IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL EDWARD HATCH, an individual; and ALISHA SUZANNE HATCH, an individual, Appellants/Cross-Respondents, vs. KARI ANNE JOHNSON, an individual, Respondent/Cross-Appellant.	**Supreme Court No.: 83692** (District Court Case No. CV21-00246)

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

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and/or entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of the Court may evaluate possibly disqualifications or recusal.

KARI ANNE JOHNSON is an individual and is not an entity. The undersigned counsel appeared on behalf of this Respondent/Cross-Appellant before the District Court and will appear on behalf of Respondent/Cross-Appellant on appeal.

Dated this 18th day of April, 2022.

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INTRODUCTION

Respondent/Cross-Appellant Kari Anne Johnson ("Johnson") initiated this action to enforce an agreement that she entered with the Appellants/Cross-Respondents Michael Edward Hatch (individually "Michael Hatch") and Alisha Suzanne Hatch (individually "Alisha Hatch") (collectively the "Hatches") wherein Johnson agreed to purchase a home for the Hatches with the understanding that she would be on the title to the property until the Hatches repaid the purchase price pursuant to a written promissory note (the "Note").

The deed for the property was recorded in 2015 and, contrary to the parties' agreement, it did not include Johnson as an owner of the property. Johnson did not discover this until the Hatches defaulted on the Note in the fall of 2020. Thereafter, Johnson commenced this litigation to obtain money damages for the default and to have her name put on title to the property. Johnson recorded a lis pendens on the property.

The Hatches immediately launched an aggressive defense, filing several motions and accusing Johnson of acting abusively, in bad faith, and of violating Nevada law. The parties attended two hearings, one on the lis pendens and one regarding one of the Hatches' motions to dismiss. At each hearing, the District Court made premature credibility judgments about Johnson, though the District Court never heard testimony from her.

In their motions to dismiss, the Hatches argued that the recorded deed put Johnson on constructive notice of *all* claims she had against them. In response, Johnson contended that inquiry notice applied, which made dismissal inappropriate under Nevada Rule of Civil Procedure 12(b)(5) ("NRCP"). The District Court seemed to acknowledge that inquiry notice applied but incorrectly concluded that because Johnson alleged she asked the Hatches for a copy of the deed, she had "inquired" and therefore, was on inquiry notice. Worse, at the hearing on the motion to dismiss, the District Court judged Johnson's credibility and the merits of the case. The District Court cautioned that if Johnson proceeded with her claims, a future motion to dismiss would likely be granted and NRCP 11 sanctions may be awarded, informing Johnson that even if she survived a motion to dismiss, she would ultimately lose the case. After a great deal of argument and discussion regarding inquiry versus constructive notice, the District Court dismissed Johnson's First Amended Complaint for failure to include a NRCP 8 jurisdictional statement. The District Court granted Johnson leave to file a second amended complaint.

The District Court's premature judgment of the case put Johnson in an untenable position. She had no choice but to voluntarily dismiss the case. Otherwise, she faced proceeding with claims that the District Court already informed her would be dismissed with imposition of sanctions, which she would have to

appeal, and even if she won the appeal, she would return to a judge who already decided the outcome of her case—all before any evidence had been presented.

After Johnson voluntarily dismissed the case, the Hatches sought almost $70,000 in attorney fees and costs. The District Court awarded $15,165 in fees to the Hatches under Nevada Revised Statutes 18.010(2)(b) ("NRS"), concluding that Johnson did not have reasonable grounds to bring her claims. However, the Hatches were not the prevailing party, and there is no credible evidence to support that determination. Thereafter, both parties appealed.

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in awarding $15,165 in attorney fees to the Hatches?

STATEMENT OF THE CASE

The appeal arises from a district court order awarding attorney fees pursuant to NRS 18.010(2)(b). The underlying litigation arose from disputes over the ownership and loan repayment for certain real property. Johnson initiated the litigation asserting that she purchased the real property for the Hatches pursuant to an agreement that she be on the title to the property with the Hatches until the Hatches paid off the promissory note for the purchase price of the property.

The Hatches engaged in an extremely aggressive litigation approach—not only against Johnson but also against Johnson's counsel. Johnson filed several

motions, many of which included identical, copy-and-paste arguments from the first motion, and all of which cast inflammatory, derogatory accusations against Johnson prior to any evidence ever being heard by the District Court. Moreover, each of the Hatches' motions included the improper legal contention that a recorded deed puts all persons on notice of *every* claim regardless of the circumstances for purposes of the statute of limitations.

Although the parties extensively briefed the constructive versus inquiry notice issue, the District Court ultimately dismissed Johnson's First Amended Complaint for failure to include a jurisdictional statement. The District Court further granted Johnson leave to file a second amended complaint. However, at the hearing on the motion to dismiss, the District Court went far beyond the appropriate analysis for a Rule 12 motion. The District Court assessed Johnson's credibility and concluded that her claims were not believable. The District Court admonished Johnson that while she had leave to file a second amended complaint, if she did file an amended pleading, the District Court would consider Rule 11 sanctions. The District Court's entire analysis was premised on the fact that Johnson alleged she had asked for a copy of the deed at the end of the purchase transaction. Based on this fact alone, the District Court concluded that Johnson was on inquiry notice "because she inquired".

Given the District Court's premature judgment of Johnson's case and inappropriate analysis at the motion to dismiss, Johnson chose to voluntarily dismiss

the claims and refile in Justice Court. Thereafter, the Hatches moved for attorney fees and costs under NRS 18.010(2)(b), arguing that the lawsuit was frivolous. Johnson opposed, contending that there was no prevailing party given the status of the proceedings and moreover, that there was no evidence the lawsuit was filed for improper purpose.

Even though no evidence was ever submitted to support a finding that the lawsuit was filed without reasonable grounds and even though Johnson expressly followed the District Court's improper Rule 11 warning by *not* filing a second amended complaint, the District Court still awarded the Hatches a portion of their attorney fees and costs. Both parties appealed. Given that both parties appealed, Johnson responds to the Hatches' Opening Brief to address their argument that the District Court abused its discretion in the event this Court decides that issue alone. However, Johnson ultimately believes that reversal is warranted for the reasons set forth in her Cross-Appeal.

STATEMENT OF THE FACTS

I. BACKGROUND.

A. The Allegations in the Complaint.

In February 2021, Johnson sued the Hatches in the Second Judicial District Court. *See* 1 Joint Appendix ("JA") 1-74 (Verified Complaint including exhibits). Johnson alleged that in November 2014, the Hatches approached her about loaning

them money to buy a house located at 9845 Firefoot Lane, Reno, Nevada, (the "Property") because the Hatches were unable to qualify for a conventional mortgage. *Id*. at 2, ¶8. The Hatches promised that they would pay the loan as agreed and that Johnson's name would be on the title to the House until the loan was paid in full. *Id*.

Johnson further alleged that as part of the deal, she was a co-purchaser of the Property with the Hatches and that she and the Hatches were identified as the "buyers" in the purchase contract for the Property. *Id*. at ¶9. Johnson paid the full amount of $665,838.40 for the Property and all closing costs. *Id*. at 3, ¶12. Johnson alleged that at the last minute before closing, the Hatches presented documents to her for signature, representing that they were normal documents needed for closing. *Id*. at ¶11. Johnson pled that in November 2020, she discovered that those documents actually included a bizarre document, prepared by Alisha Hatch, titled "Endorsement to Agreement of Sale", which purported to remove Johnson from being an owner of the Property, and which was contrary to the parties' deal. *Id*. at ¶14. Johnson alleged that Alisha Hatch either fraudulently obtained Johnson's signature through misrepresentation or forged Johnson's signature on the document. *Id*.

As part of the deal, the parties entered a promissory note (the "Note") wherein the Hatches agreed to repay the full amount of $665,838.40 to Johnson in installment payments over a 30-year period. *Id*. at ¶¶12-13. Johnson alleged that the Hatches

breached the Note by failing to make the required payments in the fall of 2020. *Id*. at 6, ¶¶31-34. Johnson initiated the action to be placed on title to the Property and to obtain money damages for her fraud claim as she contended she would not have loaned the Hatches $665,838.40 without being on the title to the Property.

B. The Lis Pendens.

On February 10, 2021, Johnson, through counsel, recorded a lis pendens on the Property because Kari asserted claims that, if granted, would affect title to the real property, including claims for equitable lien, constructive trust, and declaratory relief. *See* 1 JA 68-69 (Lis Pendens). The Hatches filed a motion to expunge the lis pendens, which was ultimately granted. *See* 4 JA 907-911 (Order Granting Motion to Expunge Lis Pendens) ("Order on Lis Pendens"). In the Order on Lis Pendens, the District Court concluded that Johnson failed to satisfy her obligations under NRS 14.015(3). *Id*. at 909.

The lis pendens was released on April 28, 2021. *Id*. at 922-24. Therefore, the lis pendens was recorded from February 10, 2021, until April 28, 2021.

C. The Hatches' Motions to Dismiss.

The Hatches filed a Motion to Dismiss the Verified Complaint (the "First Motion to Dismiss"). 1 JA 122-154. The Hatches' First Motion to Dismiss was based on a misunderstanding of the discovery rule. The Hatches argued that because the deed for the Property was recorded in 2015, then, *as a matter of law*, Johnson's

claims were barred because Johnson had constructive notice of the deed at the time of recordation. *Id*. at 132-37. The Hatches maintained this position, and still do on appeal (*see* AOB, 7), despite the clear authority to the contrary that demonstrates *inquiry notice*, not constructive notice, applies and dismissal on that basis would be improper. In response to the First Motion to Dismiss, Johnson filed an amended pleading (the "First Amended Complaint"). 1 JA 185-250 – 2 JA 250-54.

D. The Hatches' Second Motion to Dismiss.

After the hearing on the lis pendens, Johnson filed a motion for leave to file a second amended complaint. 3 JA 617-697. Five days later, the Hatches filed a Motion to Dismiss the First Amended Complaint (the "Second Motion to Dismiss"). 3 JA 698- 773. The Second Motion to Dismiss included the same, incorrect legal analysis regarding the discovery rule as was set forth in the First Motion to Dismiss. *See id*. at 708-13.

The hearing on the Hatches' Motion to Dismiss was completely improper and contrary to Rule 12. Rather than accept the allegations in the First Amended Complaint as true, the Court disbelieved those allegations, drew inferences in favor of the Hatches, and misapplied the law. *See, e.g.*, Supplemental Appendix ("SA"), 6-8, 10-11. While the Court apparently agreed that inquiry, not constructive, notice applied, *id*. at 7, the Court determined that because the First Amended Complaint alleged Johnson had asked for a copy of the deed, that she had "inquired" about the

deed and therefore, was on inquiry notice. *Id*. at 7 (the District Court stating, "And therein lies my point. . . She actually inquired.").

Johnson's counsel explained that inquiry notice applied to whether a plaintiff has notice to inquire about facts related to her claims, not simply whether she should have a copy of a real estate deed. *Id*. 8, 13 (Johnson's counsel arguing that "inquiry notice is whether an ordinary person has received facts that would cause her to investigate her claims. So knowing that deeds are recorded in general is one thing, knowing to investigate the facts of fraud or misrepresentation is much different."). Moreover, Johnson's counsel argued that inquiry notice was a question of fact that could not be decided at the Rule 12 stage. *Id*. at 6-12, 15-16.

The Court improperly prejudged the case and Johnson's credibility, indicating that even if the motion to dismiss was denied, Johnson's case would not proceed much farther than the initial stages of litigation. *Id.* at 13 ("Well, respectfully, I'll simply say, this seems to be, if you survive a motion to dismiss, it will be by the barest of margins. Because I can't see a circumstance where after the deposition of your client, perhaps she would answer to the contrary, I could logically conclude anything else than she knew she should inquire and that's why she did. Else why would she ask the question?"). Counsel for Johnson explained that factual issues existed and that counsel hoped to "proceed to discovery so that these issues can be fleshed out." *Id*. at p. 34 ("So that we can ask Alisha Hatch, why did you prepare

this document? Did you disclose to your friend Kari Anne that you were removing her as an owner of the property? . . . did you disclose your intention in doing so? Did the landscaper really have the deed when she asked? Why didn't you give her the other documents?").

After hearing a great deal of argument regarding inquiry versus constructive notice, the District Court dismissed the First Amended Complaint on other grounds—for failing to include the Rule 8 jurisdictional statement. *Id*. at p. 36. The District Court further granted Johnson's request for leave to file a second amended complaint, stating that the District Court "leave[s] to the plaintiffs a determination of the causes of action they intend to include in light of my comments." *Id*. at p. 37.

Thereafter, the District Court issued an improper, oral advisory opinion that while Johnson was granted to leave to file a second amended complaint, if Johnson did so, the District Court would consider Rule 11 sanctions against her. The District Court stated:

> Here is a warning, however. I expunged the lien in this case, because I believed there was no legal basis or factual basis for it. I am very deeply concerned all but one of the plaintiff's proposed claims are precluded by the statute of limitations and that all of their claims are precluded by the jurisdiction of the Court. If in fact there is a motion to dismiss in the future, as I know there will be, and it is granted, as I fear it may be, the fees that will accrue to the [Hatches] may likely be very substantial, because I likely would be in the position of finding that pursuant to Rule 11 there was no good faith basis for the claims factually. That is not a statement about the lawyers involved. It is instead a statement about the factual allegations of the client.

Id. at p. 37.

Given the District Court's statements, Johnson chose to voluntarily dismiss the action and refile for one claim on the Note in Justice Court to avoid the large expenses that would necessarily result given the District Court's premature determination of the merits of the claim. *See* 5 JA 1114-16.

E. The Order Awarding the Hatches a Portion of Attorney Fees and Costs.

Following the Voluntary Dismissal, the Hatches moved for attorney fees and costs in the amount of $69,486.00. 5 JA 1117-1173 (the Hatches' Motion for an Award of Attorneys' Fees and Costs); 5 JA 1198-1207 (the Hatches' Reply in support of Motion for an Award of Attorneys' Fees and Costs). Despite the District Court's advisory opinion that *if* Johnson filed a second amended complaint, she would be sanctioned, the Court nevertheless awarded the Hatches a nominal amount of $15,165 in fees and costs in the amount of $528.80, even though Johnson did not file a second amended complaint. *Id*. at 1234-37.

The District Court reduced the Hatches' fee request because of the "unnecessary animus expressed by the [Hatches] in their pleadings". *Id*. at 1236. The District Court further stated that it "suspects that had the animus been left out, the parties likely could have avoided the volume and tenor of the pleadings actually filed." *Id*. This Appeal and Cross Appeal followed.

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SUMMARY OF THE ARGUMENT

If the District Court had authority to award attorney fees under NRS 18.010(2)(b), the District Court did not abuse its discretion in reducing the fee award given that the Hatches' litigation tactics were the cause of the increased amount of fees at issue.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews district court orders concerning attorney fees for an abuse of discretion. *See Berkson v. LePome,* 126 Nev. 492, 504, 245 P.3d 560, 568 (2010) (attorney fees). "In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the *Brunzell* factors." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (internal quotation marks omitted) (alteration in original). The *Brunzell* factors include "the advocate's professional qualities, the nature of the litigation, the work performed, and the result." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (internal quotation marks omitted).

This Court has explained that "[w]hile it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, express findings

on each factor are not necessary for a district court to properly exercise its discretion." *Logan*, 131 Nev. at 266, 350 P.3d at 1143. "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Id*.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING A REDUCED AMOUNT OF ATTORNEY FEES.

As discussed in Johnson's Cross-Appeal, the District Court did not have discretion to award attorney fees and costs at all under NRS 18.010(2)(b). However, if this Court determines otherwise, Johnson contends that the District Court did not abuse its discretion in reducing the amount of fees sought based on the record before the District Court.

The Hatches aver that the District Court abused its discretion for failing to conduct the proper analysis and because there is no support for the District Court's reduction in the fees sought. While the District Court did not expressly analyze the *Brunzell* factors, the District Court properly discounted the fees sought. The District Court discounted the fees sought based on the "unnecessary animus expressed by the [Hatches] in their pleadings" because "had the animus been left out, the parties likely could have avoided the volume and tenor of the pleadings actually filed." 5 JA 1236. This analysis is relevant to the first three factors (the advocate's professional qualities, the nature of the litigation, and the work performed).

The District Court's conclusions regarding the Hatches' inappropriate litigation tenor are supported by the record because the Hatches filed numerous motions, each of which were extremely aggressive and filled with unnecessary name calling and accusations. Indeed, the Hatches labeled Johnson "abusive" and described her conduct as "coercive". *See, e.g.*, 1 JA 91. The Hatches characterized the lis pendens as "a tool to *extort* payment from the Hatches". *Id*. at 109 (emphasis added).

The Hatches' motions included several derogatory comments about Johnson and her counsel, which displayed a lack of professionalism and unnecessary animus. *See, e.g.*, *id*. at 125 ("The Complaint in this matter is poorly crafted and facially does not appear to even come close to satisfying NRCP 11's requirements."); 4 JA 824 (accusing Johnson of bad faith and referring to her claims as "baseless"); *id*. at 825-26 ("Johnson cannot claim ignorance of controlling Nevada law as justification for the ongoing abusive litigation practices being perpetrated. The abuses are not simple mistakes of fact but are based upon fundamental disregard of controlling Nevada law. Johnson's attorneys have a duty and responsibility to comply with NRCP 11."); *id*. at 826 n. 1 (citing Nevada Rule of Professional Conduct 3.3 to insinuate that Johnson's counsel had not been honest with the District Court); *id*. at 837 (describing Johnson's claims as "abusive", "nonsensical", and arguing that "Johnson repeatedly and blindly ignores controlling and dispositive Nevada law."); *id*. at 850 n. 9

(arguing that "For most attorneys, it appears well-known Nevada typically follows the Restatement (Second) of Contracts.").

Notably, Johnson's counsel avoided engaging in the same kind of rhetoric and tried to take the high road in response to the inappropriate commentary from the Hatches. *See, e.g.*, 4 JA 898 ("Plaintiff will not let this case devolve into a litigious prosecution of counsel because the focus should be on the parties, facts, and legal issues—not the attorneys of record (despite the animus one attorney may have for the others). Defendants' lack of professional courtesy is disappointing; however, it should not be allowed to detract from the actual issues before this Court.").

While Johnson disagrees with the District Court's analysis and statements in the Order (other than regarding the Hatches' animus), the District Court's conclusions about the Hatches' litigation conduct were correct and fully supported by the Hatches' aggressive filings. The District Court had discretion to consider the Hatches' litigation conduct in awarding fees. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) ("When determining the amount of fees to award, the district court has great discretion, to be tempered only by reason and fairness.") (internal quotation marks omitted). Therefore, in the event this Court concludes that the District Court was within its discretion to award fees at all, this Court should affirm the reduction in fees sought.

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III. THE POLICY UNDERLYING NRS 18.010(2)(b) DOES NOT SUPPORT THE HATCHES' ARGUMENT.

The Hatches contend that the policy underlying NRS 18.010(2)(b) supports a full award of their attorney fees and costs. That policy is not supported in this case because there was never any evidence presented that Johnson brought her claims for an improper purpose or without reasonable grounds. The Hatches provide no authority that demonstrates an award of fees would be proper in this case where the District Court made premature credibility determinations based on the pleadings.

In fact, the Hatches cite *Barnes v. Eighth Jud. Dist. Ct. of State of Nev., In & For Clark Cty.*, 103 Nev. 679, 682, 748 P.2d 483, 486 (1987) in support of their argument, but *Barnes* did not involve NRS 18.010, was entirely factually distinct from this case, and did not hold that it is "imperative to have 'economic deterrents to filing frivolous lawsuits'" as the Hatches represent. In addressing an issue under NRS 12.015, this Court simply explained that "Because plaintiffs who are allowed to proceed in forma pauperis are not affected by economic deterrents to filing frivolous lawsuits, the courts may be justified in treating such actions differently from cases filed by plaintiffs who have paid the requisite filing fee." *Id*. This Court did not address NRS 18.010(2)(b) nor indicate that it was "imperative" to have economic deterrents to filing frivolous lawsuits. *Cf.* AOB, 20.

NRS 18.010(2)(b) was certainly enacted to discourage frivolous lawsuits. However, there is no evidence that Johnson's claims were frivolous or intended to

harass the Hatches. To the contrary, Johnson has valid claims against the Hatches that, unfortunately, the District Court prematurely judged at the very outset of the litigation. It is this act that violates Nevada's public policy to decide cases on the merits. *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), *holding modified on other grounds by Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 469 P.3d 176 (2020) ("[T]he district court must consider the state's underlying basic policy of deciding a case on the merits whenever possible."). The District Court's prejudgment of the case rendered it impractical and impossible for Johnson to have the merits of her case decided.

Fees under NRS 18.010(2)(b) are not appropriate unless actual evidence supports the requisite findings. This Court has explained that "for purposes of an award of attorney's fees pursuant to NRS 18.010(2)(b), '[a] claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence ***at trial***.'" *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (quoting *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993)). Here, there was no trial nor even evidence presented to support an award of fees under NRS 18.010(2)(b). The Hatches' policy argument is not supported by Nevada law or the record in this case.

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CONCLUSION

For the foregoing reasons, if this Court concludes that the District Court had the ability to enter an award of attorney fees under NRS 18.010(2)(b), Johnson respectfully requests that this Court affirm the District Court's award of fees.

RESPONDENT/CROSS-APPELLANT KARI ANNE JOHNSON'S OPENING BRIEF ON CROSS APPEAL

JURISDICTIONAL STATEMENT

This Court has jurisdiction to decide this appeal as the order awarding attorney fees and costs is a final order entered in an action commenced in the Court in which the final order was entered. *See* NRAP 3A(b)(1). The District Court's order awarding fees was entered October 1, 2021. *See* 5 JA 1234-38. The Notice of Entry of Order was filed on October 21, 2021. *See* 6 JA 1242-51. Michael Edward Hatch and Alisha Suzanne Hatch (the "Hatches") filed their Notice of Appeal on October 21, 2021. *See* 6 JA 1252-1254. Kari Anne Johnson ("Johnson") filed her Notice of Cross Appeal on October 27, 2021. *See* 6 JA 1255-57.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals as it is an appeal of an order awarding fees and costs. *See* NRAP 17(b)(7).

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STATEMENT OF THE ISSUES

1. Whether a dismissal without prejudice confers "prevailing party" status on the Hatches under NRS 18.010(2)(b)?

2. Whether the District Court abused its discretion in concluding that Johnson brought her claims without reasonable grounds given that there is no evidence in the record to support that conclusion?

STATEMENT OF THE CASE

Johnson incorporates by reference her Statement of the Case from her Answering Brief herein.

STATEMENT OF THE FACTS

Johnson incorporates by reference her Statement of the Facts from her Answering Brief herein.

SUMMARY OF THE ARGUMENT

The District Court erred in awarding fees to the Hatches because (1) the Hatches were not the prevailing party" under NRS 18.010(2)(b), and (2) the District Court's conclusion that Johnson brought her claims without reasonable ground under NRS 18.010(2)(b) is not supported by credible evidence.

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ARGUMENT

I. THE DISTRICT COURT IMPROPERLY INTERPRETED NRS 18.010(2)(b).

A. Standard of Review.

"'[W]hen [an] attorney fees matter implicates questions of law, the proper review is de novo.'" *145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 118, 460 P.3d 455, 457 (2020) (quoting *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057,1063 (2006)). "The issue here implicates a question of law because it involves statutory interpretation—the meaning of "prevailing party," as used in NRS 18.010(2)". *Id*. (citing *Gonor v. Dale,* 134 Nev. 898, 899, 432 P.3d 723, 724 (2018)). Therefore, this Court's review is de novo.

B. A Dismissal Without Prejudice Does Not Confer Prevailing Party Status on the Hatches.

The District Court determined that the Hatches were the "prevailing party" under NRS 18.010 because they "succeeded in expunging the lien on the property and reveled the defects in the Plaintiff's claims either because of the passage of the statutes of limitation, or because of a lack of subject matter jurisdiction which resulted in a voluntary withdrawal of the action in the District Court."[1] 5 JA 1236.

[1] The Hatches refer to the voluntary dismissal as a "legal nullity". Regardless, the dismissal in this case was without prejudice.

The District Court further stated that the Hatches were "entitled to fees for expunging the lien". *Id*. But this case involves a dismissal *without prejudice* and with leave to file a second amended complaint. Thereafter, Johnson voluntarily dismissed her case *without prejudice* and refiled in Justice Court. Accordingly, the Hatches were not the "prevailing party".

This Court addressed the meaning of "prevailing party" under NRS 18.010 in *145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020). This Court relied on and cited the reasoning of federal courts that distinguish between dismissals with and without prejudice and determined that a voluntary dismissal *with prejudice* conferred prevailing party status because a dismissal with prejudice is akin to a judgment on the merits. *Id*. at 119-20, 460 P.3d at 459. However, and as the federal courts cited by this Court explained, a "'dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing.'" *Id*. at 119-20, 460 P.3d at 459 (quoting *Cadkin v. Loose*, 569 F.3d 1142, 1148 (9th Cir. 2009)). Moreover, "'a dismissal without prejudice does not decide the case on the merits because the plaintiff may refile the complaint and therefore is not sufficient to confer prevailing party status.'" *Id*. at 120, 460 P.3d at 459 (quoting *Szabo Food Serv., Inc. v. Canteen Corp.,* 823 F.2d 1073, 1076-77 (7th Cir. 1987)).

Accordingly, the dismissal without prejudice does not confer prevailing party status, which makes the award of fees and costs wholly improper.

The District Court heavily focused on the fact that the lis pendens was expunged, as though that one act could render the Hatches the prevailing party. However, fees are not available for every motion or proceeding under NRS 18.010. Rather, fees are available to the party that prevails on his or her entire claim or defense. *See In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 802-04, 435 P.3d 672, 676-77 (Nev. App. 2018) (referred to hereafter as "*Oakland Hills*") ("The ultimate inquiry under NRS 18.010(2)(b) is whether a claim or defense was brought or maintained without reasonable ground or to harass the prevailing party, with the stated goal of deter[ring] frivolous or vexatious claims and defenses.") (internal quotation marks omitted) (alteration in original). Indeed, the Court reversed the award of fees entered in *Oakland Hills* where the plaintiff lost the one motion it filed. *See id*. NRS 18.010 does not allow for an award of fees on a motion-by-motion basis. Otherwise, district courts would be inundated with fee motions.

Moreover, this Court has explained that even where a plaintiff voluntarily dismisses an action *with prejudice*, an award of attorney fees to the defendant is not automatic. *145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020) ("This rule is not absolute, as

there may be circumstances in which a party agrees to dismiss its case but the other party should not be considered a prevailing party. For instance, a party may have a strong case or defense but nonetheless stipulate to a dismissal with prejudice because it is without funds to pursue litigation.").

Johnson explained that the District Court was required to consider the circumstances of the case and the reason she dismissed the action. 5 JA 1227. Plaintiff's cost benefit analysis provides a perfect example of a justification for dismissal that does not allow the defendant to be labeled the prevailing party.

The District Court's conclusions about why Johnson voluntarily dismissed her claims are not supported by the record. In opposing the Hatches' motion for attorney fees, Johnson set forth exactly why she chose not to file a second amended complaint. Johnson explained that she "adamantly contends that her claims in the pleadings in this case are valid, timely, and that Nevada law on inquiry notice precludes dismissal." 5 JA 1227. Johnson expressed that she "had to conduct a cost benefit analysis of reasserting all of her claims given that [the Hatches] would force another round of briefing on a motion to dismiss." *Id*. at 1227-28.

Johnson further addressed the District Court's improper pre-judgment of the case by explaining that she "would have loved to conduct discovery and to have had [the District Court] hear testimony from both parties on the bizarre transaction that occurred." *Id*. at 1228. "However, given that [the District Court] made clear its

pre-discovery thoughts about Plaintiff asking for a copy of the deed, Plaintiff had to conduct a cost benefit analysis of pursing her claims in this context." *Id*.

The District Court failed to recognize how its own improper analysis at the hearing on the motion to dismiss impacted Johnson's cost benefit analysis and reason for dismissing the case. The District Court completely applied the wrong standard of review and drew every inference *against* Johnson. *Cf. Vacation Village, Inc. v. Hitachi Am. Ltd.,* 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) ("When reviewing an order granting a motion to dismiss, [t]his [C]ourt presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff.") (internal quotation marks omitted); *Morris v. Bank of Am. Nev.,* 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (The allegations in the complaint must be taken at "face value" and "construed favorably" on the plaintiff's behalf.).

In response to Johnson's counsel's argument that Johnson trusted her friends and had no reason to investigate the property deed at the conclusion of the transaction, the District Court stated, "I think you're asking me to speculate on the motivations of your client." SA 10. Johnson's counsel explained that she was asking the District Court to "accept the facts in the first amended complaint as true and to draw all inferences in favor of the plaintiff." *Id*. at 11. The District Court's conclusions that Johnson had knowledge about real estate transactions and therefore, should have discovered the fraud, are both inferences drawn in favor of the Hatches

based on Johnson's allegation that she asked for a copy of the deed. The District Court clearly misapplied the appropriate standard.

Furthermore, the District Court did not accurately assess inquiry notice. The District Court understood inquiry notice to mean that a plaintiff knows to inquire about recordation of deeds or to have knowledge about the recording process in general. *See, e.g.*, *id*. at 14 ("When you say to close out her records, that infers some knowledge on her part of real estate transactions, the fact that a deed is a seminal document in the sequence of documents and events that occur."). But inquiry notice asks whether a plaintiff acted diligently to discover her *claims*. *See Bemis v. Est. of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) ("Dismissal on statute of limitations grounds is only appropriate when *uncontroverted evidence irrefutably demonstrates* plaintiff discovered or should have discovered the facts giving rise to the cause of action.") (internal quotation marks omitted) (emphasis added).

The District Court even went so far as to tell Johnson's counsel that if the case was not dismissed, "it will be by the barest of margins. Because I can't see a circumstance where after the deposition of your client, perhaps she would answer to the contrary, I could logically conclude anything else than she knew she should inquire and that's why she did." SA 13-14. The District Court's focus on the fact that Johnson asked for a copy of the deed was completely improper.

The worst part of the District Court's award of fees is that even though Johnson completely disagreed with the District Court's approach to and assessment of Johnson's claims, Johnson listened to the District Court to avoid sanctions and the cost of a corresponding appeal. Nevertheless, the District Court *still* sanctioned Johnson. Thus, Johnson has been punished for doing exactly what the District Court suggested she do. The District Court's application of NRS 18.010 is entirely contrary to law and must be reversed.

II. IF THE HATCHES WERE THE PREVAILING PARTY, THE DISTRICT COURT ABUSED ITS DISCRETION IN CONCLUDING THAT JOHNSON BROUGHT HER CLAIMS WITHOUT REASONABLE GROUND.

A. Standard of Review.

This Court reviews a district court's attorney fee award for an abuse of discretion. *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 112 (2018). "A district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds." *Id*. at 580, 427 P.3d at 113 (citing NRS 18.010(2)(b)). This Court has explained 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." *Id*. (citing *Semenza v. Caughlin Crafted Homes,* 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995)). Moreover, "[a]lthough a district court has discretion to award attorney fees under NRS 18.010(2)(b), there must be evidence supporting

the district court's finding that the claim or defense was unreasonable or brought to harass." *Id*. at 580-81, 427 P.3d at 113.

B. The District Court's Conclusion that Johnson's Claims Were Filed Without Reasonable Ground is Not Supported by Creditable Evidence.

The District Court concluded that Johnson's "claims were brought without reasonable grounds. Plaintiff attempted to use a lis pendens as a tool to recover overdue money in an installment contract. This was not appropriate." 5 JA 1235. As noted above, the lis pendens, alone, is not an act that can support an award of fees under NRS 18.010(2)(b). In fact, the Nevada Court of Appeals has expressly held that "[m]erely losing a motion on the merits does not mean that the losing defense was utterly "without reasonable ground" for purposes of awarding attorney fees." *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. at 807-08, 435 P.3d at 679. Pertinent to this case, the Court explained that "NRS 18.010(2)(b) does not create an automatic "loser pays" system, of the kind found in England, in which the unsuccessful party always pays fees to the winning party." *Id*. at 807-08, 435 P.3d at 679.

Further, there was never evidence presented to demonstrate that the lis pendens was filed in anything other than good faith. The Hatches have seized on the fact that Johnson alleged in her pleadings that the Property was believed to be the

only source of repayment for the loan. But that allegation, alone, does not demonstrate that Johnson's entire suit was brought for an improper purpose.

The District Court never heard any evidence. The District Court simply did not find the factual allegations in Johnson's complaint credible. However, that credibility determination was extremely premature and therefore, improper. The award of fees must be completely reversed. *See id.* at 804, 435 P.3d at 677 (reversing the district court's award of attorney fees because "the district court made no findings, and the record contains no evidence, that would enable us to affirm an award of attorney fees under [NRS 18.010(2)(b)].").

CONCLUSION

For the foregoing reasons, Johnson respectfully requests that this Court reverse the award of attorney fees and costs.

Dated this 18th day of April, 2022.

BY: */s/ Hannah E. Winston*

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief and Opening Brief on Cross Appeal ("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 16 in 14 font and Times New Roman type.

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 proportionately spaced, has a typeface of 14 points or more, and contains 6,541 words.

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

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sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of April, 2022.

BY: */s/ Hannah E. Winston*

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CERTIFICATE OF SERVICE

I certify that on the 18th day of April, 2022, I served a copy of **RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF AND OPENING BRIEF ON CROSS APPEAL** upon all counsel of record:

☐ BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

☐ BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

■ BY ELECTRONIC SERVICE: by electronically filing and serving the foregoing document with the Nevada Supreme Court's electronic filing system:

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DATED this 18th day of April, 2022.

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