IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMENT MUNEY, Appellant, vs. DOMINIQUE ARNOULD, Respondent.	Case No.: 83641 Consolidated with Case No.: 83869 Appeal from the Eighth Judicial District Court, The Honorable Judge Nancy Allf Presiding.

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal.

1. The firm of Marquis Aurbach Chtd. represents Dominque Arnould in this Court.

2. Marquis Aurbach Chtd. also represented Dominque Arnould in the District Court.

Dated this 15th day of June, 2022.

MARQUIS AURBACH

By *__/s/ Alexander Calaway__*
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I. JURISDICTIONAL STATEMENT

This is the consolidated appeal of Clement Muney and Chef Exec Suppliers, LLC. This Court consolidated Supreme Court Case No. 80989 and 86341 for all appellate purposes on March 10, 2022. On the same day, the Court entered Court its Order dismissing the appeal of Chef Exec Suppliers, LLC ("CES"). Accordingly, this appeal proceeds with appellant Clement Muney ("Muney") as the only remaining appellant.

In this case, Mr. Muney's appeal primarily challenges the District Court's Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment in favor of Mr. Arnould.[1] Mr. Muney also challenges the three (3) Judgments subsequently which entered against him as a result of the District Court's summary judgment ruling. First, Mr. Muney challenges the District Court's Order Granting Summary Judgment in favor of respondent Dominque Arnould ("Arnould")[2] and the Judgment entered in favor Mr. Arnould for $6,303.93 (the "Final Judgment").[3] Second, Mr. Muney challenges the District Court's Order Granting Mr. Arnould's

[1] 8 Appellant's Appendix (hereinafter "AA"), at 823-850

[2] 8 AA 823-850.

[3] Respondent's Appendix (hereinafter "RA"), at 49-53.

Motion for Fees[4] and subsequent Judgment entered in Favor of Mr. Arnould for Fees and Interest (the "Fee Judgment").[5] Finally, Mr. Muney challenges the District Court's Order Granting in Part and Denying in Part Mr. Muney's Motion to Retax Costs[6] and subsequent Judgment entered in favor of Mr. Arnould for Costs (the "Cost Judgment").[7]

Here, Mr. Arnould does not dispute that appellate review of the Final Judgment is proper under Nevada Rule of Appellate Procedure ("NRAP") 3A(b)(1). It is also undisputed that appellate review of the Fee Judgment and Cost Judgment is proper under NRAP 3A(b)(8). Finally, to the extent any argument on behalf of CES is being made in this appeal, the Court does not have jurisdiction over CES since it was dismissed as an appellant on March 10, 2022 as noted above.

II. ROUTING STATEMENT

Mr. Arnould does not dispute that this appeal arises from business court pursuant to NRAP 17(a)(9).

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[4] 8 AA 935-950.

[5] 8 AA 931-934.

[6] RA 126-133.

[7] 8 AA 951-955.

III. ISSUES ON APPEAL[8]

1. Whether the District Court erred in granting Mr. Arnould's motion for summary judgment under NRCP 56.

2. Whether the District Court erred in dismissing Mr. Muney's first, fifth, and sixth counterclaims for breach of fiduciary duty, constructive fraud, and fraudulent concealment, respectively.

3. Whether the District Court correctly ruled on the standing issues pertaining to CES below.

4. Whether the District Court's award of attorney fees was justified under NRS 18.010.

5. Whether the District Court's award of attorney fees was justified under NRS 86.489.

6. Whether the District Court erred in awarding Mr. Arnould attorney fees in the amount of $199,985.00.

[8] The issues on appeal presented by Mr. Muney are convoluted, incorrectly state the District Court's findings, and are wholly ineffective in guiding this Court (or any reader) in its review. As such, Mr. Arnould restates the issues presented in more coherent manner.

IV. STATEMENT OF THE CASE

This case is about the break-up of CES, a two-member Nevada limited liability company with no operating agreement.[9] Since it was not reasonably practicable for CES's two members to carry on the business together, the District Court judicially dissolved CES in August of 2021.[10] After the dissolution, the District Court's appointed receiver facilitated the winding-up of CES and the distribution of CES's assets. In addition, the receiver accounted for all of the assets and liabilities of CES, and provided a comprehensive recommendation to the District Court as to how they should be distributed to each member on an equitable basis. The receiver's accounting found (1) that Mr. Muney and Mr. Arnould should equally contribute funds back to CES to cover CES' liabilities; and (2) that Mr. Muney should pay Mr. Arnould a $6,303.93 equalizing payment.[11]

Despite this relatively straight-forward split, Mr. Muney objected to the receiver's accounting and recommendations. Mr. Muney's objection to the receiver's accounting, however, failed to provide any admissible evidence in

[9] 1 AA 88.

[10] 2 AA 340-344.

[11] *Id.* at 373.

support. In fact, despite the fact that Mr. Muney had the receiver's report for over six (6) months, Mr. Muney never bothered to produce any evidence to contradict the receiver's accounting of CES. In a word, Mr. Muney's objections to the receiver's accounting were nothing but arguments of counsel.

After discovery closed, Mr. Arnould filed his motion for summary judgment.[12] In his motion, Mr. Arnould not only established his dissolution and accounting claims, but he also established that summary judgment was proper under NRCP 56 since (1) there was no genuine dispute as to any material fact, (2) Mr. Muney could not produce admissible evidence to support a genuine factual dispute, (3) Mr. Muney could not set out any fact that might be admissible in evidence via affidavit, declaration, or otherwise, and (4) Mr. Arnould was entitled to judgment as a matter of law.[13]

On June 24, 2021, Mr. Muney filed his opposition to Mr. Arnould's motion for summary judgment.[14] However, Mr. Muney's opposition failed to meet the basic

[12] 7 AA 656-683.

[13] *See id.*

[14] RA 49-60.

requirements of an opposition under NRCP 56(c).[15] For starters, his entire opposition was devoid of any factual or evidentiary support, and he only provided the District Court with unsupported arguments of counsel.[16] More importantly, Mr. Muney failed to point to any admissible fact that might dispute the accounting of CES that had already been completed by the receiver. Since Mr. Muney could not cite to a single material disputed fact, his opposition failed under NRCP 56(c). In sum, Mr. Muney provided no support for his claims and defenses in the case. As such, the District Court entered the Final Judgment in favor of Mr. Arnould for $6,303.93, consistent with the receiver's undisputed accounting of CES.

After the Final Judgment, the District Court awarded Mr. Arnould attorney's fees and partially awarded him costs. Mr. Arnould's total attorney fee award was $199,985.00, and was based on three (3) grounds: (1) Mr. Arnould was a prevailing party that recovered less than $20,000 under NRS 18.010(2)(a); (2) Mr. Muney's counterclaims and defenses were frivolous and groundless under NRS 18.010(2)(b); and (3) Mr. Arnould was successful on his derivative claims on behalf of CES under NRS 86.489. The District Court determined that the sum of $199,985.00 requested

[15] *See id.*

[16] *Id.*

by Mr. Arnould was reasonable upon applying Nevada's *Brunzell* factor test. Finally, Mr. Arnould requested an award of $55,084.60 in costs, but the District Court awarded him only $5,984.46.[17]

In conclusion, Mr. Muney's entire appeal can be summed up in two (2) halves. In the first half, Mr. Muney asks this Court to reverse the District Court's order granting summary judgment, despite the fact that Mr. Muney provided absolutely no facts or evidence to support his claims and defenses. In the second half, Mr. Muney asks this Court to reverse the District Court's attorney fee and cost award, despite the fact that he brought and maintained groundless claims and defenses for years, and did so to avoid paying his business partner a total of $6,303.93.

V. FACTUAL BACKGROUND

A. THE DISPUTE BETWEEN BUSINESS PARTNERS

Mr. Muney and Mr. Arnould were equal co-owners and co-managers of CES.[18] CES is a Nevada limited liability company, validly formed under Nevada law, with no operating agreement.[19] CES had two branches of operations: one in

[17] 8 AA 951-955

[18] 1 AA 6-17; *see also* 1 AA 88, at ¶¶2-4.

[19] *Id.*

Las Vegas, NV and the other in Los Angeles, CA.[20] Mr. Muney and Mr. Arnould both monitored the accounts of CES as co-managers.[21] In or around October of 2019, disputes between Mr. Arnould and Mr. Muney arose that were so deep that it is not reasonably practicable to carry on the business of CES together.[22] These disputes included Mr. Muney's diversion of CES profits to himself, which Mr. Arnould could not account for without cooperation from Mr. Muney.[23] Because CES lacked an operating agreement, lacked a procedure for handling the growing disagreements between the co-managers, and Mr. Muney refused to cooperate with his business partner, Mr. Arnould was left with not choice but to bring an action against Mr. Muney for an accounting and dissolution of CES.

B. VERIFIED COMPLAINT, ANSWER, AND COUNTERCLAIMS

On October 11, 2019, Mr. Arnould filed his Verified Complaint. [24] Mr. Arnould brought a derivative claim against Mr. Muney on behalf of CES (who was

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[20] *Id.*

[21] *Id.*

[22] 1 AA 9.

[23] *Id.* at ¶¶20-25.

[24] *See id.*

as a named nominal defendant).[25] This first cause of action sought declaratory relief that the requirements for receiver and dissolution had been met.[26] Mr. Arnould's second cause of action was for an accounting of CES.[27] Subsequently, Mr. Muney filed his Answer and Counterclaim against Mr. Arnould.[28] Mr. Muney's six (6) counterclaims against Mr. Arnould were breach of fiduciary duty, conversion, money had and received, unjust enrichment, constructive fraud, and fraudulent concealment.

C. APPOINTMENT OF RECEIVER AND DISSOLUTION

On June 8, 2020, the District Court appointed a receiver over CES and ordered the receiver to, among other things, prepare a report about the viability of CES.[29] Shortly thereafter, Mr. Muney locked Mr. Arnould out of the CES warehouse. [30] As such, the District Court appointed Larry L. Bertsch, CPA as receiver to take

[25] *Id.* at ¶15.

[26] *Id.* at ¶¶16-19.

[27] *Id.* at ¶¶20-25.

[28] 1 AA 6-17

[29] 2 AA 289-296.

[30] RA 34-36.

immediate control of the Nevada warehouse and inventory (hereinafter the "Receiver").[31] Finally, on August 21, 2020, the District Court entered an Order judicially dissolving CES, expressly finding that:

> Both Parties don't dispute and stipulated that it is not reasonably practicable to carry on the business of [CES] in conformance with the operating agreement since there is no operating agreement and since the owners of [CES] cannot get along and disagree about the operation of [CES]. Therefore, [CES] must be dissolved…. [and] the date of dissolution should be September 30, 2020.[32]

D. THE ACCOUNTING OF CES' ASSETS AND LIABILITIES, AND THE RECEIVER'S FINAL REPORT

On December 7, 2020, the Receiver issued his Final Report and Recommendations (hereinafter the "Final Report").[33] In his findings, the Receiver made "recommendations as to the distribution of the assets and liabilities of [CES] to each Partner on an equitable basis."[34] The Receiver's Final Report included his factual findings, analysis, and accounting opinions.[35] After accounting for all of

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[31] *Id.*

[32] 2 AA 340-344, at ¶¶1-2.

[33] 3 AA 363-374.

[34] *Id.* at 364.

[35] *Id.*

CES' assets and liabilities, the Receiver ultimately found, among other things, that (1) Mr. Muney and Mr. Arnould would both need to contribute funds back to CES; and (2) Mr. Muney was to pay Mr. Arnould a $6,303.93 equalizing payment.[36]

On January 29, 2021, Mr. Muney objected to the Receiver's report,[37] and the Receiver responded to these objections on February 6, 2021.[38] In his objection, Mr. Muney: (a) objected to the Receiver's allocation of rent expense for the warehouse in Nevada, and argued that the Receiver improperly "adjust[ed] the accounting…" because it is a "legal issue for determination by the finder of fact…";[39] (b) objected to the Receiver's accounting of various expenditures, such as shipping charges and how they were expensed, CES's checks and how they were recorded in the books, classification of business expenses, and invoicing;[40] and (c) objected to the

[36] *Id.* at 373.

[37] 6 AA 575-583.

[38] 7 AA 619-624.

[39] 6 AA 575-583.

[40] *Id.*

Receiver's calculations as to how CES's delivery truck costs should be allocated and how the truck itself should be valued.[41]

Notably, however, Mr. Muney's objections contained no expert testimony in support, no declaration/affidavit in support, and no authenticated documentary evidence.[42] In other words, Mr. Muney's objection was merely argument of counsel.[43] The Receiver's Final Report was ultimately approved and accepted by the District Court, and the Receiver was discharged on February 17, 2021.[44]

On February 26, 2021, the parties stipulated that Mr. Muney and Mr. Arnould would each pay $22,712.56 to the Receiver to settle CES's outstanding obligations, which was consistent with the Receiver's Final Report.[45] However, Mr. Muney refused to pay Mr. Arnould the $6,303.93 equalizing payment in accordance with the Final Report.[46]

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] RA 37-43.

[45] 7 AA 644-652

[46] 7 AA 373

VI. RELEVANT PROCEDURAL BACKGROUND

A. DISCOVERY AND DISCLOSURES

On May 14, 2021, Mr. Arnould designated the Receiver as an expert witness for trial and the Receiver's Final Report as an expert report.[47] On the same day, Mr. Muney timely designated Andrew Martin, MS, CFE, CFF, CGMA, CICA, CPA ("Martin") and Gene Proctor ("Proctor") as expert witnesses in this matter.[48] However, no expert report by Mr Martin nor Mr. Proctor were disclosed by Mr. Arnould.[49] Discovery closed on May 14, 2022.[50]

B. MR. ARNOULD'S MOTION FOR SUMMARY JUDGMENT

On June 14, 2021, Mr. Arnould filed his Motion for Summary Judgment pursuant to NRCP 56(a).[51] Mr. Muney filed his Opposition to the Motion for Summary Judgment; however, his opposition contained no factual support under

[47] 7 AA 685-687.

[48] 7 AA 689-692.

[49] *Id.*

[50] RA 44-48.

[51] 7 AA 656-698.

NRCP 56(c).[52] Mr. Arnould filed his Reply in Support of Motion for Summary Judgment thereafter.[53] On July 29, 2021, the District Court heard oral arguments on the dispositive motion.[54] On September 10, 2021, the District Court entered its Findings of Fact, Conclusions of Law, and Order granting Mr. Arnould's Motion for Summary Judgment.[55] On September 14, 2021, the District Court entered Judgment against Mr. Muney and in favor of Mr. Arnould for $6,303.93.[56]

C. MR. ARNOULD'S PARTIAL COST AWARD

On September 21, 2021, Mr. Arnould filed his Verified Memorandum of Costs for $55,084.60.[57] On September 24, 2021, Mr. Muney filed his Motion to Retax Costs,[58] which Mr. Arnould opposed on October 8, 2021.[59] On December 9, 2021, the District Court entered its Findings of Fact and Conclusions of Law and

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[52] 7 AA 699-710.

[53] 7 AA 711-721.

[54] 7 AA 803-822.

[55] 8 AA 823-850.

[56] RA 61-65.

[57] RA 66-137.

[58] RA 138-145.

[59] RA 153-160.

Order Granting in Part and Denying in Part Defendants' Motion to Retax Costs.[60] In granting Mr. Muney's Motion to Retax Costs, the District Court only partially awarded Mr. Arnould costs of $5,984.46.[61] On December 15, 2021, the District Court entered a Judgment in favor of Mr. Arnould and against Mr. Muney in the amount of $5,984.46.[62]

D. MR. ARNOULD'S ATTORNEY FEE AWARD

On September 28, 2021, Mr. Arnould filed his Motion for Attorney Fees, requesting a sum of $199,985.00.[63] On October 8, 2021, Mr. Muney filed his Opposition to the Motion for Fees.[64] On November 4, 2021, the District Court heard oral argument on the motion.[65] On November 10, 2021, the District Court entered its Order Granting Mr. Arnould's Motion for Attorney Fees Against Mr. Muney.[66]

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[60] RA 141-148

[61] *Id.*

[62] 8 AA 951-955

[63] 8 AA 851-893.

[64] 8 AA 894-902.

[65] 8 AA 903-930.

[66] 8 AA 935-950.

On November 16, 2021, the District Court entered Judgment in favor of Mr. Arnould for attorney's fees and interest in the sum of $199,985.00.[67]

E. MR. MUNEY'S APPEAL

As set forth above, Mr. Muney's appeal primarily challenges the District Court's Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment in favor of Mr. Arnould.[68] Mr. Muney also challenges the three (3) Judgments subsequently entered against him as a result of the District Court's summary judgment ruling, including the Final Judgment for $6,303.93,[69] the Fee Judgment for $199,985.00,[70] and the Cost Judgment for $5,984.46.[71]

VII. ARGUMENT

Mr. Muney's entire appeal can be summed up in two (2) halves. In the first half, Mr. Muney is asking this Court to reverse the District Court's order granting summary judgment, despite the fact that Mr. Muney provided absolutely no facts or

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[67] 8 AA 931-934.

[68] 8 AA 823-850.

[69] RA 61-65.

[70] 8 AA 931-934.

[71] 8 AA 951-955.

evidence to support his claims and defenses. In the second half, Mr. Muney asks this Court to reverse the District Court's attorney fee and cost award, despite the fact that he brought and maintained groundless claims and defenses for years, and did so to avoid paying his business partner a total of $6,303.93.

A. STANDARDS OF REVIEW

1. Summary Judgment Standard.

This Court reviews an order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id*. at 731, 121 P.3d at 1031. As for the burden of proof and persuasion in a summary judgment context, this Court has adopted the federal summary judgment standard set forth in *Celotex* and other federal decisions. *Wood*, 121 Nev. at 731–32, 121 P.3d at 1031 (adopting the summary judgment standard set forth in *Celotex*); *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada,* 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Under this approach, the party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact. *Id*. at 331, 106 S.Ct.; *Wood*, 121 Nev. at 732, 121 P.3d at 1031; *Maine v. Stewart*, 109 Nev. 721, 726–27, 857 P.2d 755, 758–59 (1993).

2. Attorneys Fees and Costs Standard.

In Nevada, attorney fees are not recoverable absent a statute, rule, or contractual provision. *Albios v. Horizon Cmtys., Inc*., 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). This Court reviews a district court's decision regarding fees for an abuse of discretion. *Helix Elec. of Nevada, LLC v. APCO Constr., Inc*., 138 Nev. Adv. Op. 13, 506 P.3d 1046, 1053–54 (2022) (citing *Gunderson v. D.R. Horton, Inc*., 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) (reviewing attorney fees for an abuse of discretion)). Similarly, a district court's decision regarding an award of costs will not be overturned absent a finding that the district court abused its discretion. A *Cab, LLC v. Murray*, 137 Nev. Adv. Op. 84, 501 P.3d 961 (2021). Finally, in exercising that discretion, the district court must make findings under the *Brunzell* factors. *Capriati Constr. Corp. v. Yahyavi*, 137 Nev. Adv. Op. 69, 498 P.3d 226, 231 (2021)

(citing *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969)). Under *Brunzell*, the district court considers

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. at 349, 455 P.2d at 33.

B. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MR. ARNOULD.

The first issue raised by Mr. Muney is essentially whether the District Court erred in granting Mr. Arnould's motion for summary judgment under NRCP 56. As a threshold matter, Mr. Arnould prevailed on his first claim for relief for dissolution prior to the summary judgment motion.[72] As such, the only claims that were before the District Court on summary judgment were Mr. Arnould's second cause of action for an accounting and Mr. Muney's six (6) counterclaims.

[72] 2 AA 340-344.

a. Summary Judgment Was Proper on all Claims and Counterclaims Because Mr. Muney Failed to Produce Any Factual Support as Required by NRCP 56(c) and (e).

Mr. Muney failed oppose Mr. Arnould's summary judgment motion. To be sure, Mr. Muney failed to produce *any* evidence in support of his claims and defenses, and as such, there could were simply no disputed facts that could proceed to trial.

Pursuant to NRCP 56(c)(1), a party opposing summary judgment on the basis that a fact is genuinely disputed must support his or her assertion by: (A) citing to particular parts of materials in the record; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute or lack admissible evidence to support the fact. A party opposing a summary judgment motion must "set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Id*. at 56(c)(4). If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, then the court may "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it." *Id*. at (e)(3).

In this case, Mr. Muney's opposition to Mr. Arnould's motion for summary judgment provided ***no factual support***, let alone factual support that might place any

material fact into dispute.[73] In support of his accounting claim, Mr. Arnould cited to the entire Final Report and accounting done by the Receiver on the record.[74] Mr. Arnould also designated and disclosed the Receiver and his Final Report as expert testimony for trial.[75] Conversely, in his opposition, Mr. Muney failed to cite to any fact, affidavit, declaration, exhibit, or witness that refuted the Receiver's accounting of CES.[76]

Notably, in oral argument, Mr. Muney's counsel conceded that the only witnesses or evidence presented in opposition to summary judgment were arguments of Mr. Muney's own counsel.[77] When the District Court asked, "And is there some reason why no affidavit or evidence was attached to the opposition?"[78] Mr. Muney's counsel responded stating, "[a]n affidavit was attached to the opposition, Your Honor. We are -- the ***attorney affidavit*** was sworn and attached and supported –" to

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[73] *See* 7 AA 699-710.

[74] 7 AA 656-683 (motion for summary judgment); *c.f.* 3 AA 363-374 (final report).

[75] 7 AA 685-687.

[76] *See id.*

[77] 7 AA 817.

[78] 7 AA 817.

which the District Court correctly replied" "***But the attorney is not a witness***."[79] The District Court was therefore correct in finding that "Mr. Muney failed to cite to any material facts that support his defenses and counterclaims in this matter. . . [and] Mr. Muney's Opposition failed to support [his] claims and defenses in this case."[80] Thus, the District Court did not err in granting summary judgment on Mr. Arnould's second cause of action pursuant to NRCP 56(c) and (e).

Further, the same was true for Mr. Muney's counterclaims. Mr. Muney had the burden of proving each of his counterclaims, yet in his opposition, Mr. Muney failed to cite to any fact, affidavit, declaration, exhibit, or witness to support his six (6) counterclaims.[81] Once again, the District Court explained in oral argument that "I do find that the -- all causes of action on the counterclaim have failed for lack of any evidence."[82] As such, the District Court correctly found that Mr. Muney's opposition failed to support each of his counterclaims.[83] Thus, the District Court did

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[79] *Id.* (emphasis added).

[80] 8 AA 083.

[81] *See id.*

[82] 7 AA 820.

[83] *See* 8 AA 081-842, 843.

not err in granting summary judgment on Mr. Muney's counterclaims pursuant to NRCP 56(c) and (e).

In sum, Mr. Muney failed to cite to any admissible evidence to support his six (6) counterclaims, and failed to cite to any admissible evidence to refute the Receiver's accounting of CES. Since Mr. Muney failed to cite to a single material disputed fact, his opposition to Mr. Arnould's motion for summary judgment failed under NRCP 56(c) and (e). Thus, the District Court did not err in entering its Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment in favor of Mr. Arnould.[84]

b. Summary Judgment was Proper with Respect to Mr. Arnould's Second Cause of Action for Accounting and the District Court did Not Improperly Shift the Burden.

Mr. Muney's argument that Mr. Arnould failed to establish his accounting claim ignores facts and misconstrues the law. As a threshold issue, Mr. Muney's argument that Mr. Arnould's accounting was "without evidence or allegation" is patently false.[85] Mr. Arnould clearly established his claim for accounting through

[84] 8 AA 823-850

[85] Appellant's Brief, at pg. 17.

the undisputed accounting of the Receiver.[86] As noted above, NRCP 56(c) establishes the procedures for supporting factual positions on summary judgment.

In this case, Mr. Muney's motion for summary judgment cited to, among other things, "particular parts of materials in the record, . . . documents, electronically stored information, affidavits [and] declarations, stipulations . . . [and] other materials[.]" Mr. Arnould's motion for summary judgment even expressly incorporated by reference "all of the factual findings, analysis, and exhibits in the Final Report as if fully stated herein pursuant to law and NRS 52.275(1)."[87] Not only was the Final Report on the record, it also contained documents, electronically stored information (e.g. the CES QuickBooks), sworn statements, and a myriad of other accounting materials.[88] And again, Mr. Muney produced no admissible evidence to dispute these materials. Mr. Arnould agrees that the Receiver's Final Report was not final adjudication, however, it was undisputed by Mr. Muney because he failed dispute any of the accounting evidence presented by the Receiver

[86] 3 AA 363-374, 3 AA 375-412, 4 AA 413-462, 5 AA 463-534, 6 AA 535-563.

[87] 7 AA 659.

[88] 3 AA 363-374, 3 AA 375-412, 4 AA 413-462, 5 AA 463-534, 6 AA 535-563.

in his Final Report.[89] In oral argument, Mr. Muney's counsel further admitted that Mr. Muney had no expert to rebut the Receiver's accounting.[90]

Further, Mr. Arnould was entitled to judgment as a matter of law on his accounting claim. An equitable accounting "is a restitutionary remedy based upon avoiding unjust enrichment." *See* D. Dobbs, Remedies § 4.3 at 415 (1973). Nevada courts have long recognized the action of an equitable accounting. *Botsford v. Van Riper*, 33 Nev. 158, 110 P. 705 (1910); *Young v. Johnny Ribiero Bldg., Inc*., 106 Nev. 88, 787 P.2d 777 (1990); *Oracle USA, Inc. v. Rimini Street, Inc*., No. 2:10-CV-00106-LRH-PAL, 2010 WL 3257933 (D. Nov. Aug. 13, 2010); *Mobius Connections Group, Inc. v. Techskills, LLC*, No. 2:10-CV-01678-GMN-RJJ, 2012 WL 194434 (D. Nev. Jan. 23, 2012). Courts generally define an action for an accounting as "a proceeding in equity for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice." *Verdier v. Superior Court*, 88 Cal.App.2d 527, 530, 199 P.2d 325 (Cal.1948); *Teselle v. McLoughlin*, 173 Cal. App. 4th 158, 92 Cal. Rptr. 3d 696 (Cal. App. 2009); NRS 86.5419 (providing for

[89] 3 AA 363-374

[90] 7 AA 0816-817.

an accounting performed by a receiver over a Nevada limited liability company). Finally, a prevailing party in an accounting claim may receive a judgment. *See e.g.*, *Botsford*, 33 Nev. 156, 110 P. at 709 (upholding a lower court's judgment in favor of plaintiffs shares of the capital stock and cash dividends of $6,000).

In his appellate brief, Mr. Muney argues for the first time that Mr. Arnould had to establish some wrongdoing as a prerequisite to a claim for accounting.[91] This issue was not raised by in the District Court and is deemed waived on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). And even if this Court were to consider Mr. Muney's novel argument, it still fails. Notably, the only support Mr. Muney provided for this legal assertion is *Foster v. Arata*, 74 Nev. 143, 154, 325 P.2d 759, 764 (1958), which was abrogated by *Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021). Thus, *Foster* no longer good law.

Moreover, *Foster* is easily distinguished here. The issue in *Foster* was whether stockholders were entitled to an interlocutory order for an accounting – not a final order based upon evidence presented as was the case here. *Foster*, 74 Nev. at 154, 325 P.2d at 764. In this case, the District Court properly considered the

[91] Appellant Brief, at pg. 15.

undisputed accounting evidence produced by the Receiver in his Final Report.[92] Accordingly, Mr. Muney's reliance on *Foster* is misguided at best.

Similarly, Mr. Muney's argument that he was not "in possession of property belonging to Arnould" is factually incorrect.[93] The Receiver's accounting was prepared by "reviewing the books and records of the Company, and in consultation with Arnould and Partner in order to prepare an accounting and Adjusted Financial Statements that are proper and just."[94] In other words, the Receiver's accounting adjusted the CES financials to reflect property unjustly possessed by both partners (e.g., allocation of physical inventory assets, cash, funds for rent, funds for vehicle expenses, etc.).[95] Notably, Mr. Muney does not (and cannot) dispute that this accounting performed by the Receiver was complex, detailed, and supported my substantial financial documentation.[96] Instead, Mr. Muney's argument simply ignores all of the facts and evidence within Receiver's massive Final Report, which

[92] *See* 8 AA 837-838.

[93] Appellant Brief, at p. 16.

[94] 3 AA 365-366.

[95] 6 AA 0559.

[96] Appellant Brief, at pgs. 14-18.

for perspective, spans four (4) volumes of the appellant's appendix.[97] Perhaps Mr. Muney's ability to ignore basic facts in this case explains why he felt no need to oppose summary judgment below.

c. Mr. Muney's Objection to the Receiver's Report is Not Admissible Evidence.

In his appellant brief, Mr. Muney argues for the first time that his objections to the Receiver's Report were an admissible accounting of CES.[98] Once again, this issue was not raised in the District Court and is deemed waived on appeal. *Old Aztec Mine, Inc.* 97 Nev. at 52, 623 P.2d at 983. But even if the Court considered Mr. Muney's novel argument, the argument still fails legally and factually.

First, Mr. Muney erroneously argues that the District Court did not make admissibility determinations.[99] In reality, the District Court expressly addressed the admissibility issues with Mr. Muney's objection to the Receiver's Final Report.[100] As noted above, NRCP 56(c)(4) requires a party opposing a summary judgment

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[97] 3 AA 363-374, 3 AA 375-412, 4 AA 413-462, 5 AA 463-534, 6 AA 535-563.

[98] Appellant Brief, at pgs. 18-24.

[99] *Id.* at p. 19.

[100] 8 AA 839-840.

motion to "set out facts that would be ***admissible*** in evidence, and show that the affiant or declarant is ***competent*** to testify on the matters stated." (Emphasis added).

Here, the District Court correctly found that "[w]hile Mr. Muney objected to the Receiver's accounting, his objections are not admissible evidence at trial."[101] The District Court also correctly found that "[e]ach of the issues Mr. Muney raised in his written objection on the record require specialized and technical knowledge in accounting, which are subjects reserved for experts pursuant to NRS 50.275."[102] In other words, neither Mr. Muney nor his attorney were competent to testify as to these accounting issues.

Moreover, while it is conceivable that Mr. Muney's designated experts may have been competent to testify at trial, Mr. Muney failed to produce or disclose any expert report as required under NRCP 16.1(a)(2). *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Nev. App. 2015) (citing NRCP 16.1(a)(2)). The policy underlying NRCP 16.1 "serves to place all parties on an even playing field and to prevent trial by ambush or unfair surprise." *Id*.; *see also Roberts v. Libby*, 132 Nev. 1023 (Nev. App. 2016). In this case, the District Court correctly found that "Mr.

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[101] *Id.*

[102] *Id.*

Muney failed to produce an expert report or any other admissible accounting of profits for CES."[103] Accordingly, the District Court correctly found that "to present expert testimony, the proffering party must provide a written disclosure of their experts and the contents of those experts' testimonies, including the information each expert considered in forming an opinion, well in advance of trial."[104] No expert report meant no expert testimony, and to be sure, Mr. Muney's counsel conceded on the record that he and his client were "not planning to have an expert for the accounting itself."[105]

Second, Mr. Muney incorrectly argues in his appellate brief that that he was "not entitled to present evidence or arguments to dispute any of the Receiver's conclusions."[106] This argument is patently false. Here, the District Court only declined to consider evidence and facts that were not presented by Mr. Muney. As set forth above, Mr. Muney failed to cite to any fact that would support his "list of

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[103] *Id.*

[104] *Id.*

[105] 7 AA 817.

[106] Appellant Brief, at pgs. 17, 19-20.

determinations of disputed fact" included in his opposition.[107] As set forth below, each of the facts he claimed to be in dispute were (a) unsupported by any admissible evidence; (b) only supported by argument of counsel; and/or (c) required the District Court to consider undisclosed expert testimony.

For instance, Mr. Muney failed to produce any facts to dispute the Receiver's allocation of the Las Vegas warehouse rent. Mr. Muney argued in his opposition that there was a factual dispute as to whether rent was "reasonable in that market" but failed to provide any admissible fact as to what a "reasonable" market rate might have been at the time.[108] This issue would require a witness with specialized and technical knowledge in real estate prices or the market for commercial rent in Las Vegas, Nevada (*c.f.* NRS 50.275). Yet, Mr. Muney failed to disclose any expert opinions and was thus precluded from proffering such evidence at trial. *Sanders*, 131 Nev. at 517, 354 P.3d at 212 (citing NRCP 16.1(a)(2)). In another example, Mr. Muney vaguely argued in his opposition to the motion for summary judgment that some "disputed amounts" charged by Mr. Muney and Mr. Arnould raised factual

[107] RA 49-48.

[108] RA 49-60.

questions.[109] But again, Mr. Muney failed to (1) cite to any amount actually in dispute, and (2) failed to cite to any fact that might support his conclusory statement that "charges" were improper.

Finally, Mr. Muney vaguely argues in his appellate brief that he "will not detail every issue in dispute, but will note that there are other issues disputed, which are all contained in Muney's objection to the Receiver's Report."[110] This vague argument is fitting since it is strikingly similar to the vague argument that Mr. Muney used in his defective opposition to summary judgment.[111] But the argument fails here just as it failed below. The standard for summary judgment under NRCP 56 does not allow litigants to proceed to trial with nothing but "gossamer threads of whimsy, speculation, and conjecture[.]" *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (internal quotations omitted). Since Mr. Muney failed to produce any material fact, the District Court correctly granted summary judgment in favor of Mr. Arnould.

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[109] *Id.*

[110] Appellant's Brief, at pg. 24.

[111] *C.f.* RA 49-60.

d. The District Court did not "Exclude Evidence" and Only Declined to Consider Mr. Muney's Undisclosed Expert Testimony.

Mr. Muney argues in his appellant brief that the District Court "excluded evidence" that would have established an issue of material fact for each claim and defense. In this case, the District Court did not did not "exclude" any evidence in its Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment.[112] In reality, the District Court correctly found that both Mr. Muney's opposition, as well as his objection to the Receiver's Final report, contained "no expert testimony in support, no declaration/affidavit in support, and no authenticated documentary evidence."[113] Thus, there was no evidence presented by Mr. Muney for the District Court to exclude.

Moreover, the only thing that the District Court declined to consider on summary judgment was undisclosed testimony of Mr. Muney's expert witnesses. The District Court explained in its findings that:

> Because Mr. Muney failed to produce an expert report, he is barred from attempting to proffer expert testimony at trial. Since Mr. Muney cannot present expert testimony at trial, the Final Report and Receiver's accounting of profits are undisputed. The amounts due under the Receiver's accounting were also partially stipulated to on or about

[112] 8 AA 823-850.

[113] 8 AA 823-850.

> February 26, 2021, since Mr. Muney and Mr. Arnould each stipulated and agreed to pay $22,712.56 to the Receiver to close out the receivership estate and thereafter, accepted their respective distributions of CES's assets.[114]

To be sure, the District Court's refusal to consider undisclosed expert testimony was proper. *Sanders*, 131 Nev. at 517, 354 P.3d at 212 (citing NRCP 16.1(a)(2)). In any event, Mr. Muney's counsel conceded on the record that he and his client did not even intend to present an expert at trial for the accounting.[115]

e. Each of the "Additional Matters" Raised by Mr. Muney in his Appellate Brief Lack Merit.

In his brief, Mr. Muney lists a number of "Additional Matters" challenging the District Court's order granting summary judgment.[116] Mr. Arnould will address each of these issues in turn.

First, Mr. Muney incorrectly argues that documents need not be authenticated in a motion for summary judgment. Conversely, NRCP 56(c)(4) requires that "an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the

[114] 8 AA 839.

[115] 7 AA 817.

[116] Appellant's Brief, at pgs. 26-29.

affiant or declarant is competent to testify on the matters stated." Similarly, Eighth Judicial District Court Rule ("EDCR") 2.21(a) provides that "[f]actual contentions involved in any pretrial or post-trial motion must be initially presented and heard upon affidavits, unsworn declarations under penalty of perjury, depositions, answers to interrogatories, and admissions on file." In this case, Mr. Muney did not include ***any*** affidavit or declaration in support of his opposition.[117] Nor did he cite to any affidavit or declaration on the record.[118]

Second, Mr. Arnould did not engage in any discovery "abuses," and even if discovery disputes existed, the District Court properly found the disputes to have been waived.[119] A motion to compel, absent unusual circumstances, should be filed before the scheduled date for dispositive motions. *See e.g. Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999); *see e.g. Thurston v. City of North Las Vegas*, 2011 U.S. Dist. LEXIS 96619, 2011 WL 3841110 (D. Nev. 2011); *see e.g. Hall v. Schumacher*, 2011 U.S. Dist. LEXIS 108896, 2011 WL 4458845 (D. Nev.

[117] RA 49-60.

[118] *Id.*

[119] 8 AA 846.

2011).[120] In this case, the District Court correctly found that "Mr. Muney's Motion to Compel was brought well after the close of discovery and after dispositive motions."[121] As such, the District Court correctly ruled that "Mr. Muney's Motion to Compel was untimely and is therefore denied."[122]

Third, Mr. Muney partially stipulated to the Receiver's division of assets. To be clear, on February 26, 2021, the parties stipulated that Mr. Muney and Mr. Arnould would each pay $22,712.56 to the Receiver to settle CES's outstanding obligations, which was consistent with the Receiver's Final Report and recommended division of assets.[123] Mr. Muney only refused to pay Mr. Arnould the $6,303.93 equalizing payment to Mr. Arnould in accordance with the Final Report.[124]

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[120] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Mgmt., Ltd. v. Ticor Title Ins. Co*., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quotation and citation omitted).

[121] *Id.*

[122] *Id.*

[123] 7 AA 644-652

[124] 7 AA 373

Finally, Mr. Muney did not challenge the facts and data relied upon by the Receiver. Mr. Muney's own citations in his appellate brief established this. The District Court found that "Mr. Muney failed to provide any material disputed fact that might dispute or rebut the Receiver's accounting of CES pursuant to NRCP 56(c)-(e)."[125] And the page Mr. Muney references in his objection to the Receiver's Final Report would not be admissible at trial, as already explained above.[126]

C. THE DISTRICT COURT DID NOT ERR IN DISMISSING MR. MUNEY'S FIRST, FIFTH AND SIXTH CAUSES OF ACTION, BECAUSE MR. MUNEY DID NOT ALLEGE, NOR DID HE PRODUCE, ANY FACTS TO SUPPORT A FIDUCIARY OR SPECIAL RELATIONSHIP.

Mr. Muney's second issue on appeal pertains to his first, fifth, and sixth counterclaims for breach of fiduciary duty, constructive fraud, and fraudulent concealment, respectively.[127] It is undisputed that each of these counterclaims require some duty owed by Mr. Arnould, however, for each of these counterclaims, the District Court properly found that Mr. Muney failed to allege or establish any

[125] 8 AA 838.

[126] 6 AA 575.

[127] 1 AA 1-5.

special or fiduciary duty was owed by Mr. Arnould.[128] Accordingly, the District Court was correct in dismissing these claims.

a. Mr. Muney's Counterclaims Did Not Allege or Produce Facts to Support any Fiduciary or Special Duty Owed by Mr. Arnould.

Mr. Muney incorrectly argues in his appellate brief that the District Court should have considered other "non-formal bases for fiduciary and special relationship."[129] Tellingly, Mr. Muney does not articulate what these amorphous duties might be.[130] In this case, Mr. Muney's breach of fiduciary duty counterclaim expressly alleged that Mr. Arnould owed such a duty "as co-owner and co-manager of an LLC[.]"[131] Stated another way, each of the duties alleged by Mr. Muney were duties arising out of Mr. Arnould's status as a manager and member of CES.[132] Mr.

[128] 8 AA 840-843.

[129] Appellant's Brief, at pgs. 30-32

[130] *Id.*

[131] 1 AA 11.

[132] 1 AA 11, 14-15.

Muney simply did not allege any other special or non-formal duties owed by Mr. Arnould in his counterclaims.[133]

Moreover, the District Court's finding did consider whether Mr. Arnould owed duties to Mr. Muney.[134] The District Court correctly found that "[w]hile members of an LLC can contract to fiduciary duties, such duties do not necessarily exist otherwise, aside from the implied contractual covenant of good faith and fair dealing."[135] *See e.g*. *Israyelyan v. Chavez*, 466 P.3d 939 (Nev. 2020) (unpublished). Thus, District Court correctly concluded that Mr. Arnould owed no fiduciary duties to Mr. Muney, because there was no operating agreement between the members of CES imposing fiduciary duties.[136] And even if, *arguendo*, some other legal duty existed (which does not), the District Court correctly found that "Mr. Muney's Opposition failed to support this particular claim [for breach of fiduciary duty]."[137]

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[133] 1 AA 6-17.

[134] 8 AA 840-843.

[135] 8 AA 841.

[136] *Id.*

[137] *Id.*

Further, Mr. Muney's constructive fraud and fraudulent concealment counterclaims rested on some vague duty to "lawfully manage and disburse funds and assets belonging to CES" and disclose business dealings.[138] The District Court's findings considered the duties alleged in the counterclaims and properly found that the only duties in this case arose out of "[t]he only relationship between Mr. Muney and Mr. Arnould [which] was their relationship as equal co-owners and co-managers of CES."[139]

Finally, Mr. Muney's appellate brief asserts that an existence of such a duty "appears to be a question of fact" quoting *Yerington Ford, Inc. v. Gen. Motors Acceptance Corp.*, 359 F. Supp. 2d 1075, 1088 (D. Nev. 2004).[140] But here, Mr. Muney misstates the law. The trial court's decision in *Yerington Ford, Inc*. was reversed by the Ninth Circuit in *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007). The Ninth Circuit reversed this decision, holding that a company did not owe a duty to a dealership or owner-operators arising from confidential or special relationship under Nevada law. *Giles*, 494 F.3d at 882. In fact, the Ninth

[138] 1 AA 14-15.

[139] 8 AA 842.

[140] Appellate Brief, at p. 31.

Circuit in *Giles* found that the appellants had ***failed*** to produce "evidence sufficient to support a finding that a confidential or special relationship," which is precisely what the District Court found in this case.[141] *Giles*, 494 F.3d at 883. In sum, the District Court correctly found that there were no other issues of fact that could establish a fiduciary or special relationship.

b. Judicial Estoppel Cannot Create a Fiduciary or Special Duty Owed by Mr. Arnould.

Mr. Muney incorrectly argues that Mr. Arnould is judicially estopped from arguing he owed no duty to Mr. Muney.[142] This is not the law.

Judicial estoppel is only applied when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (internal quotations omitted). Judicial estoppel does not preclude changes in position that are not intended to sabotage the judicial process. *Id*. (citing *U.S. v. Real Property Located at Incline Village*, 976 F. Supp. 1327, 1340 (D.Nev.1997). Contrary to Mr. Muney's argument in his appellant brief, simply changing one's position is not

[141] 8 AA 842 (stating that "Mr. Muney's Opposition failed to support this particular claim.").

[142] Appellate Brief, at pgs. 32-34.

enough to establish judicial estoppel.[143] Indeed, Mr. Muney's reliance on *Breliant v. Preferred Equities Corp*., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) is misguided, because this case was invalidated by *Delgado v. Am. Fam. Ins. Grp*., 125 Nev. 564, 570, 217 P.3d 563, 567 (2009).

In *Delgado*, the Court invalidated both the provision in *Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004), which indicated that it was unnecessary to satisfy all five elements of judicial estoppel, and that the provision in *Breliant*, which indicated that changing one's position is all that is necessary. *See Delgado*, 125 Nev. at 570, 217 P.3d at 567 (abrogation recognized by *Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017)).

In this case, Mr. Arnould's change on position on ok issue was in no way intend to sabotage the judicial process; nor was Mr. Arnould engaged in any intentional wrongdoing to obtain an unfair advantage. Rather, Mr. Arnould's change in position was due to a clarification by the Nevada Supreme Court made in *Israyelyan v. Chavez*, 466 P.3d 939 (Nev. 2020) in July 2020. When Arnould first argued that fiduciary duties were owed in December 2019, there was not even any persuasive authority on point. At that point, it was unclear whether fiduciary duties,

[143] *Id.* at pg. 34.

if any, were owed by a member or manager when no operating agreement exists. That is why Mr. Arnould's briefing focused on statutory duties arising under other provisions of NRS Chapter 86 (i.e., how a member is compensated).[144] Indeed, after this Court clarified the issue in *Isralyelyan*, Mr. Arnould's position aligned with the Court's ruling.

Moreover, Mr. Arnould's breach of fiduciary duty claim was dismissed by the District Court as moot. The District Court correctly found that "any diversion of funds by Mr. Muney alleged by Mr. Arnould under any breach of fiduciary duty theory was addressed in the Receiver's equitable accounting and capital account adjustment [.]"[145] Indeed, the Judgment entered against Mr. Muney for $6,303.93 was for the "unsettled amounts due under the Receiver's undisputed accounting" and not Mr. Arnould's breach of duty claim.[146] Accordingly, Mr. Arnould obtained no benefit or advantage from his change in position.

Finally, there is no indication that Mr. Arnould received any unfair advantage against Mr. Muney since Mr. Muney brought the same counterclaim for

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[144] *See* 1 AA 74-86.

[145] 8 AA 840.

[146] *Id.*

breach of fiduciary duty against Mr. Arnould.[147] Since Mr. Arnould did not intend to sabotage the judicial process or engage in any intentional wrongdoing to obtain an unfair advantage judicial estoppel does not apply here.

D. THIS COURT AND THE DISTRICT COURT BOTH CORRECTLY HELD THAT MR. MUNEY LACKED STANDING TO BRING CLAIMS ON BEHALF OF CES.

Mr. Muney lacks standing to raise his third issue on appeal (i.e., whether the District Court correctly ruled on standing issues pertaining to CES). As already stated above, upon consolidating Supreme Court Case No. 80989 and 86341 for all appellate purposes on March 10, 2022, this Court entered an Order dismissing any appeal of CES.[148] This Court's Order was very clear that the "appeal shall proceed with ***Clement Muney as the only appellant***."[149] Thus, to the extent the third issue on appeal raised by Mr. Muney asserts arguments on behalf of CES, this Court does not have jurisdiction over the issue since CES was dismissed as an appellant.

In any event, to the extent any argument is necessary, Mr. Arnould incorporates by reference the arguments, law, and factual support set forth in Mr.

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[147] 1 AA 6-17.

[148] *See* Order Dismissing Appeal in Part (Supreme Court Case No. 83869).

[149] *Id.* at pg. 1 (emphasis added).

Arnould's Motion for Summary Judgment;[150] his Reply in Support of Motion for Summary Judgment;[151] and the District Court's Findings of Fact, Conclusions of Law, and Order granting Summary Judgment.[152] Mr. Arnould further asserts that each of the counterclaims brought by Mr. Muney were identical to CES' counterclaims.[153] Indeed, CES' counterclaims rested on the same factual allegations and legal theories. Accordingly, the District Court's dismissal of Mr. Muney's counterclaims for failure to provide facts and evidence in support equally applies to the counterclaims putatively made by CES.

E. THE DISTRICT COURT'S AWARD OF ATTORNEYS FEES WAS JUSTIFIED UNDER NRS 18.010.

Mr. Muney's fourth issue on appeal is whether the District Court's award of attorney fees was justified under NRS 18.010. In this case, the District Court properly awarded Mr. Arnould attorney fees under both NRS 18.010(2)(a) and NRS 18.010(2)(b).[154]

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[150] 7 AA 656-698.
[151] 7 AA 711-721.

[152] 8 AA 823-850.

[153] 1 AA 6-17.

[154] 8 AA 935-950

a. The District Court's Final Judgment for $6,303.93 was a money judgment justifying an award of attorney fees under NRS 18.010(2)(a).

First, it undisputed that Mr. Arnould was the prevailing party in this matter. Under NRS 18.010(2)(a), a "court may make an allowance of attorney's fees to a prevailing party ... [w]hen the prevailing party has not recovered more than $20,000." In this case, the District Court correctly found that Mr. Arnould was entitled to attorneys' fees under NRS 18.010(2)(a), which allows an award of attorney's fees when the prevailing party has not recovered more than $20,000.[155] The District Court's Findings of Fact and Conclusions of Law, and Order Granting Summary Judgment clearly stated that "Mr. Arnould is entitled to judgment in his favor of and that judgment may be entered against Mr. Muney in the amount of $6,303.93."[156] On September 14, 2021, Judgment was indeed entered in favor of Mr. Arnould and against Mr. Muney in the amount of $6,303.93.[157] As such, attorneys' fees were justified under NRS 18.010(2)(a).

[155] 8 AA 939.

[156] 8 AA 840.

[157] RA 61-65.

Further, Mr. Muney's argument that this $6,303.93 does not qualify as a money judgment is without merit. It is true that a money judgment is prerequisite to recovery of attorney fees under NRS 18.010(a)(2). *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 127 P.3d 1057 (2006). However, Mr. Muney's argument that the Final Judgment of $6,303.93 was not a money judgment lacks any factual or legal support.

Tellingly, all of the cases cited by Mr. Muney did not even result in a money judgment. *See e.g., Smith v. Crown Fin. Servs. of Am*., 111 Nev. 277, 279, 890 P.2d 769, 771 (1995) (district court's finding that a letter of intent was non-binding and subsequent dismissal did not include money judgment); *see e.g., Key Bank of Alaska v. Donnels*, 106 Nev. 49, 51, 787 P.2d 382, 383 (1990) (district court granting defendants motion for dismissal of the action under NRCP 12(b)(5) did not include money judgment); *State, Dep't of Hum. Res., Welfare Div. v. Fowler*, 109 Nev. 782, 786, 858 P.2d 375, 377 (1993) (the district court ordered a reinstatement of pay and benefits). In sum, District Court did not err in awarding attorney fees under NRS 18.010(2)(a).

b. The District Court's award of attorney fees was justified under NRS 18.010(2)(b) since Mr. Muney's counterclaims and defenses were frivolous and groundless.

Second, Mr. Arnould was the prevailing party and also entitled to attorney fees under NRS 18.010(2)(b). At the outset, Mr. Muney's claims and defenses were

not groundless simply because he failed to retain an expert as he suggests in his brief.[158] The District Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment made clear that Mr. Muney failed to provide ***any*** evidence in support of his counterclaims and defenses. NRS 18.010(2)(b) allows the district court to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim ... or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." The Nevada Supreme Court has held that "[f]or purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is ***no credible evidence to support it.***" *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018) (quoting *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009)) (emphasis added).[159]

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[158] Appellant's Brief, at pg. 42-43.

[159] NRS 18.010(2)(b) in full provides:

> Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely

In this case, the District Court granted Mr. Arnould's motion for summary judgment because Mr. Muney failed to provide ***any*** evidence in support of his counterclaims and defenses by way of exhibit, affidavit or otherwise.[160] The Court expressly stated in its findings that: "Mr. Muney failed to cite to ***any*** material facts that support his defenses and counterclaims in this matter."[161] In a word, Mr. Arnould is entitled to his attorneys' fees under both NRS 18.010(2)(a) and (2)(b).

F. THE DISTRICT COURT'S AWARD OF ATTORNEY FEES WAS JUSTIFIED UNDER NRS 86.489.

The fifth issue on appeal raised by Mr. Muney is whether Mr. Arnould is entitled to attorney fees under NRS 86.489 which allows recovery of attorney fees for successful derivative claims. NRS 86.489 provides:

> If a derivative action is successful, ***in whole or in part***, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees . . . (emphasis added).

> resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public. [emphasis added].

[160] *Id.*

[161] 8 AA 832 (emphasis added).

In this case, Mr. Muney's reading of NRS 86.489 ignores the plain language of the statute. The Legislature's language in NRS 86.489 contemplates that any "successful" derivative action warrants fees and expenses. To be sure, the statute does not limit recovery to only common "funds or assets," and in this case, the District Court held that Mr. Arnould prevailed derivatively on behalf of CES. Indeed, CES reaped benefits in several ways.

First, the District Court correctly held that Mr. Arnould prevailed on his first cause of action which sought declaratory relief from the District Court that it is not reasonably practicable to carry on CES and an order granting judicial dissolution pursuant to NRS 86.495.[162] The statute calls for dissolution whenever it is "not reasonably practicable to carry on the business of the *company* in conformity with the articles of organization or operating agreement." NRS 86.495(1) (emphasis added). The statute says nothing of whether the requested dissolution would benefit the members. *Id*. Put another way, NRS 86.495 inherently focuses on furthering the interests of the company, not its members, which makes the claim inherently derivative as it seeks to further the business, articles, and operating agreement of the company. Thus, Mr Arnould's first cause of action was inherently derivative.

[162] 88 AA 941.

Second, Mr. Arnould prevailed on his second claim for relief for accounting of CES. In this case, the Receiver was appointed as a liquidating receiver and part of his duties were to perform an accounting, adjust the capital accounts of the parties and file a tax return for CES.[163] This resulted in Mr. Muney to repaying $22,712.56 to CES.[164] Thus, at the very least, Mr. Arnould recovered $22,712.56 for CES.[165]

Further, the District Court's findings meet the derivative test since (1) CES suffered direct harm from Mr. Muney's misallocation of assets and refusal to dissolve; and (2) CES received the benefit of both a recovery ($22,712.56 returned by Mr. Muney) and remedy (dissolution). *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 417, 421, 401 P.3d 1100, 1104 (2017).[166] Accordingly, the District Court correctly found that Mr. Arnould's accounting action was successful, allowed CES to dissolve and settle its obligations, and justified an award of attorney fees under NRS 86.489.

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[163] 7 AA 644-652.

[164] *Id.*

[165] *Id.*

[166] 8 AA 823-850; 8 AA 935-950.

Finally, Mr. Arnould's motion for attorney fees was timely. Mr. Arnould was entitled to move for attorney's fees and costs after a final order. NRCP 54. Mr. Muney's appellant brief completely misstates the law by stating that: "a motion for fees is required to be filed within 21 days of entry of the judgment."[167] In reality, NRCP 54(d)(2)(B)(i) provides that a motion must be "filed no later than 21 days after written ***notice of entry*** of judgment is served." (Emphasis added).

Here, a written notice of entry as to the August 21, 2020 order for dissolution was never served, thus, the 21-day limit has not tolled under NRCP 54(d)(2)(B)(i). Even if a notice of entry had been filed (which it wasn't), the August 21, 2020 order was not a final judgment because NRCP 54 defines "judgment" to "include[ ] a decree and any order from which an appeal lies." NRCP 54(a). NRCP 54(b) provides that:

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

[167] RA 49-60.

Since there were several claims for relief in this action and no NRCP 54(b) certification was made, the August 21, 2020 order was ***not*** a final order under NRCP 54(d)(2)(B)(i).

G. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES IN THE AMOUNT OF $199,985.00.

Mr. Muney's sixth and final issue on appeal is whether the District Court erred in awarding $199,985.00 for attorney fees. As set forth above, a district court must consider the *Brunzell* factors in determining whether a requested fee amount is reasonable and justified in Nevada. *Gunderson,* 130 Nev. at 81, 319 P.3d at 616. "Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a *per se* abuse of discretion." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan*, 131 Nev. at 266, 350 P.3d at 1143.

In this case, the District Court's order awarding attorney fees to Mr. Arnould addressed each of the *Brunzell* factors,[168] and the District Court was not required to use *Lodestar* as Mr. Muney suggests. Mr. Muney does not challenge the fact that the

[168] 8 AA 0943-947.

District Court sufficiently demonstrated that it considered the required *Brunzell* factors. Nor does Mr. Muney dispute that the District Court's award of attorney fees was supported by substantial evidence.

Instead, Mr. Muney disingenuously cherry-picks itemized billings – none of which constitute an abuse of discretion by the District Court. For example, the billings regarding intellectual property were related to CES' website, which was a disputed asset in the accounting.[169] The Receiver's Final Report even states "[a]nother issue that continues to cause consternation with the Partners is the website and associated intellectual property of the Company (collectively, "Company Website")."[170] Similarly, a few typos in billing (e.g., using the plural word "clients" vs. "client") hardly constitutes an abuse of discretion warranting reversal.

Finally, Mr. Muney's arguments related to cost "disbursements" were not raised in the District Court below and are deemed waived.[171] Even if, *arguendo,* these arguments were not waived, they lack merit because the "disbursements" were

[169] 3 AA 363.

[170] *Id.*

[171] 8 AA 894-902.

not included in the $199,985.00 fee award total.[172] In sum, the District Court did not abuse its discretion in awarding attorney fees in the amount of $199,985.00. And Mr. Muney's arguments to the contrary are without merit.

VIII. CONCLUSION

Mr. Muney's entire appeal can be summed up in two (2) halves. In the first half, Mr. Muney is asking this Court to reverse the District Court's order granting summary judgment, despite the fact that Mr. Muney provided absolutely no facts or evidence to support his claims and defenses. In the second half, Mr. Muney asks this Court to reverse the District Court's attorney fee and cost award, despite the fact that he brought and maintained groundless claims and defenses for years, and he did all of this just to avoid paying his business partner a total of $6,303.93.

Dated this 15th day of June, 2022.

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[172] 8 AA 860.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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:

☒ proportionally spaced, has a typeface of 14 points or more and contains 10,228 words; or

☐ does not exceed _____ pages.

3. Finally, 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)(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 15th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 15th day of June, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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