IN THE SUPREME COURT OF THE STATE OF NEVADA

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CRAIG A. MUELLER, Cross-Respondent/Appellant, vs. CRISTINA A. HINDS, Cross-Appellant/Respondent.	S.C. NO. 83412/84077 D.C. NO: D-18-571065-D

CROSS-APPELLANT/RESPONDENT'S REPLY BRIEF

Attorney for Cross-Respondent/
Appellant:
Michael J. McAvoyAmaya, Esq.
Nevada Bar No. 14082
1100 E. Bridger Ave.
Las Vegas, Nevada 89101
(702) 299-5083
Email: mike@mrlawlv.com

Attorneys for Cross-Appellant/
Respondent:
Marshal S. Willick, Esq.
Nevada Bar No. 2515
Lorien K. Cole, Esq.
Nevada Bar No. 11912
Willick Law Group
3591 East Bonanza Road, Suite 200
Las Vegas, Nevada 89110-2101
(702) 438-4100
Email: email@willicklawgroup.com

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal. In the course of these proceedings leading up to this appeal, Respondent has been represented by the following attorneys:

Marshal S. Willick, Esq. and Lorien K. Cole of the WILLICK LAW GROUP.

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There are no corporations, entities, or publicly-held companies that own 10% or more of Appellant's stock, or business interests.

DATED this 5th day of May, 2022.

Respectfully Submitted By:
WILLICK LAW GROUP

//s// Marshal S. Willick
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3591 East Bonanza Road, Suite 200
Las Vegas, Nevada 89110-2101
email@willicklawgroup.com
Attorney for Respondent

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ROUTING STATEMENT

Normally, we would not comment on a routing statement by opposing counsel. In this case, however, Craig has inexplicably misquoted our routing statement in his. We stand by our original routing statement.

STATEMENT OF THE ISSUES

1. Whether the timing limit in NRCP 54 applies to a *Memorandum of Fees and Costs* filed relating to a *pre*-judgment *Motion for Attorney's Fees* that is granted at trial.

2. If NRCP 54 applies at all, whether, when an order granting fees has already been made and a party is directed to file a *Memorandum* in a time shorter than 21 days, a court may extend the time to file that *Memorandum* to a time longer than the time originally set but less than 21 days.

3. Whether, a trial court may impose sanctions regardless of the timeliness of the filing of any *Memorandum* by a party.

STATEMENT OF CASE

Craig appears to be confused on multiple points. Cristina's multiple pre-hearing fee motions were not denied, but deferred, and ultimately granted after the evidentiary hearing. The substantive order issued July 26, 2021, is irrelevant to the timelines for this appeal. This is the order of relevant events:

2019-2020:	Cristina's multiple motions for attorney's fees (deferred).
May 28, 2020:	Cristina concedes that Craig is entitled to an offset of $36,871 from his $427,500 property equalization obligation to her.
April 1, 2021:	Evidentiary hearing.

July 26:	Decision denying all of Craig's claims and reducing to judgment remaining property equalization; Cristina awarded a portion of requested fees and ordered to file a supplemental memo.
August 11:	Cristina files her Memorandum in support of her fee award.
August 16:	Craig timely appeals from Decision (Appeal 83412).
August 25:	District court denies all attorney's fees.
September 7:	Cristina files a tolling motion regarding the fee award.
December 30:	District court denies the tolling motion, finding that the ***motion*** for attorney's fees was timely, but that NRCP 54 provided no discretion to grant fees if a Memo is filed late.
January 6, 2022:	Cristina timely files a Notice of Appeal from denial of the tolling motion.

Attorney's fees awards are independently appealable, and the time for appeal runs from denial of a tolling motion.[1] Therefore, Craig's extensively repeated arguments about how his filing an appeal from the substantive ruling in August had any effect on the jurisdiction of the lower court to award fees, or the timeliness of this appeal[2] are not further addressed in this *Reply Brief*.

Likewise ignored in this filing is Craig's inexplicable, much-repeated assertion[3] that there is some kind of 10-day deadline in either NRCP 52 or NRCP 59, which has not been true for years.

Much of Craig's "Statement of the Case" (at 2-6) is actually argument, interspersed with *ad hominum* attacks and other irrelevancies, which is not

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[1] NRAP 3A(b)(8); NRAP 4(a)(4); *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000); *Smith v. Crown Fin. Servs. Of Am.*, 111 Nev. 277, 890 P.2d 769 (1995).

[2] *See*, *e.g.*, RAB 6, 30-37.

[3] *See*, *e.g.*, RAB at 6, 8, 15, 24, 31, 33, 37.

appropriate for either a statement of the case ***or*** a statement of facts. The Court should refer to the statement of the case, and the statement of facts, in the *Opening Brief*.

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

At 7-8, Craig argues that the standard of review is abuse of discretion because normally whether to award fees is a matter left to the discretion of the district court, although he later contradicts himself (at 16-17) and asserts that this Court's review should be *de novo*.

Whatever his actual position is, Craig's assertion ignores the record and misses the point. As detailed in the *Opening Brief*, the district court already made a finding that attorney's fees *should* be awarded on multiple grounds: because Cristina was the prevailing party; because the MOU and *Decree* called for fees to be awarded to the

prevailing party; and because sanctions against Craig were warranted. The district court ruled that despite fees being clearly warranted, it was ***unable*** to order an award of fees because Cristina's Memo was technically filed a day late[4]; that is the issue in this appeal.

The legal error in the district court's determination is addressed in the *Opening Brief* and below in this *Reply*. It is worth noting, however, that if this Court determines (as we contend) that the district court was not *prohibited* from awarding fees, it was an abuse of discretion for the district court not to do so.

Specifically, this Court has repeatedly held that where, as here, parties have an agreement concerning attorney's fees in an MSA, it is an abuse of discretion for a district court to fail to award fees in accordance with the MSA.[5]

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[4] The only person who knew how to actually e-file the document was not available until the next morning.

[5] *See Kantor v. Kantor*, 116 Nev. 886, 895, 8 P.3d 825, 830-31 (2000); *Davis*

Craig continues to discuss the standard of review in his first argument (at 9-25), where for reasons never clearly explained, he argues that where this Court is called upon to determine the "policy" underlying a rule, it is somehow not actually construing the rule. We are unable to make any sense out of that argument, and stand on the position in the *Opening Brief* that construing the meaning, requirements, and application of NRCP 54 is a matter of *de novo* review under all relevant authorities.[6]

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v. Beling, 128 Nev. 301, 306, 278 P.3d 501, 515-16 (2012) (providing that prevailing party was entitled to recover reasonable attorney fees in defending against a breach of contract claim where the parties' agreement entitled prevailing party to fees).

[6] *See*, *e.g.*, *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

ARGUMENT

I. NRCP 54 Governs Post-Trial Fees Motions, Not Memoranda of Fees and Costs

The *Opening Brief* argued that NRCP 54(d), which on its face applies to "post-judgment motions," means what it says, and should not be construed as applying to memos filed in support of ***pre***-judgment motions that have already been granted at a hearing. Craig dismisses that argument (at 16-17) claiming that *any* filing after a hearing is a "post-judgment motion."

Craig's argument on this issue consists mostly of repetitive run-on paragraphs spanning multiple pages[7] and irrelevant and improper legal claims and citations.[8] As

[7] *See*, *e.g.*, RAB at 17-21.

[8] For example, his exposition (at 10) about cases involving lack of notice that fees are at issue, and his improper citations (*e.g.*, at 23, 26) to unpublished Court of Appeals orders in violation of NRAP 36(c)(3), which cases are not further addressed in this filing.

near as we can make out, his actual argument boils down to the assertion that ***all*** fee requests and orders are post-judgment NRCP 54 motions and orders.[9]

The assertion is nonsense. Literally every day in family court, fees are awarded without a "motion under NRCP 54," in *advance* of hearings for costs of suit under NRS 125.040 and *Sargeant*,[10] and *after* hearings for sanctions and otherwise under EDCR 5.501, EDCR 7.50, NRS 7.085, NRCP 11, NRS 125.180(1), and preliminary to appeals under *Griffith*.[11]

Craig makes the false factual claim (*e.g.*, at 11) that the pre-hearing motions contained "none" of the information required for a post-judgment fees motion under

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[9] Craig's argument, interspersed throughout both this section of his brief and the next, that once a court sets a deadline, it is not permitted to alter it, is addressed in the next section of this *Reply*.

[10] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

[11] *Griffith v. Gonzales-Alpizar*, 132 Nev. 392, 373 P.3d 86 (2016). In fact, one such motion and award was made in this case. IX RA 1524-1533, 1592-1596.

NRCP 54. Of course, if this Court agrees that the rule does not apply at all to post-hearing memos filed in support of pre-hearing motions, the point is academic. But if the Court decides that NRCP 54 is applicable in *any* way here, the fact is that the bulk of the rule's requirements were actually satisfied in advance.

Cristina filed fee requests in 2019 and 2020—which the district court explicitly found to be "timely" under any standard[12]—specifying "the judgment and the statute, rule, or other grounds entitling the movant to the award"[13] and "points and authorities addressing the appropriate factors to be considered by the court in deciding the motion,"[14] including all required representations under *Brunzell*[15] and *Wilfong*.[16]

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[12] IX RA 1598, 1628.

[13] I RA 57, 60-61; II RA 228, 231-233; IV RA 725-727, 737.

[14] I RA 60-62; II RA 234-235; IV RA 737-739, 759-762.

[15] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P. 2d 31 (1969).

[16] *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005).

In other words, the substantive elements of an NRCP 54 motion were on file long before the hearing. Really, all that was remained was subtraction from the billing of sums the district court concluded were ***not*** recoverable (in other words, the exact amount sought), copies of the billing statements, and counsel's signature. The question of "whether" fees would be awarded was concluded; the only remaining question was "exactly how much."

We ask this Court to rule, ***if*** it determines that NRCP 54 applies here at all, that in these circumstances the rule was substantially satisfied, and the district court had discretion to award fees, which returns us to the case law indicating that it would be an abuse of discretion to *not* award fees where it is called for by agreement in an MSA and *Decree*.[17]

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[17] *Kantor v. Kantor*, 116 Nev. 886, 895, 8 P.3d 825, 830-31 (2000); *Davis v. Beling*, 128 Nev. 301, 306, 278 P.3d 501, 515-16 (2012).

II. Whenever NRCP 54 Does Apply to Filings, a Trial Court Has Inherent Authority to Alter Any Time Limits it Imposes, Within the Outer Limitations of the Rule

Spanning both the first and second sections of his brief, Craig makes the meandering argument that there is something about NRCP 54 that prohibits a court from re-setting a 15-day deadline to a 16-day deadline, although both are within the 21-day outside limit of the rule.

Craig's argument (at 14-25) is not entirely coherent, but first he claims that the district court was "not actually applying the rule" but instead applying some (never-identified) "policy behind [the rule]." If there is some such "policy," the plain words of the rule indicate that its purpose is to give timely notice of an intention to seek fees, which was done here for two years preceding the hearing.

Craig's unclear comments (at 18-25) speak to "plain language" but never indicate which words he is talking about. From the next section of Craig's brief (at 26-28), we think that his intended reference is to the prefatory phrase "Unless a statute or a court order provides otherwise" in NRCP 54(d)(2)(B) and the phrase "The court may not extend the time for filing the motion after the time has expired" in NRCP 54(d)(2)(D).

Again, the issue is not very complicated. We do not think it reasonable to assume some unstated purpose that a court-imposed shorter time can never be changed, but more reasonable that the first phrase goes to the "no later than 21 days" deadline in the next following line, and that the words "after the time has expired" in sub-section (D) refers to that same 21-day period.

We are unable to fathom (and Craig certainly does not identify) what public policy purpose could be served by telling a district court that it is not free—in this

one single instance—to alter its discretionary-set shorter time limits, as a district court can do in all other matters.[18] If the Court finds it necessary to reach this question at all, it makes more sense to interpret the rule as referring to the 21-day outer limit for filing post-judgment motions in *each* section and sub-section.

But even if the "after the time" language of the rule was construed as referring to a shortened time rather than the outer 21-day limit, the district court would have been within its power to deem the filing timely.

The *Opening Brief* argues that it would be unreasonable to find that the 11-hour delay in the availability of the employee who knew how to electronically submit the document deprived the district court of jurisdiction to award fees required by agreement and already determined to be appropriate in law and equity; the brief set

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[18] *See*, *e.g.*, *Young v. Nev. Title Co.*, 103 Nev. 436, 441, 744 P.2d 902, 904 (1987); NRCP 1.

out the case law addressing the inherent authority of courts to reset the deadlines they impose.

In response, Craig makes contradictory arguments, claiming (at 26-27) that the district court just exercised its discretion to not extend the deadline, and (at 27-28) that the district court *had* no discretion once a shortened time passed to lengthen it.

Both assertions are incorrect. As detailed above, if the district ***did*** have authority to award fees, it would be an abuse of discretion to fail to do so because of the agreement about attorney's fees set out in the MSA and *Decree*.

And even if this Court construed the rule's language to hamstring the district court once it sets a shortened time and that time passes, this Court should find that the district court had the equitable power to re-set the time limit anyway.

In similar circumstances, some appellate courts have reversed even statute of limitations dismissals when the failure, like that which occurred here, was based on

the unavailability of staff to electronically file documents remotely during a pandemic.[19] This Court's own electronic filing rules contemplate that where there is a "technical problem," including an error in submission unknown to the party submitting the document, a filing is counted as having been submitted when intended.[20] Here, the employee who knew how to submit the document was working

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[19] *See*, *e.g.*, *Maria Rosa v. Wakefern Food Corp. a.k.a. Price Rite of Cranston*, No. 2020-255-Appeal (KC 20-506, Mar. 16, 2022) (dismissal on statute of limitations grounds reversed where counsel "was confronted with a series of logistical and computer-related issues that resulted in his failing to file the complaint in this action in strict accordance with the terms of the pertinent statute of limitations," in light of "the totality of the rather unique circumstances presented by this case, coupled with the fact that the complaint was in fact electronically filed . . . within days after the pertinent deadline"); *Rivera v. Employees' Retirement System of Rhode Island*, 70 A.3d 905 (R.I. 2013) (citing multiple federal and state cases regarding the doctrine of "equitable tolling" of statutory deadlines).

[20] NEFCR 15(a)(1).

remotely and unavailable to actually submit the document, which undersigned counsel discovered the next morning and had the document immediately filed.

The point here is that district court felt itself constrained to deny fees by the "strictness" of the rule, and this Court should hold, if it finds it necessary to reach this part of the analysis at all, that NRCP 54 does not have some kind of talismanic absolutism that prevents courts from making equitable orders.

III. A Trial Court Has Inherent Authority to Issue a Sanctions Order Irrespective of the Filings of Either Party to the Case

The *Opening Brief* noted that the plain language of NRCP 54(d)(2)(D) states that the rule's timing limit "does not apply" to sanctions orders. The district court

explicitly found that sanctions were warranted,[21] but declined to impose them, based on the "strictness" of the timing rule for post-judgment motions.[22]

Responding to our contention that the rule simply does not apply to sanctions at all, Craig responds (at 28-30) without citing any authority that it is "a matter of discretion."

To the degree it is a matter of discretion, this Court has held it is an abuse of discretion not to award fees when called for by an agreement regarding fees in an MSA,[23] but Craig's argument misses the point that the sanctions found to be warranted could and should have been awarded whether we filed a memo timely, late, or not at all. Because NRCP 54 just does not apply to sanctions orders, and because the district court already found that sanctions were warranted for Craig's extensive

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[21] VIII RA 1410-1411, 1414.

[22] IX RA 1631-1632.

[23] *Kantor v. Kantor*, *supra*.

bad faith litigation, repeated and multiple violations of court orders, and only partially complying with orders on the eve of trial after ignoring them for years,[24] failing to enter an award of sanctions was an abuse of discretion.

CONCLUSION

This Court should review the proper construction of NRCP 54(d) *de novo*, and hold that it is inapplicable to *pre*-divorce motions or to other filings such as memoranda, under its plain language. The Court should provide guidance to the trial courts by holding that whenever NRCP 54 *does* apply, a trial court has inherent authority to alter any time limits it imposes, within the 21-day outer limit of the rule. And this Court should re-affirm that a trial court has inherent authority to issue a

[24] VIII RA 1410-1411, 1414.

sanctions order irrespective of the filings of either party to the case, under the plain language of NRCP 54.

The decision of the district court denying an award of fees and sanctions should be reversed and remanded for entry of an award of fees to Cristina and sanctions against Craig.

Dated this 5th day of May, 2022.

Respectfully submitted,
WILLICK LAW GROUP

//s//*Marshal S. Willick*
Marshal S. Willick, Esq.
Attorney for Cross-Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using Corel WordPerfect Office 2021, Standard Edition in font size 14, and the type style of Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more and contains 2,996 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of May, 2022.

WILLICK LAW GROUP

//s// Marshal S. Willick
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3591 East Bonanza Road, Suite 200
Las Vegas, Nevada 89110-2101
(702) 438-4100
email@willicklawgroup.com
Attorneys for Cross-Appellant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the WILLICK LAW GROUP and that on this 5th day of May, 2022, documents entitled *Respondent/Cross-Appellant's Reply Brief* were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

Michael J. McAvoyAmaya, Esq.
1100 E. Bridger Ave..
Las Vegas, Nevada 89101
mike@mrlawlv.com
Attorney for Cross-Respondent/Appellant

//s// Justin K. Johnson
An Employee of the WILLICK LAW GROUP

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