE and VACATE the district court's order awarding Simon $200,000 in quantum meruit and instruct her to enter an order for no more than the $34,000 supported by the post-discharge work Simon himself submitted for the record.

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CERTIFICATE OF COMPLIANCE

1. I certify that I have read the **EDGEWORTH APPELLANTS' OPENING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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.

2. I also certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5), the type style requirements of Nev. R. App. P. 32(a)(6), and limitations in Nev. R. App. P. 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Palatino 14 point font. Excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it contains 3285 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 2nd day of September, 2020, a true and correct copy of the foregoing **EDGEWORTH APPELLANTS' OPENING BRIEF** was served by the following method(s):

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Dated this 27th day of January, 2022.

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