IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

REINSTATEMENT OF
WILLIAM A. SWAFFORD, ESQ.
STATE BAR NO. 11469

Case No:

Volume III

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

R. Kait Flocchini, Esq.
Assistant Bar Counsel
Nevada Bar #9861
9456 Double R Boulevard, Suite B
Reno, NV 89521

Attorney for State Bar of Nevada

William A. Swafford, Esq.
21385 Saddleback Rd.,
Reno, NV 89521

Respondent

INDEX
ALPHABETICAL LIST OF DOCUMENTS

PETITIONER'S EXHIBIT #10

swaffordw@gmail.com

From: William Swafford <swaffordw@gmail.com>
Sent: Sunday, August 30, 2020 4:08 PM
To: cathib@nvbar.org
Subject: Fee Dispute Notice Issue

Cathi,

My name is William Swafford, and I am a suspended Nevada lawyer who has been inactive and on suspension since September of 2016. My Nv. Bar No. is 11469. I was suspended in two factually related cases in September of 2016, and then again in 2017, with a term of six-months-one-day suspension ordered in both cases to run consecutively.

This weekend I became aware that Mr. Jeffery Spencer who was the complainant in the second of the two cases filed an agreement for arbitration of fee dispute in Dispute No. FD19-104 on October 1, 2019. This notice and his signed agreement were mailed to the home where I had been living and using as an office previously, and where I am currently residing again now. As the State Bar became aware during my disciplinary hearings, and during a hearing against another lawyer involved in those (Mr. William J. Routsis) that I testified in, I have problems getting my mail at this address for reasons previously addressed on the record. The State Bar was unable to notify me of the proceedings against me in the disciplinary matters by mailing notice to my 21385 Saddleback rd., Reno, Nv. 89521 address, and communication finally starting flowing between all parties when the State Bar began using my personal email address at swaffordw@gmail.com. In connection with the disciplinary proceeding against Mr. Routsis the State Bar communicated with me effectively using this email address and I communicated with them about that case as well as the payment of the fees, costs and expenses I was ordered to pay in the Orders of Suspension.

Regrettably, I was not notified of Mr. Spencer's notice of filing in Dispute No. FD19-104 until now, and I was unable to file an Agreement for Arbitration. I never received any additional notifications or requests for mediation either so I am not sure if the matter was directed to mediation ex parte. I also just received notification that on January 22, 2020, Mr. Spencer filed a Security Fund Claim (No. CSF20-004) against me as well.

The lack of notice concerning the fee dispute arbitration request is disappointing to me because I have been looking forward to presenting evidence and arguments to explain my side of this issue since it began. Unfortunately, as is stated in the default findings of fact and conclusions of law in the underlying disciplinary matter, I failed to respond to the allegations against me in large part due to the combination of the following factors: (1) I was suffering from undiagnosed traumatic brain injury and hypopituitarism which had been misdiagnosed and mistreated as bipolar disorder and I was going through extremely difficult times with my mental and physical health; (2) My health problems were compounded by my personal problems which involved the fact my father was dying of Alzheimer's disease and my uncle was dying of cancer. I had to move from Chicago to Reno to assist with the care of both family members full time and learn how to properly care for myself as well. I did not attempt to dispute any of the default findings against me, and I accepted full responsibility for my shortcomings at the formal hearing on discipline. However, I have evidence proving that many of the allegations against me by Mr. Spencer are simply untrue. I can establish that I worked on this case diligently for nearly one year, and in that time prepared and emailed documents to Mr. Routsis that were allegedly never done and performed by replacement counsel. I can establish that the motions and pleadings I emailed to Mr. Routsis with detailed instructions for filing and proceeding are nearly identical to what eventually filed in the case.

I have been wanting to present this evidence in a hearing to show that had it not been for my medical and personal issues, and had I not been involved in an ongoing dispute with Mr. Routsis the allegations alleged by Mr. Spencer concerning the fee dispute are misguided. Had I known of Mr. Spencer's fee dispute claim at the time it was mailed to me I definitely would have responded and raised numerous arguments based upon the actual work I performed on Mr. Spencer's case as well as numerous legal defenses based upon the contract at issue. I am not certain what I can do at

this time, but I never intended to avoid participation in an arbitration hearing and would like to do so if it is still possible.

Finally, with respect to the Security Fund Claim that Mr. Spencer filed against me, I never heard anything about it until now as well, and I am not sure what the status of that matter is, but I would like to challenge his claims in that matter as well. I once again apologize for this very late response, but I honestly had no knowledge of these proceedings until now. I intend on assisting in any way that I can in this matter. (Please use swaffordw@gmail.com to communicate with me.)

Sincerely,

William Swafford

swaffordw@gmail.com

From: Theresa Freeman <TheresaF@nvbar.org>
Sent: Thursday, September 3, 2020 3:50 PM
To: swaffordw@gmail.com
Cc: Kirk Brennan
Subject: CSF20-004, Spencer v. Swafford
Attachments: Swafford Respondent Letter - Copy.doc; 20-004 Spencer v. Swafford.pdf

Mr. Swafford,

I received a copy of the email you sent below to Cathi Britz regarding a fee dispute (FD19-104) and a **Clients' Security Fund claim (CSF20-004)** filed against you by Mr. Spencer. Ms. Britz will address the fee dispute matter separately, but I will address the Clients' Security Fund (CSF) claim here.

The CSF claim Mr. Spencer filed against you was received by our department on January 16, 2020. On January 22, 2020, we: opened a claim file (CSF20-004); assigned Attorney Kirk Brennan as the CSF Investigator for the claim; and, sent a letter with a copy of Mr. Spencer's claim to your SCR79 address (see attached). Since we are a separate department from the Office of Bar Counsel, we had no knowledge of your preference to receive correspondence via email.

With that being said, Mr. Spencer's CSF claim against you was to be reviewed by the CSF Committee back in April 2020, but due to the COVID-19 pandemic, that meeting was cancelled. As a result, your CSF claim will not be reviewed by the CSF Committee until our fall meeting. Therefore, you still have a brief period of time to respond to Mr. Spencer's claim and provide whatever documentation to corroborate your position.

I have copied the CSF Investigator Kirk Brennan on this email so he is aware of your interest in responding. **Please provide Mr. Brennan your response to the CSF claim and any documentation no later than September 18, 2020**. You may copy me on those correspondence to include in the claim file.

Let me know if you have any additional questions regarding the CSF claim.

Sincerely,
Theresa Freeman
State Bar of Nevada
702-317-1426
theresaf@nvbar.org

rom: William Swafford <swaffordw@gmail.com>
Sent: Sunday, August 30, 2020 4:08 PM
To: Cathi Britz <CathiB@nvbar.org>
Subject: Fee Dispute Notice Issue

Cathi,

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Sincerely,

swaffordw@gmail.com

From: Cathi Britz <CathiB@nvbar.org>
Sent: Friday, September 4, 2020 4:34 PM
To: William Swafford
Subject: RE: Fee Dispute Notice Issue

Mr. Swafford-
The fee dispute claim did not go to either mediation or arbitration since we did not receive a response from you. The Spencer's then filed the Clients' Security Fund (CSF) claim. The fee dispute will not be reopened since the CSF claim is now open and pending. I forwarded your email to Ms. Theresa Freeman, CSF claim manager. She said she would be emailing you about the CSF claim.

Have a nice weekend--

Cathi J Britz
Fee Dispute/Hearings Coordinator
SBN
cathib@nvbar.org ▪ 702.317.1416

From: William Swafford <swaffordw@gmail.com>
Sent: Sunday, August 30, 2020 4:08 PM
To: Cathi Britz <CathiB@nvbar.org>
Subject: Fee Dispute Notice Issue

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Sincerely,

William Swafford

Gmail William Swafford <swaffordw@gmail.com>

CSF Claim CSF20-004 Spencer v. Swafford

4 messages

William Swafford <swaffordw@gmail.com> Wed, Apr 14, 2021 at 6:44 PM
To: theresaf@nvbar.org
Cc: LawyerBrennan@gmail.com

Theresa,

Hi, my name is William Swafford (NV 11469) and last September I emailed a Response to a CSF Application for Reimbursement, along with numerous attachments organized in two volumes of an Appendix. I never heard anything back, and I figured that the delay was due to COVID-19 hardships. I finally searched the Client's Security Fund webpage today and clicked on the link to Reports for the year 2020, and this report shows that the claim against me was approved, and the amount approved was $5,000.

Given that I never received any notice or orders related to this approved claim, I was wondering if there were any records, transcripts, minutes, findings, conclusions or orders that I could have for my records, and for my reinstatement petition.

I recognize that my Response was unique and extremely long, and I appreciate that you guys took the time to read and consider all of the relevant facts and circumstances before approving Mr. Spencer's Claim for a total of $5,000. How can I arrange to repay this $5,000 with the State Bar?

Thank you for your efforts in resolving this matter. I would greatly appreciate any information pertaining to my above requests.

Sincerely,

William Swafford

Theresa Freeman <TheresaF@nvbar.org> Thu, Apr 15, 2021 at 9:09 AM
To: William Swafford <swaffordw@gmail.com>
Cc: "LawyerBrennan@gmail.com" <LawyerBrennan@gmail.com>

Hello Mr. Swafford,

The Clients' Security Fund (CSF) approved Mr. Spencer's claim against you in November 2020 and sent a reimbursement check to Mr. Spencer for $5,000 in February 2021. Attached are the Respondent Notice letter, Meeting Notice letter and Claim Approval letter that were sent to you (or cc'd to you) at the address we have on file (21385 Saddleback Rd., Reno, NV 89521).

As for reimbursing the Clients' Security Fund, you may send a $5,000 check made payable to the "State Bar of Nevada's Client's Security Fund" to my attention at the address below. Please include a letter of your intent to pay back the CSF for Mr. Spencer's claim. Once the Client's Security Fund has received the check, and it has cleared, you may include a copy of the 'cancelled check' from your bank as verification of reimbursement with your petition for reinstatement.

If you have further questions regarding petitioning for reinstatement, please contact the Office of Bar Counsel at 775-329-4100.

Sincerely,

Theresa Freeman

State Bar of Nevada

3100 W. Charleston, Suite 100

Las Vegas, NV 89102

702-317-1426

theresaf@nvbar.org

[Quoted text hidden]

3 attachments

Spencer v Swafford - CSF Claim Approval Letter.pdf
106K

Spencer v Swafford - CSF Meeting Notification Letter.pdf
142K

Spencer v Swafford - CSF Respondent Notice Letter.pdf
138K

William Swafford <swaffordw@gmail.com> Thu, Apr 15, 2021 at 9:28 AM
To: Theresa Freeman <TheresaF@nvbar.org>

Theresa,

Thank you for your response. I am not sure why I did not receive anything in the mail. I need to get a P.O. Box as mail delivery is problematic where I live in the mountains. I guess I was wondering if there were any findings of fact relating to the fact that the committee found I committed theft. Mr. Spencer originally wanted the dispute to be heard by the fee dispute arbitrator, but he did not file his request for more than three years, and when he did I was not notified until months later when I contacted you and learned of this CSF action. Mr. Spencer sought $35,000, claiming I stole the attorney fees, and the $5,000 claim approved strikes me as a mediation result deemed fair by the Committee. I could be wrong, but my concern is that $5,000 of the $35,000 paid to me as attorney fees was stolen rather than disputed, and that this could affect me in an unknown manner down the line. That is why I was wondering if there was any record of the committee's specific findings, or a factual basis for the findings.

I appreciate your assistance and I do not wish to waste any of your time. I just wanted to express my concerns about this finding and create a record of such. And, personally, I cannot think of scenarios where the theft finding could affect me negatively, as opposed to a neutral finding in a contested dispute involving contractual fees, but I did have this concern and wanted to share it. Perhaps just food for thought if nothing else.

Thanks for your help.

Sincerely,

William Swafford

[Quoted text hidden]

Theresa Freeman <TheresaF@nvbar.org> Thu, Apr 15, 2021 at 10:39 AM

To: William Swafford <swaffordw@gmail.com>

Mr. Swafford,

Fee disputes are referred to the Clients' Security Fund when an attorney is suspended or disbarred if there is a question of unearned fees that are no longer present in an attorney's trust account, then taking of those funds without having earned them can be considered by the CSF.

The Clients' Security Fund does not produce findings of fact. The CSF Committee gathers information from other sources, including the claimant, the respondent, court records, pleadings through the Office of Bar Counsel, etc. The attached Findings of Fact and Suspension Orders were taken into consideration, along with everything you and Mr. Spencer provided, when making a decision on this CSF claim.

Please note: all reimbursements of losses from the CSF are a matter of grace in the sole discretion of the CSF Committee; and, the Committee has sole discretion to determine whether or not any Application shall be granted in whole or in part, and its decision shall not be reviewable.

Theresa Freeman

Programs Manager

State Bar of Nevada

[Quoted text hidden]

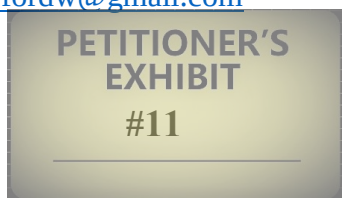
3 attachments

Swafford.findings.pdf
558K

Swafford, William - Suspension Order 2.pdf
752K

Swafford, William - Suspension Order 1.pdf
509K

Prepared and submitted by
William Swafford
NV Bar No. 11469
(Currently suspended)
swaffordw@gmail.com



September 17, 2020

Kirk Rowley Brennan, Esq.
CSF Investigator, State Bar of Nevada
Sent via email to lawyerbrennan@gmail.com

RE: Client's Security Fund Claim No. CSF20-004: *Spencer v. Swafford*

RESPONSE TO CSF APPLICATION FOR REIMBURSEMENT

I. The Allegations of Jeffrey Spencer

In his CSF Application filed January 16, 2020 Jeffrey Spencer (hereinafter "Mr. Spencer") claims that he entered into a contract with me where I agreed "To handle the writing up of all documents and to co-chair during trial with William Routsis for a civil lawsuit." Mr. Spencer alleges that pursuant to the contract (attached to his CSF Application) I was paid $35,000 and all I did was draft a complaint that was "filled with inaccuracies, wrong names, dates, incorrect individuals and misspellings throughout." Mr. Spencer claims that his wife made suggestions for me to correct which I disregarded and never did anything further in this case. Mr. Spencer claims that he was forced to hire two additional lawyers to complete the work that I was contracted to perform, and paid these two lawyers $15,000 and $26,000, respectively.

Mr. Spencer alleges that in connection with the disciplinary hearing relating to the same matter (Case No. OBC15-1069) I "admitted to not doing what (I) was contracted for," and asserts that I was required by the State Bar to provide proof of the work I did and the time spent on the case, and I failed to provide this information and did not respond to the Bar concerning Mr. Spencer's request for fee dispute arbitration.

Attached to the CSF Application is a letter that Mr. Spencer initially filed with the state bar in connection with his complaint against me which was also sent to Judge Kosach (Ninth District Court Judge) in Case No. OBC15-1069. This letter states that I finally drafted the amended complaint and he and his wife (and Mr. Routsis's secretary) had to make corrections which Mr. Routsis's secretary typed for filing, and that:

> "[Mr. Swafford] Left it up to (his) wife to proof read … he was the one paid to do this, not my wife. He has not completed any of the work he was contracted and agreed to do. … I have been informed that Mr. Swafford has done this to other client, he did not show up to a hearing in Judge [Scott] Freeman's court. … Mr. Routsis will also be writing a statement collaborating the claims above."

For the reasons addressed in the instant response, and as supported by the attached and referenced exhibits hereto, Mr. Spencer's claims that he suffered a monetary loss resulting from dishonest actions on my behalf are simply false.

II. Relevant Background Information

Attached to Mr. Spencer's CSF Application is the Northern Nevada Disciplinary Board's *Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing* dated November 4, 2016. On p. 3, at paragraph 11, it is alleged:

> In 2014, Respondent lived in Chicago, Illinois and his practice of law consisted primarily of contract work for attorney William J. Routsis II and other Reno attorneys on various matters.

Mr. Spencer's allegation that he had been informed that I had done the same thing to another client by not showing up to a hearing in Judge Freeman's court involves another case where I assisted Mr. Routsis during this same time period and is another product of our falling out. The transcript of the formal hearing on October 10, 2016 is attached hereto as **Exhibit A**. The following discussion is found at p. 18 of the formal hearing transcript:

> *Mr. Meade*: The suspension that he currently has, it was at the same time? What I'm understanding, the same time as when – this all occurred concurrently?
> *Ms. Flocchini*: Yes … Just for the ease of reference, the other clients are the Pardos, the other clients. So the representation of Mr. Spencer was happening the same time and the failures were happening at the same time.[1] … The cases track together. We received the complaint with respect to the Pardo case prior to receiving the Spencers' complaint. That's why they weren't handled in one hearing together because of the way they came into our office.[2]

This other disciplinary case is Case No. OBC15-0828, and the *Findings of Fact, Conclusions of Law and Recommendation After Formal Hearing* is attached hereto as **Exhibit B**. I would invite the reader of this Response to review the findings of fact at p. 2-7 of this exhibit to better understand the background and nature of that case (which is relevant to and relates to this case). In both of these disciplinary cases I failed to file a reply and respond to the complaints against me and communicate with the Bar (which I was punished for as well) alleging acts of professional misconduct. Accordingly, a default was entered against me in both cases and all of the allegations alleged in the respective complaints were deemed admitted. I did not challenge the allegations against me in either case and I was punished based upon the facts as alleged in these respective formal complaints drafted by Deputy Bar Counsel after investigation of the complaints against me and other relevant facts and evidence obtained. With this in mind, by reading the allegations as they were alleged by Deputy Bar Counsel after investigating the complaints and claims filed against me (and deemed admitted for purposes of that hearing) the broken and contentious nature of my relationship with Mr. Routsis at all times relevant is apparent. This is additionally relevant to rebutting the allegation that I had done the same thing in another case before Judge Freeman as alleged by Mr. Spencer, which he only could have known about from Mr. Routsis who was a complainant against me in both cases. It should also be noted that the allegations as were deemed admitted alleged in **Exhibit B** were also used by Deputy Bar Counsel in part in a complaint against Mr. Routsis relating to the same underlying

[1] Transcript at p. 18:7-16.
[2] Id. at p. 18:19-23.

criminal case and representation of two brothers with a conflict of interest, and I was subpoenaed to testify at his disciplinary hearing after failing to voluntarily communicate with the Bar or participate in the case against him.

The facts of the case relating to **Exhibit B** are nothing like the allegations by Mr. Spencer in the instant case other than it similarly involved a case that I was involved with during my working relationship with Mr. Routsis, and both complaints resulted in part from the manner in which my relationship with Mr. Routsis had soured and had become increasing hostile and no longer able to continue. In fact, in the Findings of Fact attached to Mr. Spencer's Application it is alleged at p. 6, paragraph 27:

> Respondent's failure to respond to any of the Spencer's or Routsis's communications was due in part to a falling out between Respondent and Routsis and personal and medical problems that Respondent was dealing with at the time.

The medical problems mentioned are as follows: Shortly before I graduated law school in 2009 I was playing flag football and as I was running to catch a pass while the defender was trying to intercept the ball and we hit heads running full speed. I am 6'4 and the defender who was much shorter and a former college defensive back who at that time was trained to target receivers with his head hit my cheek area with the top of his head. I shattered my skull in numerous places and had to have my face rebuilt (and I needed about 20 stitches). Treatments and protocols relating to brain injuries had not yet developed to the point that it did following the concussion issues in the NFL that the money from the league assisted with advancements, and I was never advised about possible brain injuries and the symptoms to look out for afterward. I ended up suffering traumatic brain injury and I suffer from hypopituitarism as my pituitary gland does not work properly any longer. My symptoms included insomnia, extreme anxiety, depression, attention deficit disorder and other similar problems. I was improperly diagnosed with bipolar disorder and prescribed medications that made be gain significant weight and made my issues worse without treating them. During the time in which the two disciplinary cases arose I was suffering from extreme anxiety and other problems and when my relationship with Mr. Routsis soured I was working with him on numerous cases that we began arguing about. This conflict and my problems maintaining my new solo practice in Chicago caused me to suffer extreme anxiety and depression.

Mr. Routsis believed that I failed to do a sufficient job on numerous cases as our working relationship deteriorated and told me that I needed to refund all money paid and he threatened to get me disbarred in all three states where I was licensed at the time (Nevada, Massachusetts and Illinois.) The nature of our relationship further eroded to the point where it was not only causing me extreme anxiety, mental and physical anguish (which were compounded by my untreated medical issues) but I had reason to believe that Mr. Routsis purposefully was trying to get me into trouble with the bar and ruin my future career as is (in my opinion) supported by the findings of fact contained in pages 2-7 of **Exhibit B**, which is simply the allegations deemed admitted as alleged by Deputy Bar Counsel after investigation. (The reader of this Response can read these factual findings and make an independent determination if my beliefs are objective and rational). Additional evidence of the untenable relationship between Mr. Routsis and myself are evidenced by the emails contained in **Exhibit C**. These are just a small sample of emails that

Mr. Routsis was continuously sending me during this time when I quit communicating with him and stopped working on all cases I had been working with him on. (More about this is discussed in sections below.) I had so much anxiety at the time I deleted many of his continuous emails explaining to me why he was morally, legally and logically correct and I was wrong. I explained to him that I was suffering from what I believed at the time to be bipolar disorder and he told me that he believed that I had a serious substance abuse issue and needed to go to rehab and seek support, which I guess was just another way of telling me he knew everything and I was in the wrong for yet another reason which was only in his mind.

III. Contract, Nature of My Work on Mr. Spencer's Case and Responses to Specific Allegations in His Claim

Attached to Mr. Spencer's CSF Application is a copy of the contract at issue. This contract is between Mr. Spencer and Mr. Routsis. The contract states that Mr. Spencer hires Mr. Routsis to defend the claims filed against him and to prosecute potential counter claims against Mr. Klementi and other potential defendants who may be liable to Client for damages in connection with the events surrounding the case at issue. The contract then states that Mr. Routsis will associate with William Swafford Esq., who will share responsibility for the handling of Client's case, and Mr. Routsis will splint his attorney fees received on the contract and assigns 50% of the legal fees paid by Client to Mr. Swafford. The contract states that the $50,000 paid for legal services is a non-refundable fee as it is not based upon any specific hourly rate at which attorney will be billing the client. It further states that in the event of a fee dispute attorney charges $250 per hour for work performed.

Mr. Routsis and I had been working together on cases since 2009 at the time this case began. For some of that time I was living in Chicago and was working on cases with Mr. Routsis and his law office in Reno, Nevada. The nature of our relationship was that when there was a complex issue in a case I would analyze the discovery and evidence relating to that case and identify issues that could be litigated by pretrial motions, or would otherwise draft evidentiary motions for use during trial, and occasionally I would draft appellate briefs and prepare post-conviction pleadings and motions.[3] In this case the understanding was that I would analyze a vast amount of evidence relating to the criminal trial and events surrounding that trial to ascertain causes of action that could be filed against potential defendants who were responsible for the criminal case prosecuted against Mr. Spencer in which he was accused of Elder Abuse and was acquitted following a week long jury trial, as well as allegations which caused him to lose his job as a snowplow driver during winter months.

During the Formal Hearing on October 10, 2016 concerning the punishment phase of my disciplinary case relating to the Spencer matter, I testified as follows:

[3] One of our issues when our relationship broke down was that Mr. Routsis believed that some of the motions I had written recently were subpar and I should return all of the money earned from those cases. In one case he told me that I failed to prepare a supplemental motion which I did but he abandoned those arguments, and in another case he believed that my arguments were incorrect because he confused some legal issues and lost the argument. It should be noted that given the way I research and write my best and most difficult work usually comes when I draft the response to the State's Opposition. I would typically get paid $2,000 for the motion and would not be paid anything for the Reply. I currently work for David R. Houston and Ken Lyon in Reno, Nevada doing similar work and I get paid by the hour for everything I do.

> So I filed the first response and counterclaim. And some of the people they wanted to – the first time I spoke with them I was aware that they wanted me to sue the district attorney, and pretty much everyone involved. I think they wanted to sue the judge. And I was narrowing down who we could sue. A lot of the actions of the people involved in this case involved testimony in front of the administrative hearing where I thought there would probably be a privilege, and I was trying to find other ways to sue besides defamation to get around either quasi-judicial or absolute privilege. And I thought I had found some pretty creative things. And I had done similar things in the other suit and I thought they were good.
>
> And then they wanted me to bring in more people. And I thought some of the defendant were, in my mind I knew that the motion to dismiss stage, summary judgement was a nightmare because of how many possible privileges there were, and the timely things. In my opinion I spent a lot of time on it. I did as good as a job as I could. *See p. 73 – 74 of* ***Exhibit A***.

Mr. Spencer alleges in his CSF Application and attached materials that all I did was draft a complaint that was filled with errors which had to be corrected by his wife and Mr. Routsis's secretary for filing, and that I failed to prepare an amended complaint and the motions and stipulations associated with filing the amended complaint which added additional counter-defendants to the lawsuit. It is also alleged that I failed to file a defamation claim which was barred by the statute of limitations.

In responding to these allegations it should be noted that the Spencer's case was appealed to the Nevada Supreme Court in Nevada Supreme Court Case No. 77086. The appeal was filed after the claims against the counter defendants were dismissed following summary judgment, and Mr. Spencer was ordered to pay the attorney fees of the counter defendants. The summary of the court's opinion filed on July 9, 2020 states as follows:

> Appellant (Mr. Spencer) sued respondents for, among other things, defamation based on statements they made during the public-comment period of planning commission and improvement-district meetings, and malicious prosecution following his acquittal on battery and elder abuse charges. As to the defamation claim, the district court separately granted summary judgment to each respondent, relying in part on the judicial-proceedings privilege. Generally, the privilege absolutely protects statements made during the judicial proceedings, and therefore those statements cannot form the basis of a defamation claim. This privilege extends to statements made during quasi-judicial proceedings, but the issue here is whether the public-comment periods of planning-commission and improvement-district meetings are quasi-judicial proceedings. We conclude that in this case, the public-comment period of planning-commission and improvement-district meetings, and malicious prosecution following his acquittal on battery and elder abuse charges. As to the defamation claim, the district court separately granted summary judgment as to each respondent, relying in part on the judicial proceedings privilege. Generally, the privilege absolutely protects statements made

> during judicial proceedings, and therefore those statements cannot form the basis of a defamation claim. This privilege extends to statements made during quasi-judicial proceedings, but the issue here is whether the public comments period of planning commission and improvement-district meetings are quasi-judicial proceedings. We conclude that in this case, the public comment portions of the meetings were not quasi-judicial because they lacked the due-process protections we would normally expect to find in a court of law. ….
>
> *See pages 2-3 of Nevada Supreme Court Opinion in Case No. 77711*, attached hereto as **Exhibit D**.

This shows that all of the issues I worked on initially for months was well planned and was time well spent. The complex issues I was able to identify from the outset were the issues that were relevant to the only causes of action available which could keep the lawsuit in court without being dismissed due to an absolute or quasi-judicial privilege defense. With this in mind, I respond to the specific allegations in Mr. Spencer's CSF claim as follows:

First, with respect to the allegation by Mr. Spencer that I failed to prepare a defamation cause of action in a timely manner which resulted in the claim being barred by the statute of limitations, this is not the first time that Mr. Spencer has made this allegation.[4] Attached to the CSF Application are the findings of fact and conclusions of law in the disciplinary case pertaining to the same matter. On p. 6, paragraph 29, it is alleged that, "Respondent failed to seek amendment of the counterclaim such that included third-party claims may be barred by the Statute of Limitations." Clearly, as is demonstrated by the Supreme Court opinion and appellate case, the defamation claim was never barred by the statute of limitations and I addressed the law surrounding this issue in emails sent to Mr. Routsis in response to questions by Mr. Spencer concerning this issue which are discussed below and attached in exhibits to this response.

Not only does the appeal demonstrate that the statute of limitations claim concerning the defamation claim is untrue, but as is seen in the emails I sent to Mr. Routsis addressing the statute of limitations issue as it related to defamation claims against the counter defendants, I researched the law applicable to potential arguments that the SOL barred defamation claims against the counter defendants and explained this law to Mr. Routsis. (*See* emails relating to the SOL defamation issues contained at **Exhibit E**, attached hereto.) If this claim was barred by the statute of limitations it is curious why it was included in the amended answer and third party complaint filed by another lawyer two years later and that it is still pending following appeal against at least one counter defendant.

Like all of the allegations against me in the formal complaint filed by the State Bar in this case (and the other related case) these allegations were deemed admitted because I was unable to file a reply responding to the allegations. My failure to respond was caused not only by my medical conditions, but at the time I was dealing with this case, responding to the allegations against me

[4] Mr. Spencer seems to erroneously believe that because I failed to respond to the complaint against me in the disciplinary hearing and the allegations in the formal complaint were deemed admitted for purposes of the punishment hearing, that I admitted to these allegations for all purposes including the CSF claim that he has filed in the instant matter.

by Mr. Routsis relating to our working relationship and during the time the complaints were filed against me in both cases, I was taking care of my father who was dying of Alzheimer's disease and my uncle who was dying of cancer, as well as all of the issues associated with the care of both family members and my own medical issues. In light of my medical issues I was unable to address the complaints against me in either case as I had not yet been properly diagnosed and treated for my brain injury and symptoms. I regret not challenging them as is evidenced by this particular allegation, it is simply untrue and is bellied by the evidence.

Second, with respect to the allegation that all I did was prepare an error ridden complaint that needed to be corrected by Mr. Spencer's wife and Mr. Routsis's secretary before she filed the amended complaint and associated motions for leave and stipulations, and that I stole the money assigned to me by Mr. Routsis under the contract without performing the legal research and writing that I was contracted to perform, I have attached zip files to the email that this response is attached to with a large portion of the evidence in this case that was necessary to review and analyze in detail, as well as my research and notes relating to the causes of action in the complaints.

As I explained to the Northern Nevada Disciplinary Board panel at my hearing concerning punishment following the default entered against me in the underlying disciplinary case, I began this case by communicating with Mr. Spencer and Mr. Routsis about the underlying criminal case and his desire to sue those responsible for making false allegations against him that caused him to be prosecuted for felony offenses and fired from his snow plow driver job with improvement-district. I understood from the beginning that the allegations were made in connection with police and D.A. investigations into criminal allegations, various hearings before numerous political subdivision agencies, judicial and quasi-judicial proceedings, and I was aware that the statements themselves as well as some of the people that Mr. Spencer wanted to sue such as the district attorney and the judge were protected by certain First Amendment privileges and other privileges and case law. I understood and explained to Mr. Spencer and Mr. Routsis that the difficult part of the case (after reviewing all evidence and identifying causes of action that could survive motions to dismiss/summary judgment) would be responding to motions to dismiss and/or for summary judgment, and then possibly preparing appellate arguments if dismissed before trial. I had discussed initially with Mr. Routsis that the issues would be similar to another case that we were involved in years earlier involving defamation and civil conspiracy claims where I spent more than a year analyzing evidence, researching the law to formulate causes of action and then responding to motions to dismiss and summary judgment, and we agreed that this time I would do all of the difficult, time consuming work up front, prepare a complaint based on that work and be prepared for the motions to dismiss/summary judgment up front. We discussed that if we were able to get past motions to dismiss or summary judgment it would be likely that the case would settle before trial.

I spent several months analyzing reports from various meetings and letters from counter-defendants and other third parties where allegations were made concerning the actions of Mr. Spencer upon which the criminal trial was predicated. I reviewed summaries written by Mr. Spencer and his wife, photographs and all of the preliminary hearing transcripts, trial transcripts and a vast amount of evidence relating to the claims against Mr. Spencer to ascertain who we would be able to sue and how to get around absolute and qualified privileges that would preclude

claims of defamation, civil conspiracy, invasion of privacy and malicious prosecution, and how to frame these allegations properly to survive motions to dismiss and motions for summary judgment filed by the counter defendants that we could possibly sue. I not only had to analyze all of this evidence, but I also had to research case law from jurisdictions all over the country and rely on various restatements and secondary sources to determine how to properly draft the complaints and prepare for the anticipated arguments in defense. Also, at the time a big issue to the Spencers was that a video recording of the incident where Mr. Spencer tackled his neighbor and was one of the predicates for the criminal charges against him had been edited and this fact was necessary in the Spencer's opinion to be used as either the basis of a claim or as evidence to support a claim, which was another difficult issue I had to research and think about from numerous angles.

This research and work took approximately six months because Mr. Routsis also had me working on several other very time consuming cases that involved similar research and complex analysis of law and facts. I have moved several times, lost a few computers to malfunction and allowed my subscription to Clio case management software to expire due to difficulty paying the monthly fees while I was suspended over the previous four years while I was taking care of family and personal responsibilities. I do not know the exact time I spent on this work, but just to review all of the materials and research the law I would spend 15 hours a day, 5 days a week for several months; allocating 10 days at a time to the case. I estimate that I spent approximately 300 hours or more working on this case. By simply looking over the documents in the zip files attached to the email that this response was attached to it is easy to see how many hours this case would require, or at least see that it was necessary to spend this much time working on this case to figure out the issues that I addressed at the beginning, which ended up being the relevant issues on appeal.

Ironically, the research that I did initially on this case involving absolute and quasi-judicial privileges as they applied to the causes of action in this case against the counter defendants was at issue in the appeal that Mr. Spencer's appellate lawyers filed following the dismissal of his causes of action following summary judgment. The issues that I identified at the beginning and the research performed during the months I worked on this case were directly at issue in the appeal, and the arguments as they related to these issues which were explained to Mr. Routsis were prepared by me during this time from the beginning. To say that I did absolutely nothing on this case except for prepare an error plagued complaint that secretaries corrected and filed is not true. The zip files contain about 70% of the notes and research I did on this case, some of the work I did was lost and is not in these files. Some of the evidence given to me by the Spencers was also in paper format which is not included with this response. A brief review of these materials reveals that I was working on the correct issues from the beginning, and this is exactly what my value is which is further evidenced below in another section. However, as a brief demonstration to show that the claims of Mr. Spencer are grossly misguided and fabricated, I have attached several pages of notes relating to these exact issues that I prepared in connection with the Answer, Counterclaims and Third Party Complaint. Also included in this exhibit are emails about the corrections I made to the initial filed document discussing the corrections with Mr. Routsis, and additional emails to Mr. Routsis about the causes of action and possible privilege defenses, especially relating to the defamation causes of action and malicious prosecution claims; attached hereto at **Exhibit F**. Also relevant to this issue are the emails I sent

to Mr. Routsis with instructions for filing the motions for leave to file the amended counterclaims and answers, stipulations for adding additional counter-defendants and related documents for filing, with instructions for how to file. These are attached at **Exhibit G**. While Mr. Routsis was doing what I perceived as anything he could to get me in trouble with the State Bar he notified me that I needed to fly to Reno and get these documents filed several months after I sent these documents with instructions.

Mr. Spencer claims that I never did any of this work, and it is possible that Mr. Routsis told him that I did not ever do it. He claims that he had to hire another lawyer to prepare these documents and file them. Attached to this response at **Exhibit H** is the Answer to Amended Complaint and Amended Counterclaim and Third Party Complaint that was filed on March 3, 2017 by Mr. Routsis and attorney Lynn G. Pierce, Esq., almost two years after I initially instructed Mr. Routsis how to file it. Compare this with the document that I prepared that was never filed contained in **Exhibit G**. (I obtained this document from the 1st of the three volumes of appendixes that were filed with the opening brief in the appellate case with the Nevada Supreme Court.) This document that another attorney was allegedly hired to prepare after I failed to do so is almost identical to what I sent Mr. Routsis but Mr. Spencer claims that his secretary had to complete and file. The allegations of Mr. Spencer that I never did this work is simply untrue and may possibly be concerning to this committee.

Third, Mr. Spencer alleges in his CSF Application that at the formal hearing for which a transcript is attached at **Exhibit A** to this response, that I admitted to not doing the work that I was contracted for. This is also untrue. I admitted that I quit communicating with Mr. Spencer and his wife, and quit communicating and working with Mr. Routsis because I believed that Mr. Routsis was trying to get me into trouble with the State Bar, and that everything I did was just a way for Mr. Routsis to try to get me into trouble. Our relationship had broken down and Mr. Routsis was not only going out of his way to get me into trouble, but was sending me emails that were harassing in nature and accusing me of things I did not do as well as demanding that I return his money he paid me on other cases. I apologized to the Spencer's at this hearing and informed them that my communication breakdowns were due to my falling out with Mr. Routsis, but I stated that I worked diligently on this case and that they were mistaken about me not preparing documents that I did in fact prepare and send to Mr. Routsis.

Mr. Spencer alleges that the State Bar required me to provide proof of the work I did and I did not do this or respond to his request when he filed the fee dispute. The State bar never required me to do this, and Mr. Spencer filed his request for arbitration on October 3, 2019, which was three years after the hearing where the disciplinary hearing ordered me to participate in any fee dispute arbitration requested by Mr. Spencer as a condition to being reinstated. I was suspended for a total of one year and one day in both cases to run consecutively. I waited to file my petition, which I am going to file soon, because I was taking care of family and personal obligations and healing from the trauma I went through. My dad was dying of Alzheimer's and escaped a few weeks before he died and was involved in a head on collision with a semi-truck, and this is just one example of what I went through for years. Mr. Spencer possibly tried to hold up my ability to petition for reinstatement and I was never notified of his request for arbitration until a few weeks ago when I contacted the Bar and was advised to respond to this complaint accusing me of theft. I would have presented all of the same information at that time because I

was never able to present my side of the story at the two cases where I defaulted and the allegations against me were deemed admitted. It believe that if arbitration fails the case is automatically referred to mediation, I do not know if this case was ever referred to mediation or why it was not, but I cannot locate anything suggesting that it was. I have no problem, and I have a strong desire to present all of this evidence in addition to contract defenses to a mediator or arbitrator.

One thing that I would like this committee to consider is the fact that I never responded to the allegations in either complaint against me, with both matters relating to work I did with Mr. Routsis. The findings of fact in **Exhibit B** resulted from a default and the allegations in the complaint were deemed admitted. I request you, the reader of this response to read these facts which were alleged by the Deputy Bar Counsel after she investigated the claims in the complaints against me. It should be realized that this same attorney who I worked with, (Mr. Routsis was one of the persons who filed a complaint against me in this case as evidenced by the letter to Judge Kosach attached to Mr. Spencer's Application) Mr. Routsis, had a complaint filed against him based on the same nucleus of operative facts and I was subpoenaed to testify against him because I did not want to testify against my old friend and law partner voluntarily. I took as much blame as I could and admitted that I had a brain injury and was having a difficult time remembering exactly what transpired. While I was punished in part for assisting Mr. Routsis violate the professional rules of conduct by representing two clients with a conflict of interest, the disciplinary committee found that Mr. Routsis did not violate the rules of professional conduct and dismissed the complaint against him after presentation of evidence. Now there is a case where I performed a great deal of work for months, and was assigned half of the fee paid to Mr. Routsis pursuant to the contract between Mr. Spencer and Mr. Routsis and demonstrated by the contract attached to Mr. Spencer's claim. Mr. Routsis was paid to represent Mr. Spencer at the civil trial despite the fact that less than 2% of all civil cases filed actually go to trial. Mr. Routsis agreed to file the things I sent him from Chicago which he did not do and he is involved in assisting Mr. Spencer in his claims that I stole his money where it is alleged that I did no work. The ironic thing here is that there is no way to argue that I did less than Mr. Routsis in this matter as this case is only now scheduled for trial following appeal where some of the summary judgment rulings were overturned. So after Mr. Routsis attempted to get me in trouble in connection with the related disciplinary action in the Pardo brother case he himself had a complaint filed against him by the State Bar Counsel sua sponte. Now, in this matter Mr. Routsis is trying to assist Mr. Spencer with getting me in trouble not only with the Bar which already caused me to be disciplined, but in this CSF claim matter as well so that I can be found to have stolen money when in fact I did a great deal of work and was forced to quit working with Mr. Routsis after he tried to get me in trouble in another case. If I stole money from Mr. Spencer then I guess I work for free and the work I do for other lawyers that is similar to what I did in this case must be valueless and these lawyers are paying me for a reason I do not understand. (I discuss samples of work for other lawyers and provide an example in an exhibit mentioned below.)

Another claim by Mr. Spencer in the complaint attached to the CSF claim that was also sent to Judge Kosach is that the money that was paid to me for technical research and writing (this is exactly the case and is true) but then he also alleges in the same two sentence paragraph that the money was paid to cover the costs of expenses for travel when it came time for trial and I had to

fly from Chicago to Reno. This allegation is misguided and it represents a belief held by Mr. Spencer and probably Mr. Routsis that underlies this action and the CSF claim against me. As I explained above, and to Mr. Spencer at the beginning of the case, the majority of the work and the hardest thing about this case would be analyzing the evidence, researching the law as it applies to the evidence and underlying facts and preparing causes of action that would not be defeated by absolute and qualified privileges. (The precise issues subsequently addressed by the Nevada Supreme Court.) Mr. Spencer believes that the legal fees I was paid in this case were paid so that when the trial happened I could travel and sit second chair at trial assisting Mr. Routsis. This is true in that if there was a trial I would have sat second chair and assisted Mr. Routsis before our relationship broke down. I once assisted Mr. Routsis and sat second chair during a five week murder trial which resulted in a hung jury. I researched evidence and prepared pretrial motions and did a lot of work before the trial, but during trial I didn't say one word, I just assisted with the preparation of evidence and with discussing issues with Mr. Routsis involving evidence during trial as well as certain strategy as well as advising him of certain constitutional and evidentiary rules during the trial. This would have been my role again. I was paid legal fees in this case to do exactly what I did; to analyze all of the evidence, research the law that applied to that evidence, reanalyze the evidence, obtain additional evidence and prepare causes of action and prepare for anticipated responses to defenses that would likely arise. Unfortunately, Mr. Spencer is of the belief that I simply read the underlying evidence – *which is so vast that it would take any lawyer at least 50 hours to analyze it all and understand how it relates to viable causes of action that would not be dismissed, and to ascertain which defendants those claims can proceed against without getting dismissed* -- and prepared an error ridden cookie cutter complaint from a law school handbook. It seems that Mr. Spencer is of the opinion that all of the work that I did in this case was free of charge and a donation of my time, and that I was paid to assist at trial, irrespective of the fact that the odds of a complex civil case like this actually going to trial is extremely low.

The actions of Mr. Routsis made it impossible for me to continue doing my job as the findings of fact in **Exhibit B** alone support, and his constant threats and actual statements that I was fired from the case for not communicating and doing what he wanted me to do in other cases we were working on made it impossible for me to continue working with him on this case. I was booted off of this case by the attorney who assigned half of his fees to me under his contract with Mr. Spencer, and while this is simply my interpretation of what happened it is what I believe happened and I was punished for these actions by the State Bar and this punishment was affirmed by the Nevada Supreme Court. Mr. Spencer claims that I stole his money and did no work to earn it, however, the Northern Nevada Disciplinary Committee and the Nevada Supreme Court decided that my actions in this case, which followed discipline in a related case was cause to suspend me for six months and one day. If the State Bar and the Supreme Court had believed that I did what I am being accused of by Mr. Spencer it would be highly unjust for them to have only suspended me for six months and one day. Especially given that I failed to communicate with the Bar or respond to the complaints filed against me.

Two additional claims by Mr. Spencer that I would like to address are as follows. "He disappeared for weeks at a time. Traveling to exotic places after he received a check from me, not answering his phone or returning messages." It is true that I disappeared for weeks at a time and did not answer phone calls or return emails for two reasons. The first reason was discussed

above and it involves my falling out with Mr. Routsis later in the case before I was kicked off (about the time I decided I could not continue working with someone I believed was trying to get me disbarred). However, even early on in the case I did avoid responding at certain times because as the emails between Mr. Routsis and myself in **Exhibit E** demonstrates Mr. Routsis also had me working on preparing a complex response in a post-conviction case in a very complex case with publicly known facts involving convicted murder client Darren Mack (also convicted for attempted murder relating to shooting Judge Weller with a sniper rifle.) Mr. Routsis directed me to take substantial time away from the Spencer case for weeks at a time to research and write arguments in this case, and sometimes to put communicating with the Spencers on hold. A few other cases also came up which made Mr. Routsis tell me to put the Spencer case on hold from time to time to complete work on other matters.

The allegation that I travelled to two exotic places after I was paid but did not do the work I was paid for is simply a fact that Mr. Routsis told the Spencers to inflame their anger against me and make it appear that I stole their money without doing any work as promised and paid for. During the months between when I was paid and I finally quit working and communicating with Mr. Routsis my brother who is one year younger than me got married to the mother of his children who he met in pharmacy school and dated for 12 years before proposing. He had a bachelor party where a small group of friends and family went on a marlin fishing trip to Cabo San Lucas, and one month later he got married at the same location as part of a package deal. My best friend from childhood is extremely wealthy and paid for the entire fishing trip, and my brother paid for my flight and stay at the resort for his wedding as I was his best man and his father-in-law gave him money to pay for the wedding. So yes, I was my brother's best man and went to his bachelor party and wedding, I admit it and take responsibility for my actions. I would also note that at that time I lived in Chicago and took comedy writing classes at Second City Training Center where nearly all Saturday Night Live alumni began, and I gave one of the best "best man" speeches of all time according to all who heard it, including waiters and bartenders. The only reason Mr. Spencer knows about this is because I was friends with Mr. Routsis's secretary on Facebook at the time (the person who allegedly amended my error ridden complaint and filed it, although the complaint was actually filed by another lawyer two years later) and she saw photos I published or was tagged in online. This is just another example of Mr. Routsis doing anything he could to try to get me into trouble. Over the course of about six months, perhaps longer, this is the only money I made as I had already been paid for older cases I was working on with Mr. Routsis and I did not have any other paying jobs or work. The anxiety Mr. Routsis causes me at this time coupled with my other life issues made me quit law for a short time and look for jobs elsewhere relying on my other two master's degrees in economics and international policy and I would not have wasted any money traveling or doing anything not necessary. In fact I was lucky at that time that my girlfriend I lived with had a good job and supported me while I struggled.

All things considered, I was already punished for what is alleged against me. While many of the allegations below were deemed admitted because I failed to respond to the formal complaint, many of the allegations are false and bellied by the evidence, and numerous allegations are simply added to make me look bad. The allegations are supported by statements made by Mr. Routsis as stated in the letter attached to the claim which was initially sent to the State Bar in connection with the initial complaints filed against me by Mr. Spencer. I had never seen this letter until now as it was not provided in the evidence given to me by the State Bar in connection

with my prior disciplinary hearing. I was the only lawyer who worked on this case for months, I was able to identify the causes of action and issues that were relevant to this difficult case at the very beginning as these issues were subsequently addressed by the Supreme Court years later. I quit working on this case after working on it for nearly a year after it became obvious to me that I could not continue working with or communicating with Mr. Routsis who had just tried to get me in trouble with the State Bar as is evidenced by the findings of fact in pages 2-7 of **Exhibit B**. There is no evidence that I mishandled property or embezzled money from Mr. Spencer and there is no evidentiary support for this claim other than the claims against me which are shown to be untrue in their majority.

If there is a formal hearing in this case I have communicated with two other lawyers I have been working with for six years and I will continue to work with in an increased capacity after I get reinstated to practice law. Both of these lawyers agreed that they will testify on my behalf concerning the type of work I do and the value of the research I do early in cases to identify issues that can be used defensively or offensively in cases and outline strategies for all stages of a case from the very beginning. I learned about this claim against me while preparing my petition for reinstatement which I will file when this hearing is completed. I realize that the type of work I do is unique and it is not immediately obvious to people who have not observed my work as to what the value of what I do is, and exactly what it is I do. For this reason I have also included the following section with one example of some of the work I did on one case for other lawyers in the Reno area.

III. Example of Similar Work in Another Case

At issue in this matter is whether I stole money from Mr. Spencer in connection with my work performed in his case. Initially, I would argue that while the claims and assertions by Mr. Spencer suggest that I did not earn all of the money that I was paid under the contract, this is a contract or an issue or a disciplinary issue that was already addressed. The language of the contract states that the money paid to Mr. Routsis and assigned to me under that contract for my technical research and writing work was agreed to be a nonrefundable fee which was earned for agreeing to spend the time to analyze the evidence, research the law and figure out what claims could get into and stay in court against which particular third party or counter defendants. If the suit went to trial I agreed to assist Mr. Routsis at trial and handle motion work to keep the causes of action from being dismissed. However, because Mr. Routsis constructively prevented me from continuing to assist him with getting the case to trial or settlement before trial, my involvement was terminated, and if the client to the contract (Mr. Spencer) had a fee dispute issue I would earn the nonrefundable fee paid to me at $250 per hour. I easily worked more than 200 hours on this case and I earned every penny paid to me by Mr. Spencer. Nonetheless, this case involves contract issues and there is no evidence that I committed embezzlement or theft.

The type of work I do cannot easily be represented by tangible results such as a specific petition or the representation of a client at a specific already scheduled hearing, or a hearing that is 100% going to be held if a certain pleading is filed with a judicial body. Instead, I address evidence and solve complex issues relating to a claim or a defense in a criminal, civil or administrative case.

An example of the value I provide is demonstrated in the documents included in **Exhibit I**. This exhibit relates to a case that arose in 2016 that was referred to publicly as the Little Valley Fire and involved a controlled burn that got out of control and burned numerous homes in the Washoe Valley area of Washoe County. The initial email sent to me by attorney David Houston asked me to think up a cause of action that would allow the plaintiffs to get around the $100,000 statutory cap on damages in a lawsuit against the State of Nevada and its political subdivisions. The following documents show that I initially prepared a brief memo discussing a few options I thought of including a cause of action for Inverse Condemnation, which is a type of eminent domain action which would have no cap on damages. The attorneys representing several of the plaintiffs who lost their homes liked my ideas and I was then asked to review underlying evidence and prepare a research memo addressing the issues that would come up in an action where the plaintiffs filed claims based on inverse condemnation. The research memo I drafted is included in this exhibit. This claim ended up being successful at the district court level and was appealed. The case settled before the appeal was decided and the plaintiffs ended up recovering much more than they would have been limited to had they not got around the $100,000 statutory damages cap.

I am paid by other lawyers who hire me to assist them with evaluating their cases at the beginning and thinking of issues that will arise, identifying issues that will be determinative somewhere between filing and appeal, researching and addressing those issues, and if requested I will draft motions, complaints, pleadings, writs, appeals and anything else that I am hired to do. The work I perform is intangible and consists of using my training in law, economics, international policy and other fields to address complex issues in cases that other lawyers will not or cannot address.

IV. Conclusion

All in all, there is no evidence that I committed the crimes of embezzlement, misappropriation or any other type of theft relating to my fee for legal services and the manner in which I worked on Mr. Spencer's case. I am in fact sorry that he feels cheated by me or like I stole money from him, but this is simply not the case. The evidence shows that most of the allegations in the CSF claim filed by Mr. Spencer are false and are based on misunderstandings or information he has been provided that is simply untrue.

Client's Security Fund Claim No. CSF20-004: *Spencer v. Swafford*

RESPONDENT'S APPENDIX

Appendix Consists of Two (2) Volumes

Gmail

William Swafford <swaffordw@gmail.com>

refunds

William Routsis <williamjroutsis@gmail.com> Sun, Nov 9, 2014 at 10:00 AM
To: William Swafford <swaffordw@gmail.com>

I have simply decided that your conduct and insults have made working with you impossible. Your failure to return messages-texts-calls-emails to both me and the Spencer's has caused much worry and doubt about what is going on with you.

Weeks go by without a return message which is simple respect and professional courtesy. You have failed to keep your word with the Spencers who I swore to them you would be professional. There is no way we can try a case together nor is there mutual respect any longer. I have great respect for your writing but it is no longer worth it to me and any association with you is demeaning to me and a compromise I will not make.

I do not wish to cause you any harm--however you owe me money and you probably should pay the Spencers all their money back (that is between you and them, they may go to the Bar) Regarding me, you must now refund the 2k for the DUI appeal, so I need the money asap-as you were paid in cash and Elizabeth is a witness-if you do not explain when you will refund the money, I must go to the State Bar of both States--I do not wish to do this but your failure to communicate is beyond my comprehension.

You also received 1k for the Petition to seal the record and I need that refunded. You also received 2k on Mack and I need this money for Cornell. You have court hearings on Pardo and I will not make any appearances for you until you address your obligations as a man with me, I will be sending you your next court appearance in Sparks on Pardo and I will be giving the court your email and phone if you do not contact me. On the Habeas you were paid 7,500 dollars and you are attorney of record as well--so you we be dealing with Elizabeth on this.

Just so you know- to attack the hand that helped you; and have your mother attack me; and to not have the courtesy to return messages; "is what it is"--but I will not insult my self by working with you any more. You have until Wednesday or I will go to the Bar of both States --I do not wish to do this but my clients need their money back and I will not compromise on this. You have embarrassed me with the Spencers--you are causing them emotional distress and you should be ashamed.

This is a legal notice by William Routsis,II

mack

1 message

William J. Routsis <williamjroutsis@gmail.com> Thu, Oct 15, 2015 at 3:12 PM
To: William Swafford <swaffordw@gmail.com>

Hey brother--you go on your way--I asked you to take care of my friend Mack—you did not even read the transcripts

truth

1 message

William J. Routsis <williamjroutsis@gmail.com> Fri, Oct 16, 2015 at 10:00 AM
To: William Swafford <swaffordw@gmail.com>

I will tell you this; forget being a lawyer; what you have done to my secretaries husband; Mack; the Spencers: is morally repugnant to good and kind conduct. Forget the fact that you will be disbarred and live in that shame; you have failed your fellow man and that will never leave your soul. I may go to the Bar myself with Elizabeth for your conduct. If I never see or hear from you again it will be too soon. I entrusted you to take care of people and you cannot even pick up the phone.

Now Swafford; are you going to return my money or are you going to be a criminal. I want the money you owe me; and again if you stick your head in the sand like an Ostrich I will act accordingly.

spencer

3 messages

William Routsis <williamjroutsis@gmail.com> Wed, Jul 15, 2015 at 10:35 AM
To: William Swafford <swaffordw@gmail.com>, William Swafford <swafford@wswaffordlaw.com>

You are a disgrace. I am going to the Bar and will assist in any law suit against you not because I want to—but because I have brought you in to these peoples lives and you have been incompetent-late on relevant filings which may cost them down the line--non responsive and derelict in your duty.

You are a cancer in my life and I need to remove you. You have 48 hours to make everything right and never do this again (which I know is insanity to even hope for this) or I and clients are coming after you. I am sorry as I do not wish to do this but I must to stop you from doing this again and again.

Sincerely,
William Routsis,II

William Swafford <swaffordw@gmail.com> Thu, Jul 16, 2015 at 10:48 AM
To: William Routsis <williamjroutsis@gmail.com>

That's great, you told me I was a disgrace before among many other things. You indirectly already went to the bar before when you told Freeman that I was another matter and that he should deal with me. The bar sent me all of the transcripts from all of the hearings they could get and asked about the case. I sent them every email and text message you sent me for the last few months. I didn't even know I was on the case in Eugene Pardo for five months and found out when Elizabeth sent me an email telling me there was a mandatory case conference hearing. At that time I didn't even know what court it was in. I feel like anything I do now is just a trap.

With the amended complaint on Spencer I asked you to set a hearing when you filed it. You knew when we started working on it I was in Chicago and there were some small things you would have to do.

I've been working on getting everything caught up I'll get back to you soon with everything.

[Quoted text hidden]

William Routsis <williamjroutsis@gmail.com> Thu, Jul 16, 2015 at 11:07 AM
To: William Swafford <swaffordw@gmail.com>

You may soon be removed from all further work on the Spencer case as the clients are furious with your late filing --non responsive conduct for close to a year. You never ever keep your word inexcusable. You met the damn Pardos and agreed to take their case--you appeared in court before Judge Stiglich and failed to appear at sentencing-- your words have no honor or meaning.. Every attorney I have referred you too my brother --Jordan me, all have wanted to take you to the State Bar but have not out of my friendship I believe.

You owe me a lot of money and I want it paid or promised to be paid in a reasonable time. You have taken 30 thousand dollars from the Spencers and all you have done is filed a late (and maybe time barred Complaint) Complaint. They will be contacting you; you caused them great suffering. I have nothing left to say to you Will--I hope someday you stop acting like a superior and spoiled little child; for I cannot explain how you never answer calls and take money and justify your conduct--it cannot be justified. Your a man and your a lawyer honor yourself and the profession
[Quoted text hidden]

state bar

3 messages

William Routsis <williamjroutsis@gmail.com> Thu, Jul 16, 2015 at 5:54 PM
To: William Swafford <swaffordw@gmail.com>, William Swafford <swafford@wswaffordlaw.com>

My office has located all the emails I have sent to you in regard to numerous matters. Specifically the Pardo case. As is a most concerning pattern with your conduct; we sent you email after email explaining your mandatory appearance before Freeman. You did not respond. We had your client call you and your voice mail was full. You obviously should not be dealing with the public in a legal capacity. You were informed you were counsel and you signed an Authorization of counsel and you abandoned your client. That is just reality. I do not know how you could not read over a month of emails telling to prepare for the sentencing before Freeman; we have those emails.

In regard to the State Bar. I probably should go to the Bar regarding your conduct however, I have not done that to date out of a hope you will change and my sincere desire not to end your career. However, if you are not honest with the Bar regarding all our emails and notices for you to appear in the District Court; or if you try to deceive them in how we dealt with you; I will turn over all our emails and records should they request them or they become relevant.

Again, what you have done to the Spencers, Mack, Learhbaum, and Rios, is inexcusable conduct. You still have not gotten Rios set for a Habeas Hearing and you have never responded to the family or my emails. Mack, you took 7 thousand dollars or close to that, and you refused to answer calls or complete the work. I had to pay cornell 2,800 dollars to do your job in which you were paid 7 thounsand dollars (Or close to that) and I took no money at all. I had to pay Cornell because you shut off your phone when a mans life was in our Reply brief; I will never understand how you could do this. Your reasoning; you were tired. You failed to return what is sometimes over a month of contacts when work is due or overdue. You missed the Reply brief on Lehrbaum and shut off your phone. I could go on and on.

However, what you are presently doing to the Spencers is remarkable in your lack of professionalism. You do not answer calls from either of us. You do not answer emails. You filed a complaint after almost a year or close there to and created SOL problems. You errors and failure to review the case before filing a very late complaint was concerning. When the Spencers explained all the errors; you did not address many of them and repeated many of them. You have names incorrect and have taken 30 thousand dollars and you still do not respond to either of us.

I spoke to the Spencers; and before you are fired and taken to the State Bar, they are going to offer you a one time offer to fly out here and work their case until trial and make right all the horrible wrongs you have done. I will not work with you unless you apologize and tell the truth to the Bar and address the money you owe me and fly out here and turn what is about to be a failed legal career around.

I advise you to be honest with the State Bar, lying or deceiving is a probable disbarment. And your record is contemptible.

William Swafford <swaffordw@gmail.com> Thu, Jul 16, 2015 at 6:14 PM
To: William Routsis <williamjroutsis@gmail.com>

I'm going to respond to this in detail. The reply I missed in Learhbaum is a good example of what you are accusing me of. You sent me a 30 plus page motion on a Friday at about 3:30 and wanted a response by Monday after you knew I spent an unreasonable amount of hours that week working on Mack.

On Thu, Jul 16, 2015 at 7:54 PM, William Routsis <williamjroutsis@gmail.com> wrote:

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> I advise you to be honest with the State Bar, lying or deceiving is a probable disbarment. And your record is contemptible.

William Routsis <williamjroutsis@gmail.com> Thu, Jul 16, 2015 at 6:35 PM
To: William Swafford <swaffordw@gmail.com>, William Swafford <swafford@wswaffordlaw.com>

Do yourself a favor and save any response--I do not want to hear from you, you crossed this line too many times with me. Unless you come to me with apologies and reparations--you owe me quite a bit of money. Do not contact me with any more promises or excuses, I am done.

On Thu, Jul 16, 2015 at 6:14 PM, William Swafford <swaffordw@gmail.com> wrote:

> I'm going to respond to this in detail. The reply I missed in Learhbaum is a good example of what you are accusing me of. You sent me a 30 plus page motion on a Friday at about 3:30 and wanted a response by Monday after you knew I spent an unreasonable amount of hours that week working on Mack.
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> > I advise you to be honest with the State Bar, lying or deceiving is a probable disbarment. And your record is contemptible.

Gmail by Google

William Swafford <swaffordw@gmail.com>

refunds

7 messages

William Routsis <williamjroutsis@gmail.com> Sun, Nov 9, 2014 at 12:00 PM
To: William Swafford <swaffordw@gmail.com>

I have simply decided that your conduct and insults have made working with you impossible. Your failure to return messages-texts-calls-emails to both me and the Spencer's has caused much worry and doubt about what is going on with you.

Weeks go by without a return message which is simple respect and professional courtesy. You have failed to keep your word with the Spencers who I swore to them you would be professional. There is no way we can try a case together nor is there mutual respect any longer. I have great respect for your writing but it is no longer worth it to me and any association with you is demeaning to me and a compromise I will not make.

I do not wish to cause you any harm--however you owe me money and you probably should pay the Spencers all their money back (that is between you and them, they may go to the Bar) Regarding me, you must now refund the 2k for the DUI appeal, so I need the money asap-as you were paid in cash and Elizabeth is a witness-if you do not explain when you will refund the money, I must go to the State Bar of both States--I do not wish to do this but your failure to communicate is beyond my comprehension.

You also received 1k for the Petition to seal the record and I need that refunded. You also received 2k on Mack and I need this money for Cornell. You have court hearings on Pardo and I will not make any appearances for you until you address your obligations as a man with me, I will be sending you your next court appearance in Sparks on Pardo and I will be giving the court your email and phone if you do not contact me. On the Habeas you were paid 7,500 dollars and you are attorney of record as well--so you we be dealing with Elizabeth on this.

Just so you know- to attack the hand that helped you; and have your mother attack me; and to not have the courtesy to return messages; "is what it is"--but I will not insult my self by working with you any more. You have until Wednesday or I will go to the Bar of both States --I do not wish to do this but my clients need their money back and I will not compromise on this. You have embarrassed me with the Spencers--you are causing them emotional distress and you should be ashamed.

This is a legal notice by William Routsis,II

William Swafford <swaffordw@gmail.com> Mon, Nov 10, 2014 at 9:55 PM
To: William Routsis <williamjroutsis@gmail.com>

Hey William I deleted most of the emails this one I opened just looking for something else. With the Prado case I'm not sure exactly what's going on I'll talk to you about it tomorrow I thought that you were doing that one alone though. I sent you a case for the restitution earlier and am working on the obstruction now. Let me work on everything all day tomorrow and I will get everything right. Also, I'll call you about the petition for sealing. If we have that stuff I will do that ASAP as well.

[Quoted text hidden]

William Routsis <williamjroutsis@gmail.com> Tue, Nov 11, 2014 at 9:46 AM
To: William Swafford <swaffordw@gmail.com>

William,

Swafford ROA - 392

Yes I have Pardo handled. I just need you to speak with your client who is taking full responsibility for all the drugs, and his brother is having all charges dismissed which is good as his brother has the long criminal record.

The DA just wants a short letter to her stating that is the deal, then I waive the Preliminary hearing and I make a special appearance for you at arraignment and sentencing.

The email was simply the result of feeling you would not respond to me--and I took it personally--that is my only concern with you, so please get back to me within 24 hours if possible --even if to say that you are busy for a few days. Thanks for the work on these two cases, my super Web page is coming along with other work by Reputation .Com---are you still planning to keep doing this kind of work or are you making other plans, because I am thinking of taking another homicide and I can put money aside for you, let me know.

[Quoted text hidden]

William Swafford <swaffordw@gmail.com> Tue, Nov 11, 2014 at 11:22 AM
To: William Routsis <williamjroutsis@gmail.com>

I just sent Spencer's an email letting them know I am sorry for being out of reach last week and explained why and that I am finishing putting everything I have right now together for their review and input or concerns. I am going to come home in three weeks again for a month or more and I let them know that and that I will have something ready to file against the brothers and the neighbor but not the DA or the police. Right now I am taking a few hours to try to sort out this issue with the IRS. The issue with the IRS and federal government right now (as short as possible) is that I haven't been able to pay student loans and have got deferment for last year but my interest is getting out of control, I had them paid down to $85,000 at one point and they are back up to $125,000. The IRS has been levying a $500 per month fee on top of the $400 I pay them for the past 6 months because they said that I was not paying the proper amount so they tacked on penalties so that is also getting out of hand. I'm trying to figure out a way to hold off the storm for a bit longer without this getting too out of control. I have bill collectors calling for all kinds of shit from last year when I moved out of my apartment and cancelled services early and it's so annoying and stressful I sometimes just can't deal with it when I have things happen in life that stress me out like when I'm sick or hurting or have family issues. By themselves its no problem, its just when everything hits at once. In the last few months I've had gout which actually hurts like a bitch, requiring hospital visits, broken bones and serious stomach issues. The times I've had those things happen or when I dad had to go to the hospital I just can't deal with the added shit for a few days. I'm sorry for that, I just physically can't. I fucked up when I spent all my money trying to start a firm here without enough capital and resources and just put myself into a mess that I'm still working on getting out of. I'm glad I did it because I would have regretted not doing it forever, but I just wish I wouldn't have taken so many risks. So anyway, yeah of course I still want to keep doing this. As hard as its been the last year it is getting better, at one time it was really really bad and seemed insurmountable.

With Prado I wasn't sure what you wanted me to do. I was under the impression that you didn't want me to do anything because it was unnecessary and you needed the money and if I wasn't needed to do anything I wouldn't need to take any part of it. I feel bad if you expected me to work on it. I have no problem doing anything you want me to do with it.

With Raymundo, it's pretty interesting in that the officers stopped him in front of his house but had no reason to suspect him of any wrongdoing. I found a case from Ohio with similar facts where the police saw a guy in his front yard with his hands on his waistband and told him to come to them and stop while they approached and he ran into his house. The officer then saw him throw a gun under a couch from the window and the defendant then ran out of a front window where he was detained. The officers then asked his roommate to let them in and they found the gun. The trial court suppressed because the officers had no reason to believe he had a firearm when they told him to stop, but the appellate court reversed the suppression order because they said that they saw him throw the gun and then got permission from his roommate to enter. There is a implication that absent permission they could not have entered. The problem is that the officers can tell a passenger to exit or remain in a vehicle while they process the stop, and if they told someone to remain in a vehicle and they exited, or to exit and they remained, this would be obstructing. Here the Defendant exited on his own and was then told to stop, but the officers had no reason to believe he was a threat to safety as it was a traffic stop and the driver exited the vehicle and was not attempting to retreive a weapon. They could argue that the passenger was trying to hide evidence of a crime, but they had no reason to suspect any criminal activity. This is a real delicate issue that could go either way so I'm trying to find cases to make it stronger..

With a homicide, wow, let me know.

[Quoted text hidden]

William Routsis <williamjroutsis@gmail.com> Tue, Nov 11, 2014 at 12:05 PM
To: William Swafford <swaffordw@gmail.com>

William here is my work so far on Mack pleas let me know what you think-- I am going to write a 30 page case history for you
[Quoted text hidden]

bambammack.doc
61K

William Swafford <swaffordw@gmail.com> Tue, Nov 11, 2014 at 1:16 PM
To: William Routsis <williamjroutsis@gmail.com>

Okay I just printed it I'll read it.
[Quoted text hidden]

William Routsis <williamjroutsis@gmail.com> Tue, Nov 11, 2014 at 1:42 PM
To: William Swafford <swaffordw@gmail.com>

thanks I am thinking something unique I will give you a 20 or so page John Grisham reply which tells the story and you put In the law and make it more like a Novel.
[Quoted text hidden]

From: William Swafford
To: William Routsis
Subject: text message
Date: Thursday, May 21, 2015 2:49:52 PM

I just read you text message. First of all, on Pardo, I singed the representation with the understanding that if they decided to retain I would know about it and earn something. The first time I heard you were on the case is when Elizabeth sent me an email about a hearing that I had no clue about. Then you gave me the case to look at a few weeks later and I didn't find any issues. I'm not even going to talk about that one. Mack, I'm done talking about. Rios, I feel horrible about the time, but I kept telling you I needed time to work on it and you kept asking me to do other cases. I'm going to start writing my bar response now. With the Spencers, the last two weeks, after threatening me and saying everything terrible you could think of that made me have to start looking for work I could do while I was working on the Spencer case, you put me in a position where I didn't know what the hell to do. Seriously, think about it.

From: William Routsis
To: William Swafford; William Swafford
Subject: Re: state bar
Date: Thursday, July 16, 2015 6:35:53 PM

Do yourself a favor and save any response--I do not want to hear from you, you crossed this line too many times with me. Unless you come to me with apologies and reparations--you owe me quite a bit of money. Do not contact me with any more promises or excuses, I am done.

On Thu, Jul 16, 2015 at 6:14 PM, William Swafford <swaffordw@gmail.com> wrote:

> I'm going to respond to this in detail. The reply I missed in Learhbaum is a good example of what you are accusing me of. You sent me a 30 plus page motion on a Friday at about 3:30 and wanted a response by Monday after you knew I spent an unreasonable amount of hours that week working on Mack.

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I advise you to be honest with the State Bar, lying or deceiving is a probable disbarment. And your record is contemptible.

From: William Swafford
To: William Routsis
Subject: Re: refunds
Date: Monday, November 10, 2014 7:55:45 PM

Hey William I deleted most of the emails this one I opened just looking for something else. With the Prado case I'm not sure exactly what's going on I'll talk to you about it tomorrow I thought that you were doing that one alone though. I sent you a case for the restitution earlier and am working on the obstruction now. Let me work on everything all day tomorrow and I will get everything right. Also, I'll call you about the petition for sealing. If we have that stuff I will do that ASAP as well.

On Sun, Nov 9, 2014 at 12:00 PM, William Routsis <williamjroutsis@gmail.com> wrote:

> I have simply decided that your conduct and insults have made working with you impossible. Your failure to return messages-texts-calls-emails to both me and the Spencer's has caused much worry and doubt about what is going on with you.
>
> Weeks go by without a return message which is simple respect and professional courtesy. You have failed to keep your word with the Spencers who I swore to them you would be professional. There is no way we can try a case together nor is there mutual respect any longer. I have great respect for your writing but it is no longer worth it to me and any association with you is demeaning to me and a compromise I will not make.
>
> I do not wish to cause you any harm--however you owe me money and you probably should pay the Spencers all their money back (that is between you and them, they may go to the Bar) Regarding me, you must now refund the 2k for the DUI appeal, so I need the money asap-as you were paid in cash and Elizabeth is a witness-if you do not explain when you will refund the money, I must go to the State Bar of both States--I do not wish to do this but your failure to communicate is beyond my comprehension.
>
> You also received 1k for the Petition to seal the record and I need that refunded. You also received 2k on Mack and I need this money for Cornell. You have court hearings on Pardo and I will not make any appearances for you until you address your obligations as a man with me, I will be sending you your next court appearance in Sparks on Pardo and I will be giving the court your email and phone if you do not contact me. On the Habeas you were paid 7,500 dollars and you are attorney of record as well--so you we be dealing with Elizabeth on this.
>
> Just so you know- to attack the hand that helped you; and have your mother attack me; and to not have the courtesy to return messages; "is what it is"--but I will not insult my self by working with you any more. You have until Wednesday or I will go to the Bar of both States --I do not wish to do this but my clients need their money back and I will not compromise on this. You have embarrassed me with the Spencers--you are causing them emotional distress and you should be ashamed.
>
> This is a legal notice by William Routsis,II

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE

-oOo-

STATE OF NEVADA, Plaintiff, vs. EUGENE PARDO, Defendant.	Case No. CR15-0316 Dept. No. 9

TRANSCRIPT OF PROCEEDINGS

Sentencing

Monday, May 18, 2015

Reno, Nevada

Reported By: SUSAN KIGER, CCR No. 343, RPR

A P P E A R A N C E S

For the Plaintiff:	TRAVIS LUCIA, ESQ. Deputy District Attorney One South Sierra Street Reno, Nevada 89520 328-3200
For the Defendant:	WILLIAM J. ROUTSIS, II, ESQ. Attorney at Law 571 California Avenue Reno, Nevada 89509
For the Department of Parole and Probation:	MARILYN LA BADIE
The Defendant:	EUGENE PARDO

RENO, NEVADA, MONDAY, MAY 18, 2015, 9:16 A.M.

-oOo-

THE COURT: The next case I have is State versus Eugene Pardo. I remember this and I asked -- This is CR15-0316. Mr. Routsis is here and Mr. Lucia is here.

I remember this case, and then it went to Judge Stiglich, and apparently Mr. Swafford showed up, did he not?

MR. ROUTSIS: He did.

THE COURT: Okay.

MR. ROUTSIS: However, I can fill the Court in. Mr. Swafford has fallen off the face of the earth and is not answering e-mails or phone calls. As a courtesy to him, as the Court knows, I came in as co-counsel.

THE COURT: You did. I remember the uniqueness of this situation.

MR. ROUTSIS: Yes, yes. I even went and got an evaluation on this young man's behalf.

But, Judge at this point, I'll have my staff forward you the contact information to Mr. Swafford. He's not responding, and it's really -- I'm doing this as a courtesy. I don't know what to do.

THE COURT: Now, I've got some ideas. First of all, if the Defendant -- in you have no objection to continue on on

behalf of Mr. -- because I've got to sentence him. It's not too complicated. I'm thinking you could maybe take over the case in this regard, if you're comfortable.

They waive conflicts, Mr. Lucia has no objection, you're here locally, we can move the case and assist him if you wanted to step up to the plate now.

I know you represent the codefendant. My understanding is the codefendant was supposed to be dismissed as a result of negotiations. The Court wouldn't have any objection if you wanted to go forward.

MR. ROUTSIS: And then Mr. Swafford is a different matter?

THE COURT: A very different matter.

MR. ROUTSIS: A very different matter.

Your Honor, what I would ask, and I appreciate that because I think the client shouldn't be suffering, we did an evaluation. We are going to be asking for a Diversion Court. I don't think there's a problem with that unless the Court -- I never served anybody because I couldn't file those papers as I wasn't the attorney of record.

THE COURT: Where does Mr. Pardo live?

MR. ROUTSIS: He lives here in Reno.

THE COURT: Okay. Go ahead.

MR. ROUTSIS: What I would ask is maybe put it over

a week or two and that way I can file appropriate paperwork and file conflict waiver.

THE COURT: Do you have an objection in my suggestion of taking over the case?

MR. ROUTSIS: No, sir.

THE COURT: So why don't you be properly prepared and put it over a week.

Do you have any objection, Mr. Lucia?

MR. LUCIA: Your Honor, I don't. The only thing I noticed, Your Honor, is my reading of the file reflected that Mr. Pardo pled to Count I, the Possession With the Intent to Sell only. The PSI reflects Count I and Count II, the Possession of a Controlled Substance. So I think that would be nice to give some time to allow a supplemental PSI to be prepared, if that's something the Division can do.

MS. LA BADIE: That's correct. We'll submit a corrected PSI.

THE COURT: That's great.

Please cooperate with the Division of Parole and Probation, Mr. Pardo. Now that I forced you to have a new lawyer in Mr. Routsis, please communicate with Mr. Routsis.

Thank you very much, Mr. Routsis, for tanking the case under the circumstances.

Would it be fair to say, may I use this term, it

seems as though Mr. Swafford has abandoned his client.

MR. ROUTSIS: Judge, as a matter of friendship of Mr. Swafford, all I can say is he has responded to probably no -- no -- three or four phone calls and e-mails, and I just don't know what to tell you.

THE COURT: The Court has certain duties when that happens.

MR. ROUTSIS: Certainly. And I can forward all the contact information to the Court if the Court doesn't have it.

THE COURT: It's not my responsibility, it's Mr. Swafford's responsibility.

But thank you for stepping up to the plate. It is appreciated by the Court. See you at the time of Sentencing.

MR. ROUTSIS: Did we put that over one week?

THE COURT CLERK: How many weeks do you need? Two?

THE COURT: Just give him a week.

MR. ROUTSIS: Give him a week. Let's do it in a week.

THE COURT CLERK: That will be May 27th at 9:00 a.m.

THE COURT: That will be great. See you back here then. See you both back here then.

Thank you, Mr. Routsis.

MR. ROUTSIS: Thank you.

THE COURT: Alright.

(Proceedings concluded.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, SUSAN KIGER, an Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, State of Nevada, DO HEREBY CERTIFY:

That I am not a relative, employee or independent contractor of counsel to any of the parties, or a relative, employee or independent contractor of the parties involved in the proceeding, or a person financially interested in the proceedings;

That I was present in Department No. 9 of the above-entitled Court on June 3, 2015, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 8, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 3rd day of June, 2015.

/s/ Susan Kiger

SUSAN KIGER, CCR No. 343

PETITIONER'S EXHIBIT

#14

9/2/2021

David R. Houston
Law Office of David R. Houston, P.C.
432 Court Street
Reno, Nevada 89501
Telephone: 775.786.4188

Re: Reinstatement of William Swafford

To the State Bar of Nevada, Northern Nevada Disciplinary Panel,

By way of brief introduction, I was admitted to the Nevada Bar in 1978 and I am the founding member of the Law Officer of David R. Houston, established four decades ago. My law firm primarily provides representation in criminal defense matters and represents clients at all stages of criminal proceedings, but also handles a wide range of civil and administrative matters as well. I have been recognized as Reno's Premiere Criminal Defense attorney, and the Editorial Staff of the Consumer Business Review recognized me as *Criminal Defense & Personal Injury Trial Attorney of the Year* 1996-1999, *Criminal Defense Attorney of the Year* 2005-2006, 2008-2015, and *Trial Attorney of the Year* 2016. I was the President of the Northern Nevada Association of Criminal Defense Lawyers from 1993-1995, and recognized as a Top 50 DUI Attorney, Nevada 2014. I am the creator and moderator of the NBC show "Lawyers, Guns and Money," a weekly political and pertinent issue show, and I have been a guest or interviewed on numerous nationally broadcasted television shows involving legal matters.

I currently write to you to recommend, without any hesitation or reservation, that suspended lawyer, William Swafford (NV. Bar. 11469), be reinstated to active membership of the State Bar of Nevada. I initially learned of Mr. Swafford's talents as a legal writer in approximately 2014 when I read an argument that he drafted for another criminal defense lawyer I had been working with on a criminal case at that time. The issues he had identified and organized as arguments in pretrial motions to suppress evidence and dismiss charges were based on federal preemption (Supremacy Clause) and statutory construction of relevant language found in both state and federal statutes that were pertinent to that particular case. Mr. Swafford had found a unique, extremely clever way to argue that the charges were misapplied to the specific underlying facts at issue, and his arguments were highly persuasive and resulted in a favorable outcomes to the clients in those matters.

I contacted Mr. Swafford at about that same time and communicated with him about possibly assisting me with research and writing in a convoluted case where I represented a defendant charged with the murder of his wife. The defendant's wife had tumbled awkwardly down a flight of stairs in the couples' residence, and after investigating her injuries and the evidence, the Sheriff determined that the death was accidental. More than a year later the District Attorney

looked back into the investigation reports and decided to charge my client with murder. The District Attorney wanted to exhume the deceased woman's body from a federal veteran's cemetery in California, and the applicable law was not entirely clear as it involved federal law, and well as conflicts between statutes in Nevada and California. Mr. Swafford was still living in Chicago at this time, and I emailed him the relevant discovery and information so that he could research these issues and draft arguments preventing the District Attorney from ordering the body to be exhumed and inspected. Once again, I was extremely impressed with Mr. Swafford's ability to identify relevant issues and articulate persuasive arguments. The arguments he drafted for me in that case were successful and I spoke with him about working with me on a more permanent basis.

Mr. Swafford has been assisting me with addressing relatively complex issues in my clients' cases ever since, and he continues to do so at the present time. During the previous six years, Mr. Swafford has primarily assisted me with handling unforeseen legal issues, as they sometimes arise, in multifarious stages of both state and federal criminal cases. During this time he has researched legal issues and drafted pretrial motions to suppress evidence, dismiss charges, exclude testimonial and physical evidence and obtain exculpatory evidence in some of the most highly publicized cases in Northern Nevada. He has also assisted me in a handful of postconviction and appellate cases by reviewing all of the underlying case materials in those matters, identifying issues upon which those convictions could be challenged, researching the relevant law, and then drafting appellate briefs and writs of habeas corpus. After reviewing his work, and making necessary changes as I see fit, I typically file his drafts and argue them. Mr. Swafford his not only extremely versed in postconviction practice, but the majority of the appellate and postconviction matters he has assisted me with have been successful.

Two of the specific successful postconviction cases Mr. Swafford assisted me with are as follows:

Woods v. Nevada, 132 Nev. 1048 (Nev. App. 2016):

In *Woods* I asked Mr. Swafford to review the expansive underlying record on behalf of my client, Mr. Antonio Woods, to identify issues that could potentially be argued on appeal. Mr. Swafford informed me of two issues worth arguing, and I then asked him to draft a supplemental appellate brief (prior appellate counsel had filed an initial appellate brief). The first argument was that Mr. Woods's trial counsel was ineffective for advising him to enter a plea of guilty to a felony offense that never could have been established beyond a reasonable doubt at trial in light of the evidence, and his conviction resulted in a sentence of life imprisonment under the habitual criminal sentencing statute. The second argument was that the district court judge improperly coerced Mr. Woods to enter a plea in violation of the bright-line rule prohibiting "any judicial participation in the formulation or discussions of a potential plea agreement" by stating that he would not remand him that day if he entered his plea right then in open court. The Nevada Supreme Court agreed with the second argument and overturned Mr. Wood's conviction.

State v. Gresham, 460 P.3d 994 (Nev. 2020):

In *Gresham* I once again requested that Mr. Swafford overlook an even more expansive underlying case file containing all discovery from three separate underlying felony cases which resulted in Mr. Gresham being sentenced to life imprisonment under the habitual criminal sentencing statute. Mr. Swafford was able to identify five separate reasons why Mr. Gresham did not receive effective representation of counsel in connection with the underlying cases, which were handled together by the same two lawyers. I requested Mr. Swafford to draft a petition for a postconviction writ of habeas corpus with a memorandum of points of authorities, and I filed and argued the petition. The district court agreed that there was a prejudicial error with the terms of the plea agreement itself, and that after Mr. Gresham breached the agreement by not attending his sentencing hearing they could not vacate the plea but continue to hold him to the agreement at sentencing. The district court overturned his conviction and the State appealed. After the State filed its opening brief, I requested Mr. Swafford to prepare an answering brief, and I filed the arguments he drafted. The Nevada Supreme Court agreed with our arguments and upheld the district court's order to grant the writ and vacate Mr. Gresham's conviction.

During the time I have been working with Mr. Swafford I have also requested him to assist with civil litigation and administrative licensing issues as well. Mr. Swafford is consistently able to review an issue I present to him, understand it, research the nuances of the relevant law and formulate effective arguments. I have occasionally asked him, in connection with civil litigation, to identify which causes of action should be brought and to brief the legal issues that will likely arise along the way. I sometimes ask him to assist with administrative cases as well, which typically involve clients facing suspension/revocation of state issued licenses or are otherwise facing disciplinary action by the various licensing agencies. Mr. Swafford is particular competent at identifying defenses in administrative cases and formulating arguments that are likely to succeed, and in the event they are unsuccessful he frames in so they may be easily appealed if desired.

It should be noted that the specific work that I hire Mr. Swafford to perform involves research and writing, and I provide him with enough information to research the issues implicated (which I ask him to address) and draft arguments. I then review his arguments, make necessary amendments and when finished I sign and file any final drafts that I believe should be filed with the court. I pay Mr. Swafford for the time that he bills me for on a case-by-case basis, and he is hired to perform work as an independent consultant. Mr. Swafford is in no way practicing law, but is simply working on a per assignment basis entirely under my supervision as an advisor to me relating with extremely narrow, specific issues arising in my cases.

In the time that I have known and worked with Mr. Swafford I have been very impressed by his understanding of constitutional law and his ability to identify transgressions thereof in the manner that both substantive and procedural statutes and regulations are applied by the government. In my communications with Mr. Swafford over the years I have come to realize that he is able to easily identify potential constitutional shortcomings in the manner cases are investigated, instituted and prosecuted, and if the statutes and regulations used by the government do not comport with constitutional requirements, he is able to frame persuasive arguments based on the specific areas of constitutional law implicated, some of which are not

seen argued very often. In the years I have been working with Mr. Swafford I have relearned areas of constitutional law that I have rarely seen in practice, and probably last reviewed long ago while studying for law school exams.

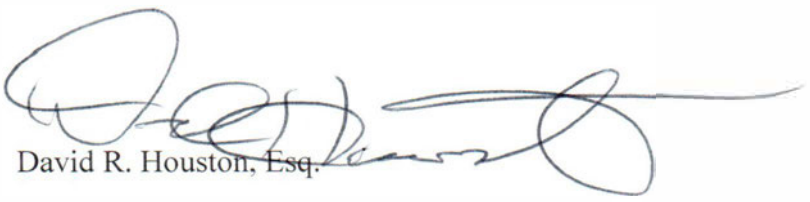
I oftentimes request Mr. Swafford to assist me in cases where the law is complex, continuously amended and highly fact sensitive. For example, since Covid-19 there have been many issues in DUI cases involving the legality of evidentiary testing after law enforcement agencies decided that they would no longer offer the choice of breath tests to motorists suspected of driving under the influence of alcohol. Mr. Swafford must constantly review legislative history and track amendments to various DUI statutes, and he stays abreast of new cases from across the United States where courts, both federal and state, have addressed implied consent laws in light of similar issues. I am aware from cases I have worked with Mr. Swafford on that he is constantly reviewing changes to Nevada law pertaining to regulation of controlled substances, driving under the influence, diversion programs and alternative sentencing, and changes to rules of criminal and civil procedure.

Not only is Mr. Swafford a brilliant legal mind and a hard worker, but he is also of good character, reliable, and has made significant strides in overcoming serious obstacles that made is life very difficult in the recent past. I have communicated with Mr. Swafford abut his disciplinary cases, and I know that he accepts responsibility for his professional misconduct and is ready to move on. When I first started working with Mr. Swafford he was still living in Chicago and flying back and forth to Reno to assist with his father who was in the early stages of Alzheimer's disease. I was aware that Mr. Swafford's father was an attorney who I had encountered previously when he was the District Attorney for Storey County, and that Mr. Swafford was dealing with a lot of hardships. After Mr. Swafford moved back to Reno I became aware that he had disciplinary cases pending against him, and that he had not responded to either of them because of the medical and personal issues he was dealing with, and he believed he was incapable of defending himself. He informed me that he was constantly meeting with physicians to treat his own medical issues and was also trying to care for his father and an uncle who was dying of cancer. During this time my work with Mr. Swafford became more sporadic, as he would sometimes be available for two months, and would then need to take a month off, or sometimes longer. I informed Mr. Swafford that I appreciated his work, thought highly of him, and would be there for him when he was able to return to work each time that he needed a break. About a year-and-a-half ago I noticed significant improvements in Mr. Swafford's availability, as he was able to work on more assignments and get more done in shorter periods of time. From the work I have seen, and from my discussions with Mr. Swafford, it is clear to me that he is much better than he was at the time he committed the violations of professional conduct which resulted in his suspensions, including his failure to respond to the Bar and the complaints against him.

All things considered, I am strongly in favor of Mr. Swafford being reinstated to practice law in Nevada, and I recommend that this Board request to the Supreme Court that he be reinstated. I would like Mr. Swafford to continue assisting me with issues in my cases, and if you recommend

him for reinstatement I will continue to work with him to ensure that he has someone to guide him and advise him.

Sincerely,



David R. Houston, Esq.

STATE BAR OF NEVADA
NORTHERN NEVADA DISCIPLINARY BOARD

FORMAL HEARING
(SCR 116 Petition for Reinstatement)
William A. Swafford, Esq. SBN. 11469
Case No.: SBN21-99129

Wednesday, April 20, 2022, beginning at 9:00 a.m. -- *Zoom Platform*

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PANEL

Rich Williamson, Esq. Chair
William Hanagami, Esq.
Tim Meade, Layperson

WILLIAM A. SWAFFORD, ESQ.
Petitioner – In Proper Person

R. KAIT FLOCCHINI, ESQ.
Assistant Bar Counsel
State Bar of Nevada

10/28/2016

To: David Houston, Ken Lyon

RE: LITTLE VALLEY FIRE LAWSUIT RESEARCH.

CONTROLLED BURN LIABILITY

This memorandum addresses potential causes of action in connection with the Little Valley Fire including a proposed inverse condemnation action that could potential side step statutory caps on damages, as well as a possible due process violation claim.

a. Nevada Controlled Fires - Statutory Background:

Chapter 528 of NRS - *Forest Practice and Reforestation*.

"Director" refers to the Director of the *State Department of Conservation and Natural Resources*. NRS 528.015.

"Division" refers to the *Division of Forestry* of the State Department of Conservation of Natural Resources. NRS 528.016.

The executive head of the Division of Forestry shall be the State Forester Firewarden, who shall be appointed by and be responsible to the Director. The State Forester Firewarden and the employees of the Division of Forestry shall have such powers and shall perform such duties as are conferred upon the State Forester Firewarden pursuant to chapters 472 and 528 of NRS and the provisions of any other laws. NRS 232.120.

Controlled Fires – NRS 527.122 to 527.128.

NRS 527.122:

As used in NRS 527.122 to 527.128, inclusive, unless the context otherwise requires:

1. "Authority" means the State Forester Firewarden, or a local government, whichever is charged with responsibility for fire protection in the area where a controlled fire is to take place.

2. "Controlled fire" means the controlled application of fire to natural vegetation under specified conditions and after precautionary actions have been taken to ensure that the fire is confined to a predetermined area.

NRS 527.124:

The State Forester Firewarden shall adopt such regulations as the State Forester Firewarden deems necessary to carry out and enforce the provisions of NRS 527.126 and 527.128.

NRS 527.126:

1. The authority may authorize an agency of this state or any political subdivision of this state to commence a controlled fire.

2. A controlled fire must be conducted:

(a) Pursuant to a written plan which has been submitted to and authorized by the authority; and

(b) Under the direct supervision of at least one person who is qualified to oversee such fires and who remains on-site for the duration of the fire.

3. A controlled fire which is commenced pursuant to this section and which complies with laws relating to air pollution shall be deemed in the best interest of the public and not to constitute a public or private nuisance.

4. The State of Nevada, an agency of this state or any political subdivision or local government of this state, or any officer or employee thereof, is not liable for any damage or injury to property or persons, including death, which is caused by a controlled fire that is authorized pursuant to this section, ***unless the fire was conducted in a grossly negligent manner***.

NRS 527.128:

1. The written plan required by NRS 527.126 must remain on-site for the duration of the fire. The plan must be prepared by a person qualified to oversee a controlled fire and contain at least:

(a) A description and map of the area to be burned;

(b) A list of the personnel and equipment necessary to commence and control the fire;

(c) A description of the meteorological factors that must be present before commencing a controlled fire, including surface wind speed and direction, transport wind speed and direction, minimum mixing height, minimum relative humidity, maximum temperature and fine fuel moisture;

(d) A description of considerations related to common behavioral patterns of fires in the area to be burned, including various burning techniques, the anticipated length of the flame and the anticipated speed of the fire; and

(e) The signature of the person who prepared the plan.

2. Before signing the written plan, the person qualified to oversee the fire must evaluate and approve the anticipated impact of the fire on surrounding areas which are sensitive to smoke.

3. The State Forester Firewarden shall establish the qualifications for a person to oversee a controlled fire.

Gross Negligence Standard

As stated in subsection (4) of NRS 527.126, the State of Nevada, an agency of this state or any political subdivision or local government of this state, or any officer or employee thereof, is not liable for any damage or injury to property or persons, including death, which is caused by a controlled fire that is authorized pursuant to this section, ***unless the fire was conducted in a grossly negligent manner***.

In contrast, NRS 472.530 provides:

Except as otherwise provided in NRS 527.126, any person, firm, association or agency which, personally or through another, willfully, negligently or in violation of the law:

1. Sets fire to the property, whether privately or publicly owned, of another;

2. Allows fire to be set to the property, whether privately or publicly owned, of another; or

3. Allows a fire kindled or attended by the person, firm, association or agency to escape to the property, whether privately or publicly owned, of another,

is liable to the owner of the property for the damages caused by the fire.

In order for the gross negligence standard to apply to damages caused by fire, the fire must be (1) "a controlled fire" and (2) authorized pursuant to NRS 527.126. In this case, unless the fire was started and controlled pursuant to a written plan conforming to the requirements of NRS 527.128, and supervised by an individual qualified to oversee the prescribed burn at issue,

the fire was neither a "controlled fire" nor "authorized" pursuant to NRS 527.126. The written plan may reveal that the gross negligence standard is not applicable to the instant case and the plaintiffs may be able to bring claims under NRS 472.530.

I searched for the written plan but it is not available anywhere online. I did fine the following items which are helpful for evaluating the potential claims:

Preliminary Relevant Evidence

Exhibit #1: Little Valley Burn – Nevada Division of Forestry (Attached)

This project description states that the Little Valley Prescribed Burn was funded by an $89,600 Hazardous Fuels Reduction Grant from the U.S. Postal Service. Winds during the controlled burn were expected to be S/SW. (Which leads to Exhibit # 2).

Exhibit #2: Little Valley Program Grant Application (Attached)

This application states that the applicant was the Nevada Division of Forestry. The number of acres to be treated was 461, with 3 communities affected by the proposed prescribed burn and 4,000 residences affected. The applications further stated that the Division of Forestry would plan and implement the burn in the Whittell Forest, which is owned by the University of Nevada. The United States Forest Services would coordinate with private land owners to gain necessary private land access via private roads and forest, and the University of Nevada would provide staff and/or students to assist with monitoring after the burn.

Exhibit #3: Department of Conservation and Natural Resources, Fire Origin and Cause Report (Attached)

The Little Valley Fire began on October 14, 2016, and was caused by an escape from the Little Valley Prescribed Burn conducted by the Nevada Division of Forestry on October 3-7. With winds coming out of the west west/northwest[1] at a steady speed of 16 to 20 mph with gusts of over 80 mph, embers from smoldering or reignited vegetation crossed the control line for the prescribed burn and ignited unburned vegetation outside of the prescribed burn control area.

The Report specifies that the State Forestry Firewarden was/is Joe Freeland.

[1] The brief Prescribed Burn Information published on the Division of Forestry website stated that the winds would be blowing S/SW during the burn, which would be sometime in early October. Given that the winds were actually blowing W/NW, and no specific dates were provided, the required written plan may not have been prepared as required by statute.

Exhibit #4: Natural Resources Conservation Service (NRCS) – NV Prescribed Burning Policies.

Planning Prescribed Burns: A written prescribed burn plan will be prepared by a person with the appropriate job approval authority or qualifications and will, at a minimum, contain the following: (i) The dates for burning, (ii) objectives of the burn, (iii) a description and map of the area to be burned, including size and topography, (iv) the type of vegetation, percent cover, and fuel load, (v) the method of burning, (vi) a list of the personnel and management necessary to commence and control the fire including designation of the fire or burn boss, (vi) a description of the meteorological factors that must be present before commencing a prescribed fire, including surface wind speed and direction, transport wind speed and direction, minimum mixing height, minimum relative humidity and maximum temperature, (vii) common patters of burning in the area, various burning techniques, anticipated flame length and anticipated speed of fire, (viii) smoke management and air quality concerns, (ix) *a contingency plan which describes the weather conditions which would trigger the activation of post-burn contingency actions with the objective of minimizing the potential for escape. The contingency plan would also include escaped fire procedures.*

Not all of these practice specifications are specifically listed in NRS 527.128 (written plan). In this case, the controlled burn ended on October 7, 2016, but it did not escape beyond the perimeter of the controlled burn until October 14, 2016. The Division of Forestry had seven days to realize the potential dangers imposed by the prescribed burn and to execute a post-burn contingency plan to minimize the potential for escape. It is more than likely that there were no post-burn contingency plans, and as mentioned in the Application (Exhibit #2) the Division of Forestry left it to the University of Nevada to monitor the site after the prescribed burn (the site was owned by the University). The basis of the negligence/gross negligence claims will likely be based on the actions of the Division of Forestry between October 7 and October 14.

Exhibit #5: NRCS Burn Classifications (attached)

Given that the controlled burn involved approximately 431 acres, the Little Valley Rx Burn was designated as either a Class IV or a Class V Maintenance Burn, depending on whether the slope of the terrain was under 15% or under 25%. Depending on the class, the burn must have been supervised by an individual with the requisite level of experience conducting prescribed burns with completion of necessary training.

The NRCS burn classifications contains the following checklist for supervisors when deciding whether they are prepared to commence a prescribed burn. After reviewing the written plan attendant to the Little Valley Rx Burn it can be ascertained whether the Division was prepared to ignite and control the burn. In all likelihood, items 4, 8, 10 and 13 were inadequate.

BURN CHECKLIST

GO or NO GO QUESTIONNAIRE

	QUESTION	YES	NO
1	Is burn plan completed and approved?	☐	☐
2	Are all fire prescription specifications met?	☐	☐
3	Are all smoke management prescription specifications met?	☐	☐
4	Is the current and projected fire weather forecast favorable?	☐	☐
5	Have all air quality considerations and smoke requirements been met?	☐	☐
6	Are all personnel required in the prescribed burn plan on site?	☐	☐
7	Have all personnel been briefed on the prescribed burn plan requirements?	☐	☐
8	Have all personnel been briefed on safety hazards, escape routes, and safety zones?	☐	☐
9	Is all of the required equipment in place and in working order?	☐	☐
10	Are available, including backup, resources adequate for containment of escapes under worst-case conditions?	☐	☐
11	Are answers to all the above questions YES?	☐	☐
12	In your opinion, can the burn be carried out according to plan and will it meet the planning objective?	☐	☐
13	Is there an adequate contingency plan developed?	☐	☐

If all thirteen questions have been answered "**YES**," you may proceed with ignition.

Exhibit #6: Burn Unit Map (attached)

If the written plan at issue reveals that it was inadequate or that the prescribed burn was planned, implemented or supervised by someone with inadequate training and/or experience then the burn was not a "controlled fire" as defined in NRS 527.122, and was not authorized under NRS 527.126. This would mean that plaintiffs would not have to plead gross negligence, but could instead establish liability via willful, negligent or other conduct in violation of Nevada law. NRS 472.530. The written plan will also be used to ascertain the actions/omissions by the Division that are negligent/grossly negligent, malicious, oppressive or otherwise tortious.

b. Statutory Liability Cap – NRS 41.035

As explained below, the facts likely support tort causes of action for negligence/gross negligence and trespass. However, given that tort based claims against the State and its political subdivisions are arguably subject to the $100,000 liability cap (NRS 41.035) I attempted to construct a cause of action that was not sounding in tort.

In my opinion, the actions of the Division of Forestry are very similar to those of Washoe County in Fritz v. Washoe Cnty., (Nev., 2016). In Fritz, the plaintiffs filed an Inverse Condemnation action alleging that Washoe County approved plat maps, managed and directed development of the water drainage system, approved final maps, and ultimately accepted dedication of the water drainage system that increased the flow of water to Whites Creek and caused flooding to the plaintiff's property.

Inverse Condemnation

The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made." Nev. Const. art. 1, § 8(6).

When a governmental entity takes property without just compensation, or initiating an eminent domain action, an aggrieved party may file a complaint for inverse condemnation. *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004); Fritz. As the counterpart of eminent domain, inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not

instituted formal proceedings. *See Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645-47, 173 P.3d 734, 738-39 (2007) (providing that an interest in real or personal property satisfies the private property requirement); *Gutierrez v. Cty. of San Bernardino*, 130 Cal. Rptr. 3d 482, 485 (Ct. App. 2011) (providing that the taking must be proximately caused by a government entity). Fritz at *6. Because Washoe County had taken actions beyond merely approving the subdivision maps which proximately caused flooding of the plaintiff's property, the inverse condemnation claim was actionable. **(See Exhibit #7 – Order of Nevada Supreme Court in *Fritz*.)**

In a case with facts more similar to those underlying this case, in Brewer v. Alaska the Supreme Court of Alaska held that an inverse condemnation claim was properly before the court where the Alaska Department of Forestry burned plaintiffs' property during a controlled burn. (**See Exhibit #8 – Unpublished Opinion, *Brewer v. Alaska*.)** At issue was whether the actions by the Dept. of Forestry which resulted in the taking of plaintiff's property constituted a "public use."

In this case, the Division of Forestry was executing a prescribed burn for the purpose of mitigating risk of fire damage to neighboring communities. The actions and/or omissions complained of constitute public use. The issue is whether the resulting taking was a likely consequence of the unlawful acts/omissions.

After reviewing the Division's written plan and other relevant evidence, there will most likely be acts/omissions, the likely consequence thereof being the escape of the controlled burn fire and the damages caused to plaintiffs' real and personal property interests.

Provided this cause of action is based on the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as the Nevada Constitution, it is not subject to the liability cap in NRS 41.035 which applies to actions sounded in tort. This cause of action can get the case into federal court will all additional state law causes of action brought as supplemental claims.

I have attached another Nevada case evaluating a claim for inverse condemnation at **Exhibit #9, attached)**.

c. Possible State Created Danger Due Process Claim.

The "general rule" is that a state actor is not liable under the Due Process Clause "for its omissions." Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000). There are two exceptions to this general rule: "(1) when a 'special relationship' exists between

the plaintiff and the state (the special-relationship exception); and (2) when the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known or obvious danger' (the state-created danger exception)." Patel v. Kent Sch. Dist, 648 F.3d 965, 971–72 (9th Cir. 2001) (citations omitted).

The 9th Circuit and a majority of other circuits have held that, under the state created danger doctrine, a state actor can be held liable for failing to protect a person's interest in his personal security or bodily integrity when the state actor affirmatively and with deliberate indifference placed that person in danger. The doctrine holds state actors liable "for their roles in creating or exposing individuals to danger they otherwise would not have faced.

The 9th Circuit first recognized the state-created danger doctrine in Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), in which a police officer pulled over a car in the early morning. After arresting the driver, the officer left the female passenger alone in a high crime area at 2:30 a.m. The passenger was subsequently attacked and raped. We held that the officer could be held liable under § 1983 for the attack and rape because, according to the plaintiff's evidence, the officer "affirmatively placed her in danger and then abandoned her." Id. at 596.

In this case, the Division of Forestry commenced a prescribed burn on October 4th and abandoned it on October 7th with imputed knowledge that there would be severe wind storms in the area the following week. Those persons supervising the burn had seven days to execute a contingency plan to minimize the risk to neighboring land owners and protect them from the danger it affirmatively placed them in and failed to act. However, in order to establish this cause of action, a plaintiff must establish that the state acted with deliberate indifference to a known and substantial risk of harm to the plaintiff. Deliberate indifference requires a culpable mental state that is more than gross negligence. However, if this can be established, this may be another cause of action that allows the plaintiffs to seek compensation without being subjected to the statutory liability caps.

d. Claim Brought Under NRS 472.530.

If the written plan governing implementation, control and supervision of the Little Valley Rx Burn establishes that the burn was not a "controlled fire" or otherwise authorized pursuant to NRS 527.126, then damages may be sought under NRS 472.530 without having to plead gross negligence. Nonetheless, even if gross negligence must be shown the action may be brought pursuant to NRS 527.126. Because the plaintiffs have the right to seek compensation under

either of these two statutes, it could be argued that plaintiffs are not relying upon NRS 41.031 (wavier of sovereign immunity statute) and the language in NRS 41.035 limiting liability to $100,000 is not applicable. This is probably a weak argument but it is technically correct as applied to the language of NRS 41.035.

While NRS 527.126 states that the State of Nevada and its political subdivisions are not liable for damages caused by fire escaping from controlled fires absent gross negligence, NRS 472.530 states that agencies and their employees are liable for fire damages resulting from willful, negligent or unlawful acts. In this case, if the controlled fire failed to conform to the requirements set forth in NRS 527.126 -527.128 the fire was the result of unlawful acts, and the Division of Forestry would be liable as a matter of law even without a showing of negligence.

As previously suggested, the written plan may not only establish that the actions/omissions of the Division of Forestry were grossly negligent, but it may establish that the prescribed burn was not authorized by law. This would not only allow the plaintiffs to bring their claims under NRS 472.530, but it would preclude any discretionary immunity defense.

e. Trespass to Land Causing Damages.

Attached as **Exhibit #10** is the case Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (Cal.App. 4 Dist., 1996). In this case the court held that a negligent invasion by fire which causes damage to real property constitutes a trespass, and the spread of fire from defendant's land to the plaintiff's property was an intrusion significant enough to constitute a trespass to land. The following is an excerpt from this case:

> A Negligent Invasion by Fire Which Causes Damage to Real Property Constitutes a Trespass. Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (Cal.App. 4 Dist., 1996). "Trespass to property is the unlawful interference with its possession. Id. At 1305. The interference need not take the form of a personal entry onto the property by the wrongdoer. Instead, it "may be accomplished by the casting of substances or objects upon the plaintiff's property from without its boundaries." (75 Am.Jur.2d, Trespass, § 11, p. 15, fn. omitted.)"An entry may also be accomplished by setting in motion an agency which, when put in operation, extends its energy to the plaintiff's premises to its material injury." (75 Am.Jur.2d, Trespass, § 11, p. 16, fn. omitted.) [50 Cal.App.4th 1307] Thus, intangible intrusions such as noise or vibrations may constitute a trespass if they cause actual physical damage. While no California case has previously decided that a fire can constitute a trespassory invasion, other states have. The Supreme Court of

> Washington has held that an action for trespass lies to recover damages caused when a spark was negligently cast from the defendant's property onto the plaintiff's property, igniting a fire. (Zimmer v. Stephenson (1965) 66 Wash.2d 477, 403 P.2d 343, 345.) Alleging facts even closer to those at issue here, the plaintiffs in Martin v. Union Pacific Railroad Company (1970) 256 Or. 563 [474 P.2d 739] claimed that the defendant railroad negligently caused a fire to occur on its right of way and negligently permitted the fire to escape and spread onto the plaintiffs' land. (474 P.2d at pp. 739-740.) The Oregon Supreme Court held that "[t]he spread of the fire from defendants' land onto plaintiffs' land was an intrusion of a character sufficient to constitute a trespass." (Id., p. 740; accord, Koos v. Roth (1982) 293 Or. 670, 652 P.2d 1255, 1267-1268 [spread of fire from defendant's field to plaintiff's property was a trespass].)

Because this is an intentional tort the State would not be able to raise a defense under the discretionary immunity statute.

f. Possible Breach of Contract – Third Party Intended Beneficiary Claim.

As shown in Exhibit #2 – the Application for Grant Funding for the prescribed Little Valley burn, the Division of Forestry applied for a federal grant and mentioned its Interagency Collaboration with the United States Forest Service, the University of Nevada, Truckee Meadows Fire Department and several other agencies involved with the implementation and execution of the prescribed burn. It is possible that written agreements exist between the Division of Forestry and other agencies involving obligations and duties running to neighboring land owners. It is possible that there may be an action based on breach of contract, and foreseeable damages may include those sought to be redressed by Plaintiffs. These agreements may additionally reveal other potentially liable parties.

At this time this is all I was able to do based on the limited information that I had. I spent a lot of time trying to find the written plan but could not find it online. Let me know if you have any additional questions or would like me to research any of these ideas further.

5/8/2017

To: David Houston
Ken Lyon
From: Will Swafford

RE: **LITTLE VALLEY FIRE RESEARCH & MEMORANDUM**

I. Introduction

This memorandum addresses the numerous issues implicated in the defendants' Motion to Dismiss ("MTD"). The majority of Defendants' MTD challenges the inverse condemnation claims, and involves causation issues that have not been addressed by Nevada's Supreme Court. Reliance on cases from federal and state jurisdictions outside Nevada are of minimal assistance because the causation requirements are vastly different across jurisdictions, and are highly fact sensitive. Unfortunately, in order to understand the relevant issues it is necessary to initially understand an expansive background of federal and state takings cases.

II. Was There a *Taking* Requiring Just Compensation?

In its MTD, Defendants argue that the allegations in Plaintiff's Amended Complaint do not constitute a taking as a matter of law for numerous reasons. Plaintiffs argue that the alleged damages to property do not amount to physical appropriations or regulatory takings and do not require just compensation. Plaintiffs also argue that there is insufficient causation between the alleged actions of the State and the damages to Plaintiffs' property interests, and that Plaintiffs' allegations sound in tort as opposed to a taking under the state and/or federal constitution. These arguments are intertwined and somewhat circular. In addressing these arguments, for explanatory purposes, it is logical to begin with the argument addressed in Sections 3 & 5 of Defendants' MTD involving the tort/taking distinction.

a. Tort v. Taking

Defendants rely on *Ridge line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003) for the position that the federal courts have distinguished takings cases from tort cases and stated that "a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. *MTD: p. 10 of 20*. The defendants argue plaintiffs fail to allege that the defendants indented the controlled burn to reach their land and consume their properties, and do not allege that the damage actually suffered was the direct, natural result of the act of conducting a controlled burn. *MTD:.p 10 of 20*.

At the federal level the importance of distinguishing between a tort and a taking derives primarily from a long-established reading of the Tucker Act. *28 U.S.C. § 1491*. The Tucker Act pertains to the United States Court of Federal Claims (Court of Claims) and proscribes jurisdiction over claims sounding in tort. *Hansen v. United States*, 65 Fed. Cl. 76, 95 (2005). Pursuant to this act, federal courts have developed a general standard for determining whether a

plaintiff's claim is properly brought as a taking. *Id*. at 95. Prior to the enactment of the Tucker Act in 1887, the Court of Claims had jurisdiction only over "claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." *Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855)*. Although jurisdiction did not yet extend to cases arising under the Constitution, the Court of Claims recognized takings claims based on a theory of a breach of implied contract between the federal government and private parties. *See, e.g*., *Shreve v. United States*, 8 U.S. Cong. Rep. C.C. 205 (Ct. Cl. 1860); *Wirt v. United States*, 6 U.S. Cong. Rep. C.C. 172 (Ct. Cl. 1858). Under the implied contract theory, a plaintiff may prevail in a takings challenge if it proves that government action resulted in a breach of the implied contract not to "take" private property without providing just compensation. *United States v. Great Falls Mfg. Co*., 112 U.S. 645, 657 (1884). *For such a claim to be successful, a plaintiff owner must show that the government-defendant subjectively intended to cause the harm to the plaintiff's private property*. *See Hansen at 96*. When the government expanded the Tucker Act it waived sovereign immunity with respect to takings actions brought by private parties directly under the Fifth Amendment. 28 U.S.C. § 1491(a). The enactment of the Tucker Act prompted federal courts to formulate a causation-based standard to determine if a claim could be heard as a taking.

The Federal Circuit has adopted a tort-taking inquiry that determines whether "treatment under takings law, as opposed to tort law, is appropriate under the circumstances." *Ridge Line*, *supra*. The court in *Ridge Line* set forth a two part test for distinguishing between torts and takings in the federal circuit:

> First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. . . . Second, the nature and magnitude of the government action must be considered.
>
> *346 F.3d 1346.*

The *Ridge Line* decision incorporates both "intent" and "causation" requirements by stating the first prong of the test in the disjunctive: either intent or causation is sufficient for the government action to be considered a taking. *Id*. at 1355. If the plaintiff to a takings action does not show that the government-defendant "intentionally appropriated" the plaintiff's property, then the reviewing court must determine whether the harm was the "direct, natural, or probable result" of the government's action—a taking—or "merely an incidental or consequential injury, perhaps compensable as a tort." *Id*. at 1356. According to *Ridge Line*, the "direct, natural, or probable result" standard will be satisfied—and the action will be a taking—if the plaintiff–property owner's harm was the "predictable result" of the government action. *Id*. The second prong looks at the merits of the claim to "consider whether the government's interference with any property rights of [the plaintiff] was substantial and frequent enough to rise to the level of a taking." *Id*. at 1357. Under *Ridge Line*, intent is not a necessary element of a taking. *Id*. at 1355-56.

10/28/2016

To: David Houston, Ken Lyon

RE: LITTLE VALLEY FIRE LAWSUIT RESEARCH.

CONTROLLED BURN LIABILITY

This memorandum addresses potential causes of action in connection with the Little Valley Fire including a proposed inverse condemnation action that could potential side step statutory caps on damages, as well as a possible due process violation claim.

a. Nevada Controlled Fires - Statutory Background:

Chapter 528 of NRS - *Forest Practice and Reforestation*.

"Director" refers to the Director of the *State Department of Conservation and Natural Resources*. NRS 528.015.

"Division" refers to the *Division of Forestry* of the State Department of Conservation of Natural Resources. NRS 528.016.

The executive head of the Division of Forestry shall be the State Forester Firewarden, who shall be appointed by and be responsible to the Director. The State Forester Firewarden and the employees of the Division of Forestry shall have such powers and shall perform such duties as are conferred upon the State Forester Firewarden pursuant to chapters 472 and 528 of NRS and the provisions of any other laws. NRS 232.120.

Controlled Fires – NRS 527.122 to 527.128.

NRS 527.122:

As used in NRS 527.122 to 527.128, inclusive, unless the context otherwise requires:

1. "Authority" means the State Forester Firewarden, or a local government, whichever is charged with responsibility for fire protection in the area where a controlled fire is to take place.

2. "Controlled fire" means the controlled application of fire to natural vegetation under specified conditions and after precautionary actions have been taken to ensure that the fire is confined to a predetermined area.

NRS 527.124:

The State Forester Firewarden shall adopt such regulations as the State Forester Firewarden deems necessary to carry out and enforce the provisions of NRS 527.126 and 527.128.

NRS 527.126:

1. The authority may authorize an agency of this state or any political subdivision of this state to commence a controlled fire.

2. A controlled fire must be conducted:

(a) Pursuant to a written plan which has been submitted to and authorized by the authority; and

(b) Under the direct supervision of at least one person who is qualified to oversee such fires and who remains on-site for the duration of the fire.

3. A controlled fire which is commenced pursuant to this section and which complies with laws relating to air pollution shall be deemed in the best interest of the public and not to constitute a public or private nuisance.

4. The State of Nevada, an agency of this state or any political subdivision or local government of this state, or any officer or employee thereof, is not liable for any damage or injury to property or persons, including death, which is caused by a controlled fire that is authorized pursuant to this section, ***unless the fire was conducted in a grossly negligent manner***.

NRS 527.128:

1. The written plan required by NRS 527.126 must remain on-site for the duration of the fire. The plan must be prepared by a person qualified to oversee a controlled fire and contain at least:

(a) A description and map of the area to be burned;

(b) A list of the personnel and equipment necessary to commence and control the fire;

(c) A description of the meteorological factors that must be present before commencing a controlled fire, including surface wind speed and direction, transport wind speed and direction, minimum mixing height, minimum relative humidity, maximum temperature and fine fuel moisture;

(d) A description of considerations related to common behavioral patterns of fires in the area to be burned, including various burning techniques, the anticipated length of the flame and the anticipated speed of the fire; and

(e) The signature of the person who prepared the plan.

2. Before signing the written plan, the person qualified to oversee the fire must evaluate and approve the anticipated impact of the fire on surrounding areas which are sensitive to smoke.

3. The State Forester Firewarden shall establish the qualifications for a person to oversee a controlled fire.

Gross Negligence Standard

As stated in subsection (4) of NRS 527.126, the State of Nevada, an agency of this state or any political subdivision or local government of this state, or any officer or employee thereof, is not liable for any damage or injury to property or persons, including death, which is caused by a controlled fire that is authorized pursuant to this section, ***unless the fire was conducted in a grossly negligent manner***.

In contrast, NRS 472.530 provides:

Except as otherwise provided in NRS 527.126, any person, firm, association or agency which, personally or through another, willfully, negligently or in violation of the law:

1. Sets fire to the property, whether privately or publicly owned, of another;

2. Allows fire to be set to the property, whether privately or publicly owned, of another; or

3. Allows a fire kindled or attended by the person, firm, association or agency to escape to the property, whether privately or publicly owned, of another,

is liable to the owner of the property for the damages caused by the fire.

In order for the gross negligence standard to apply to damages caused by fire, the fire must be (1) "a controlled fire" and (2) authorized pursuant to NRS 527.126. In this case, unless the fire was started and controlled pursuant to a written plan conforming to the requirements of NRS 527.128, and supervised by an individual qualified to oversee the prescribed burn at issue,

the fire was neither a "controlled fire" nor "authorized" pursuant to NRS 527.126. The written plan may reveal that the gross negligence standard is not applicable to the instant case and the plaintiffs may be able to bring claims under NRS 472.530.

I searched for the written plan but it is not available anywhere online. I did fine the following items which are helpful for evaluating the potential claims:

Preliminary Relevant Evidence

Exhibit #1: Little Valley Burn – Nevada Division of Forestry (Attached)

This project description states that the Little Valley Prescribed Burn was funded by an $89,600 Hazardous Fuels Reduction Grant from the U.S. Postal Service. Winds during the controlled burn were expected to be S/SW. (Which leads to Exhibit # 2).

Exhibit #2: Little Valley Program Grant Application (Attached)

This application states that the applicant was the Nevada Division of Forestry. The number of acres to be treated was 461, with 3 communities affected by the proposed prescribed burn and 4,000 residences affected. The applications further stated that the Division of Forestry would plan and implement the burn in the Whittell Forest, which is owned by the University of Nevada. The United States Forest Services would coordinate with private land owners to gain necessary private land access via private roads and forest, and the University of Nevada would provide staff and/or students to assist with monitoring after the burn.

Exhibit #3: Department of Conservation and Natural Resources, Fire Origin and Cause Report (Attached)

The Little Valley Fire began on October 14, 2016, and was caused by an escape from the Little Valley Prescribed Burn conducted by the Nevada Division of Forestry on October 3-7. With winds coming out of the west west/northwest[1] at a steady speed of 16 to 20 mph with gusts of over 80 mph, embers from smoldering or reignited vegetation crossed the control line for the prescribed burn and ignited unburned vegetation outside of the prescribed burn control area.

The Report specifies that the State Forestry Firewarden was/is Joe Freeland.

[1] The brief Prescribed Burn Information published on the Division of Forestry website stated that the winds would be blowing S/SW during the burn, which would be sometime in early October. Given that the winds were actually blowing W/NW, and no specific dates were provided, the required written plan may not have been prepared as required by statute.

Exhibit #4: Natural Resources Conservation Service (NRCS) – NV Prescribed Burning Policies.

Planning Prescribed Burns: A written prescribed burn plan will be prepared by a person with the appropriate job approval authority or qualifications and will, at a minimum, contain the following: (i) The dates for burning, (ii) objectives of the burn, (iii) a description and map of the area to be burned, including size and topography, (iv) the type of vegetation, percent cover, and fuel load, (v) the method of burning, (vi) a list of the personnel and management necessary to commence and control the fire including designation of the fire or burn boss, (vi) a description of the meteorological factors that must be present before commencing a prescribed fire, including surface wind speed and direction, transport wind speed and direction, minimum mixing height, minimum relative humidity and maximum temperature, (vii) common patters of burning in the area, various burning techniques, anticipated flame length and anticipated speed of fire, (viii) smoke management and air quality concerns, (ix) *a contingency plan which describes the weather conditions which would trigger the activation of post-burn contingency actions with the objective of minimizing the potential for escape. The contingency plan would also include escaped fire procedures.*

Not all of these practice specifications are specifically listed in NRS 527.128 (written plan). In this case, the controlled burn ended on October 7, 2016, but it did not escape beyond the perimeter of the controlled burn until October 14, 2016. The Division of Forestry had seven days to realize the potential dangers imposed by the prescribed burn and to execute a post-burn contingency plan to minimize the potential for escape. It is more than likely that there were no post-burn contingency plans, and as mentioned in the Application (Exhibit #2) the Division of Forestry left it to the University of Nevada to monitor the site after the prescribed burn (the site was owned by the University). The basis of the negligence/gross negligence claims will likely be based on the actions of the Division of Forestry between October 7 and October 14.

Exhibit #5: NRCS Burn Classifications (attached)

Given that the controlled burn involved approximately 431 acres, the Little Valley Rx Burn was designated as either a Class IV or a Class V Maintenance Burn, depending on whether the slope of the terrain was under 15% or under 25%. Depending on the class, the burn must have been supervised by an individual with the requisite level of experience conducting prescribed burns with completion of necessary training.

The NRCS burn classifications contains the following checklist for supervisors when deciding whether they are prepared to commence a prescribed burn. After reviewing the written plan attendant to the Little Valley Rx Burn it can be ascertained whether the Division was prepared to ignite and control the burn. In all likelihood, items 4, 8, 10 and 13 were inadequate.

BURN CHECKLIST

GO or NO GO QUESTIONNAIRE

	QUESTION	YES	NO
1	Is burn plan completed and approved?	☐	☐
2	Are all fire prescription specifications met?	☐	☐
3	Are all smoke management prescription specifications met?	☐	☐
4	Is the current and projected fire weather forecast favorable?	☐	☐
5	Have all air quality considerations and smoke requirements been met?	☐	☐
6	Are all personnel required in the prescribed burn plan on site?	☐	☐
7	Have all personnel been briefed on the prescribed burn plan requirements?	☐	☐
8	Have all personnel been briefed on safety hazards, escape routes, and safety zones?	☐	☐
9	Is all of the required equipment in place and in working order?	☐	☐
10	Are available, including backup, resources adequate for containment of escapes under worst-case conditions?	☐	☐
11	Are answers to all the above questions YES?	☐	☐
12	In your opinion, can the burn be carried out according to plan and will it meet the planning objective?	☐	☐
13	Is there an adequate contingency plan developed?	☐	☐

If all thirteen questions have been answered "**YES**," you may proceed with ignition.

Exhibit #6: Burn Unit Map (attached)

If the written plan at issue reveals that it was inadequate or that the prescribed burn was planned, implemented or supervised by someone with inadequate training and/or experience then the burn was not a "controlled fire" as defined in NRS 527.122, and was not authorized under NRS 527.126. This would mean that plaintiffs would not have to plead gross negligence, but could instead establish liability via willful, negligent or other conduct in violation of Nevada law. NRS 472.530. The written plan will also be used to ascertain the actions/omissions by the Division that are negligent/grossly negligent, malicious, oppressive or otherwise tortious.

b. Statutory Liability Cap – NRS 41.035

As explained below, the facts likely support tort causes of action for negligence/gross negligence and trespass. However, given that tort based claims against the State and its political subdivisions are arguably subject to the $100,000 liability cap (NRS 41.035) I attempted to construct a cause of action that was not sounding in tort.

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Inverse Condemnation

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When a governmental entity takes property without just compensation, or initiating an eminent domain action, an aggrieved party may file a complaint for inverse condemnation. *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004); Fritz. As the counterpart of eminent domain, inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not

the plaintiff and the state (the special-relationship exception); and (2) when the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known or obvious danger' (the state-created danger exception)." Patel v. Kent Sch. Dist, 648 F.3d 965, 971–72 (9th Cir. 2001) (citations omitted).

The 9th Circuit and a majority of other circuits have held that, under the state created danger doctrine, a state actor can be held liable for failing to protect a person's interest in his personal security or bodily integrity when the state actor affirmatively and with deliberate indifference placed that person in danger. The doctrine holds state actors liable "for their roles in creating or exposing individuals to danger they otherwise would not have faced.

The 9th Circuit first recognized the state-created danger doctrine in Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), in which a police officer pulled over a car in the early morning. After arresting the driver, the officer left the female passenger alone in a high crime area at 2:30 a.m. The passenger was subsequently attacked and raped. We held that the officer could be held liable under § 1983 for the attack and rape because, according to the plaintiff's evidence, the officer "affirmatively placed her in danger and then abandoned her." Id. at 596.

In this case, the Division of Forestry commenced a prescribed burn on October 4th and abandoned it on October 7th with imputed knowledge that there would be severe wind storms in the area the following week. Those persons supervising the burn had seven days to execute a contingency plan to minimize the risk to neighboring land owners and protect them from the danger it affirmatively placed them in and failed to act. However, in order to establish this cause of action, a plaintiff must establish that the state acted with deliberate indifference to a known and substantial risk of harm to the plaintiff. Deliberate indifference requires a culpable mental state that is more than gross negligence. However, if this can be established, this may be another cause of action that allows the plaintiffs to seek compensation without being subjected to the statutory liability caps.

d. Claim Brought Under NRS 472.530.

If the written plan governing implementation, control and supervision of the Little Valley Rx Burn establishes that the burn was not a "controlled fire" or otherwise authorized pursuant to NRS 527.126, then damages may be sought under NRS 472.530 without having to plead gross negligence. Nonetheless, even if gross negligence must be shown the action may be brought pursuant to NRS 527.126. Because the plaintiffs have the right to seek compensation under

either of these two statutes, it could be argued that plaintiffs are not relying upon NRS 41.031 (wavier of sovereign immunity statute) and the language in NRS 41.035 limiting liability to $100,000 is not applicable. This is probably a weak argument but it is technically correct as applied to the language of NRS 41.035.

While NRS 527.126 states that the State of Nevada and its political subdivisions are not liable for damages caused by fire escaping from controlled fires absent gross negligence, NRS 472.530 states that agencies and their employees are liable for fire damages resulting from willful, negligent or unlawful acts. In this case, if the controlled fire failed to conform to the requirements set forth in NRS 527.126 -527.128 the fire was the result of unlawful acts, and the Division of Forestry would be liable as a matter of law even without a showing of negligence.

As previously suggested, the written plan may not only establish that the actions/omissions of the Division of Forestry were grossly negligent, but it may establish that the prescribed burn was not authorized by law. This would not only allow the plaintiffs to bring their claims under NRS 472.530, but it would preclude any discretionary immunity defense.

e. Trespass to Land Causing Damages.

Attached as **Exhibit #10** is the case Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (Cal.App. 4 Dist., 1996). In this case the court held that a negligent invasion by fire which causes damage to real property constitutes a trespass, and the spread of fire from defendant's land to the plaintiff's property was an intrusion significant enough to constitute a trespass to land. The following is an excerpt from this case:

> A Negligent Invasion by Fire Which Causes Damage to Real Property Constitutes a Trespass. Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (Cal.App. 4 Dist., 1996). "Trespass to property is the unlawful interference with its possession. Id. At 1305. The interference need not take the form of a personal entry onto the property by the wrongdoer. Instead, it "may be accomplished by the casting of substances or objects upon the plaintiff's property from without its boundaries." (75 Am.Jur.2d, Trespass, § 11, p. 15, fn. omitted.)"An entry may also be accomplished by setting in motion an agency which, when put in operation, extends its energy to the plaintiff's premises to its material injury." (75 Am.Jur.2d, Trespass, § 11, p. 16, fn. omitted.) [50 Cal.App.4th 1307] Thus, intangible intrusions such as noise or vibrations may constitute a trespass if they cause actual physical damage. While no California case has previously decided that a fire can constitute a trespassory invasion, other states have. The Supreme Court of

> Washington has held that an action for trespass lies to recover damages caused when a spark was negligently cast from the defendant's property onto the plaintiff's property, igniting a fire. (Zimmer v. Stephenson (1965) 66 Wash.2d 477, 403 P.2d 343, 345.) Alleging facts even closer to those at issue here, the plaintiffs in Martin v. Union Pacific Railroad Company (1970) 256 Or. 563 [474 P.2d 739] claimed that the defendant railroad negligently caused a fire to occur on its right of way and negligently permitted the fire to escape and spread onto the plaintiffs' land. (474 P.2d at pp. 739-740.) The Oregon Supreme Court held that "[t]he spread of the fire from defendants' land onto plaintiffs' land was an intrusion of a character sufficient to constitute a trespass." (Id., p. 740; accord, Koos v. Roth (1982) 293 Or. 670, 652 P.2d 1255, 1267-1268 [spread of fire from defendant's field to plaintiff's property was a trespass].)

Because this is an intentional tort the State would not be able to raise a defense under the discretionary immunity statute.

f. Possible Breach of Contract – Third Party Intended Beneficiary Claim.

As shown in Exhibit #2 – the Application for Grant Funding for the prescribed Little Valley burn, the Division of Forestry applied for a federal grant and mentioned its Interagency Collaboration with the United States Forest Service, the University of Nevada, Truckee Meadows Fire Department and several other agencies involved with the implementation and execution of the prescribed burn. It is possible that written agreements exist between the Division of Forestry and other agencies involving obligations and duties running to neighboring land owners. It is possible that there may be an action based on breach of contract, and foreseeable damages may include those sought to be redressed by Plaintiffs. These agreements may additionally reveal other potentially liable parties.

At this time this is all I was able to do based on the limited information that I had. I spent a lot of time trying to find the written plan but could not find it online. Let me know if you have any additional questions or would like me to research any of these ideas further.

5/8/2017

To: David Houston
Ken Lyon
From: Will Swafford

RE: **LITTLE VALLEY FIRE RESEARCH & MEMORANDUM**

I. Introduction

This memorandum addresses the numerous issues implicated in the defendants' Motion to Dismiss ("MTD"). The majority of Defendants' MTD challenges the inverse condemnation claims, and involves causation issues that have not been addressed by Nevada's Supreme Court. Reliance on cases from federal and state jurisdictions outside Nevada are of minimal assistance because the causation requirements are vastly different across jurisdictions, and are highly fact sensitive. Unfortunately, in order to understand the relevant issues it is necessary to initially understand an expansive background of federal and state takings cases.

II. Was There a *Taking* Requiring Just Compensation?

In its MTD, Defendants argue that the allegations in Plaintiff's Amended Complaint do not constitute a taking as a matter of law for numerous reasons. Plaintiffs argue that the alleged damages to property do not amount to physical appropriations or regulatory takings and do not require just compensation. Plaintiffs also argue that there is insufficient causation between the alleged actions of the State and the damages to Plaintiffs' property interests, and that Plaintiffs' allegations sound in tort as opposed to a taking under the state and/or federal constitution. These arguments are intertwined and somewhat circular. In addressing these arguments, for explanatory purposes, it is logical to begin with the argument addressed in Sections 3 & 5 of Defendants' MTD involving the tort/taking distinction.

a. Tort v. Taking

Defendants rely on *Ridge line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003) for the position that the federal courts have distinguished takings cases from tort cases and stated that "a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. *MTD: p. 10 of 20*. The defendants argue plaintiffs fail to allege that the defendants indented the controlled burn to reach their land and consume their properties, and do not allege that the damage actually suffered was the direct, natural result of the act of conducting a controlled burn. *MTD:.p 10 of 20*.

At the federal level the importance of distinguishing between a tort and a taking derives primarily from a long-established reading of the Tucker Act. *28 U.S.C. § 1491*. The Tucker Act pertains to the United States Court of Federal Claims (Court of Claims) and proscribes jurisdiction over claims sounding in tort. *Hansen v. United States*, 65 Fed. Cl. 76, 95 (2005). Pursuant to this act, federal courts have developed a general standard for determining whether a

plaintiff's claim is properly brought as a taking. *Id*. at 95. Prior to the enactment of the Tucker Act in 1887, the Court of Claims had jurisdiction only over "claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." *Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855)*. Although jurisdiction did not yet extend to cases arising under the Constitution, the Court of Claims recognized takings claims based on a theory of a breach of implied contract between the federal government and private parties. *See, e.g*., *Shreve v. United States*, 8 U.S. Cong. Rep. C.C. 205 (Ct. Cl. 1860); *Wirt v. United States*, 6 U.S. Cong. Rep. C.C. 172 (Ct. Cl. 1858). Under the implied contract theory, a plaintiff may prevail in a takings challenge if it proves that government action resulted in a breach of the implied contract not to "take" private property without providing just compensation. *United States v. Great Falls Mfg. Co*., 112 U.S. 645, 657 (1884). *For such a claim to be successful, a plaintiff owner must show that the government-defendant subjectively intended to cause the harm to the plaintiff's private property*. *See Hansen at 96*. When the government expanded the Tucker Act it waived sovereign immunity with respect to takings actions brought by private parties directly under the Fifth Amendment. 28 U.S.C. § 1491(a). The enactment of the Tucker Act prompted federal courts to formulate a causation-based standard to determine if a claim could be heard as a taking.

The Federal Circuit has adopted a tort-taking inquiry that determines whether "treatment under takings law, as opposed to tort law, is appropriate under the circumstances." *Ridge Line*, *supra*. The court in *Ridge Line* set forth a two part test for distinguishing between torts and takings in the federal circuit:

> First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. . . . Second, the nature and magnitude of the government action must be considered.
>
> *346 F.3d 1346.*

The *Ridge Line* decision incorporates both "intent" and "causation" requirements by stating the first prong of the test in the disjunctive: either intent or causation is sufficient for the government action to be considered a taking. *Id*. at 1355. If the plaintiff to a takings action does not show that the government-defendant "intentionally appropriated" the plaintiff's property, then the reviewing court must determine whether the harm was the "direct, natural, or probable result" of the government's action—a taking—or "merely an incidental or consequential injury, perhaps compensable as a tort." *Id*. at 1356. According to *Ridge Line*, the "direct, natural, or probable result" standard will be satisfied—and the action will be a taking—if the plaintiff–property owner's harm was the "predictable result" of the government action. *Id*. The second prong looks at the merits of the claim to "consider whether the government's interference with any property rights of [the plaintiff] was substantial and frequent enough to rise to the level of a taking." *Id*. at 1357. Under *Ridge Line*, intent is not a necessary element of a taking. *Id*. at 1355-56.

In a subsequent federal case, *Moden v. United States*, 60 Fed. Cl. 275, 282–83, 288–89 (2004), the court recognized that *Ridge Line* could lead to differing results, and attempted to clarify the causation requirement by holding that that the government act need only be the "cause-in-fact" of the resulting injury. *Id*. at 278. Under a pure cause-in-fact test, it does not matter if a result is intended, subjectively foreseen, or objectively foreseeable. What does matter is whether the harm would not have occurred but for the government's action. The court of appeals affirmed *Moden* (*Moden v. United States*, 404 F.3d 1335, 1346 (Fed. Cir. 2005)) but recognized that federal law seems to require some sort of objective foreseeability for a governmental act to be deemed a taking.

Unlike federal courts, state courts have jurisdiction to decide both tort and takings claims, but they must still determine between the claims when determining whether a reviewing court may address the merits of a claim for just compensation. *See, e.g.*, *Dunn v. City of Milwaukie*, 250 P.3d 7, 8 (Or. Ct. App. 2011). In general, the tort/takings tests used by state courts resemble the federal formulations in which a taking requires the government to satisfy requirements of causation and/or intent. *See Doner v. Zody*, 958 N.E.2d 1235, 1248 (Ohio 2011). However, state courts do not always apply tests that are equivalent to the federal formulations. Some state courts hold that intent is a necessary prerequisite to finding a taking as opposed to a tort. *MBP Corp. v. Bd. of Trs. Galveston Wharves*, 297 S.W.3d 483, 488 (Tex. Ct. App. 2009) (stating that a requisite intent is needed for a takings case). Some courts allow an inference of intent to be drawn from the government-defendant's action if the natural and ordinary consequence of that action is a substantial interference of property rights. *Dunn* at 8. Other state courts allow a takings claim to proceed even though the government act that allegedly resulted in the harm was only a substantial concurrent cause. (California & **arguably Nevada**).

The government-defendant in *Dunn v. City of Milwaukie* argued that the plaintiff's cause of action did not satisfy the elements of a taking because it failed to set forth evidence that the government either intended to cause a taking, or substantially interfered with the plaintiff's private property. *Dunn* at p. 8. However, the Oregon Supreme Court opinion noted that "[a] factfinder may infer the intent to take from the governmental defendant's action if . . . the natural and ordinary consequence of that action was the substantial interference with property rights." *Id*. The causation issue in Dunn boiled down to whether the harm resulting from the city's routine hydrocleaning was sufficiently "unnatural" or "extraordinary" to defeat a takings claim, or if the harm was a "natural and ordinary consequence" of the government action and thus the claim could proceed. *Id*. at 10-11.

In *Struthers v. City of Seattle*, No. 63943-9-I, No. 65201-0-I, 2011 Wash. App. LEXIS 878, at *14 (Wash. Ct. App. Apr. 18, 2011) the Court of Appeals of Washington applied a "necessary incident" test to determine whether public interference with private lands amounted to a taking, where to establish a takings claim the plaintiff must show that the interference was "reasonably necessary" to the maintenance or operation of property devoted to a public use. *Id*. *10.

In *California State Automobile Association Inter-Insurance Bureau v. City of Palo Alto*, 41 Cal. Rptr. 3d 503 (Ct. App. 2006), the court held a property owner may recover any actual injury to real property proximately caused by the government whether foreseeable or not. *Id. at 506*. In

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California, it appears that a takings claim may proceed against a government-defendant when (1) the government act is the substantial cause of the plaintiff's injury, and (2) if other forces alone would not have caused this injury. *Belair v. Riverside Cnty. Flood Control Dist*., 764 P.2d 1070, 1074-75 (Cal. 1988).

The causation requirement is additionally influenced by the type of taking involved. If government action or regulation causes private property to be physically occupied, the regulation is a categorical per se taking regardless of the reason for the occupation or the impact on the owner. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 421 (1982) (finding that an ordinance requiring landlords to install a cable box and wires in apartment building is a per se taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (finding the same for the imposition of navigational servitude). "Permanent does not mean forever." *Otay Mesa Prop. L.P. v. United States*, 86 Fed. Cl. 774, 786 (2009) (*quoting Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991)) (internal quotation marks omitted). Rather, it involves substantial physical intrusion of the property. Id. Causation is relevant for physical takings because a court must first determine if the defendant, or some other entity, was responsible for the invasion, and second whether the physical invasion is substantial enough to constitute a per se taking. *Id*.

In this case, the Plaintiffs' property was physically invaded by fire which destroyed homes, trees, landscaping, outbuildings and other real and personal property interests. The physical occupation was substantial and resulted in the permanent loss of possession, use, enjoyment and the ability to exclude and transfer property interests, as well as a significant diminution of value to the remaining parcels and property interests. This is unquestionably a substantial interference that was caused by the State. All things considered, a per se taking by the defendants occurred in this case.

In *Fritz v. Washoe Cnty*., 376 P.3d 794, 132 Nev. Adv. Op. 57 (Nev., 2016), Nevada's Supreme Court stated:

> Nevada case law has not clearly and comprehensively set forth the elements of inverse condemnation, but we do so now. As the counterpart of eminent domain, inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings. See *Dickgieser v. State*, 153 Wash.2d 530, 105 P.3d 26, 29 (2005) ; see also *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645–47, 173 P.3d 734, 738–39 (2007) (providing that an interest in real or personal property satisfies the private property requirement); *Gutierrez v. Cty. of San Bernardino*, 198 Cal.App.4th 831, 130 Cal.Rptr.3d 482, 485 (2011) (providing that the taking must be proximately caused by a government entity).

Nevada's inverse condemnation law does not include an element of intent requiring plaintiffs to establish that the state intended to condemn property, and defines causation as "proximate" causation. Nevada law requires a plaintiff in an inverse condemnation action involving the

drainage of surface waters to show both a physical invasion and a resulting substantial injury. *Buzz Stew, LLC v. City of N. Las Vegas*, 341 P.3d 646 (2015). This is consistent with federal case law stating that in cases involving physical invasion all that must be shown to establish a per se taking is a physical invasion caused by the government and a substantial injury.

The defendants argue that Plaintiffs fail to allege that Defendants intended the controlled burn to reach their lands, or that the damage was the direct, natural act of conducting the controlled burn. It is unclear whether Nevada inverse condemnation law requires plaintiffs to prove the government intended the invasion of property, and the Supreme Court did not suggest otherwise in *Fritz* when it articulated the elements of a Nevada inverse condemnation claim. It is also uncertain whether the plaintiff must establish that the damage to property was the direct, natural act of the government action. In this case, there was a physical invasion of property by the State and a per se taking, and as such, it is arguably unnecessary for Plaintiffs to establish additional causation. Nonetheless, contrary to defendant's assertions, Plaintiffs' Amended Complaint alleges: "Defendants' acts and omissions concerning the planning, initation, control, management, and/or supervision of the controlled fire which resulted in the Little Valley Fire were reckless, willful and/or grossly negligent, and such acts and omission were the ***direct cause*** of the of the damage to Plaintiffs' real and personal property interests … Amended Complaint ("AC") ¶32. At ¶ it is stated "Defendants' acts and omission concerning the planning, initiation, control, management and/or supervision of the controlled fire was the **proximate cause** of a physical invasion and taking of Plaintiffs' real and personal property interests for a public use ….

Thus, Plaintiffs' complaint clearly alleges that the alleged damages were the direct and proximate result of the complained of actions of Plaintiffs. This is all that is required to be alleged in the event that further causation must be established.

Defendants suggest that because Plaintiffs did not allege that Defendants actually intended the controlled burn to spread to and destroy Plaintiffs' property the allegations in the complaint are deficient. However, this argument rests on an improper interpretation of the law. Under *Ridge Line* the role of subjective elements such as the government's intent or whether it actually foresaw the harm are obviated. *Hansen v. U.S*, No: 02-21L. (Fed. Cl. Apr. 11, 2005). Even under prevalent federal standards, as stated in *Barnes v. United States*, 538 F.2d 865, 871 (Ct. Cl. 1976), the court of claims examined what might constitute a natural and probable consequence; There need only be a governmental act, the natural and probable consequences of which effect such an enduring invasion on plaintiff's property as to satisfy all other elements of compensable taking. *Id.* at 871.

Additional Authorities:

Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. 253, 257 (1980). *A claim for inverse condemnation involves a two-part test that can be characterized as a causation prong and an appropriation prong*. See, e.g., *Cary v. United States*, 552 F.3d 1373, 1376 (Fed.Cir.2009).

As to the causation prong, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *In re Tennessee Valley Auth. Ash Spill Litig*., 805 F.Supp.2d 468 (E.D. Tenn., 2011). As to the appropriation prong, "[e]ven where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." *Id*. *citing Cary at 1356*. *Under the appropriation prong, the nature and magnitude of the government action must be considered*. *Cary* at 1355–56. Before a taking occurs the government must deny the owner all or essential use of his property." *In re Tennessee Valley Auth. Ash Spill Litig*., 805 F.Supp.2d 468 (E.D. Tenn., 2011).

The next logical inquiry is into what constitutes a taking. "That inquiry, by its nature, does not lend itself to any set formula, and the determination whether justice and fairness require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons, is essentially ad hoc and fact intensive." *Eastern Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (quotations omitted) (citation omitted).

"The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed." *Md. Port Admin. v. QC Corp*., 310 Md. 379, 387, 529 A.2d 829, 832 (1987) (citation omitted); *see also Hardesty v. State Rd. Comm'n of the State Hwy. Admin.,* 276 Md. 25, 32, 343 A.2d 884, 888 (1975) ("[N]ot every injury to property involves a taking, that compensation for a taking may be exacted only for severe interferences which are tantamount to deprivations of use or enjoyment, and that whether there has been a taking is dependent on the facts of each case."); *Litz v. Md. Dep't of the Env't*, 434 Md. 623, 76 A.3d 1076, 1094 (Md., 2013).

It is also important to note, particularly in this context, that a taking may be partial or complete. A partial taking is one in which "there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." U.S. v. Causby, 328 U.S. 256, 265 (1946).

An act by the State amounting to a taking can also be, and oftentimes is a tort. "Inverse condemnation law is tied to, and parallels, tort law." 9 Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 34.03[1] (3d. 1980 & Supp. 2002)). However, the distinction between a tort and a taking is not well-defined. *See Hansen v. United States*, 65 Fed.Cl. 76, 80–81 (Fed.Cl.2005) ("[T]here is no clear cut distinction between torts and takings .... and [t]he best that can be said is that not all torts are takings, *but that all takings by physical invasion have their origin in tort law*"). (Emphasis added).

In this case, the physical invasion by fire that destroyed plaintiffs' property interests was tortious and amounted to a taking.

In *Clark v. United States*, 660 F.Supp.1164 (W.D. Wash. 1987), *aff'd* 856 F.2d 1433 (9th Cir. 1988), the plaintiff owned land near a U.S. Air Force base. The Government dumped toxic waste material at landfill sites and burn pits on the base. As a result of the dumping the plaintiff could not use water on her land. The district court found that the government's dumping of chemicals on the base constituted negligence per se and as a result the government had committed a tort. The claims court then found that plaintiff was entitled to summary judgment on her takings claim.

In *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), the court held that when government (or a private party acting pursuant to explicit government authority) uses land in such a way as to create a nuisance, the action rises to the level of a taking when the burden placed on the plaintiff is "peculiar and substantial." *Id*. at 557.

In this case, Plaintiffs allege in the Amended Complaint that the property was substantially damaged by actions of the State that directly and proximately caused the damages. Nothing else must be alleged.

b. <u>The Requirement of Intent</u>.

The defendants argue that accidental damage to property is not a taking, and even in states whose constitutional compensation clause includes the word "damage" in addition to "taking" plaintiffs in inverse condemnation actions must prove that the government intended to take their property.

This allegation is overbroad. In some cases in certain states such as Colorado this would true, however, the majority of jurisdictions do not require a showing of intent.

In *Pacific Bell v. City of San Diego* (4th Dist., Div. 1, June 13, 2000) 81 Cal.App.4th 596 [96 Cal.Rptr.2d 897], a City-owned water pipe leading to a fire hydrant burst, damaging plaintiff's property. The city argued that that it was not liable on an inverse condemnation theory because its maintenance of the pipe was reasonable. *The court held that that the City was strictly liable on an inverse condemnation theory even if it maintained the pipe reasonably.*

Proximate cause, in the absence of fault, is now well established as the basis for recovery in inverse condemnation in California. *Youngblood v. Los Angeles County Flood Control Dist.,* 56 C.2d 603, 607. In a landmark case in inverse condemnation law, *Albers v. County of Los Angeles*, 62 C.2d 250 , 258 (1965) the supreme court quoted with approval this statement from *Hooker v. Farmers Irrig Dist.*, 272 F. 600, 603, (8th Cir. 1921):

> If the defendant has inflicted damage upon the property of the plaintiff that is the necessary effect of its permanent maintentence and operation of this cannal in a lawful and careful manner, which the state has authorized it to do for a public use, it is liable to pay this damage to the plaintiff because the infliction of such damage without compensation is a violation of the constitutional prohibition against the taking or damaging of property for public use without just compensation therefore.

Washington's Supreme Court has held that intent has never been a required element of a takings claim. *Dickgieser v. State,* 153 Wn.2d 530, 534-35 (2005). Contrary, Washington courts have long held that " 'whenever property is thus taken, voluntarily or involuntarily, . . . the courts must look only to the taking, and not to the manner in which the taking was consummated.' " *Boitano v. Snohomish County, 11* Wn.2d 664, 675 (1941) (quoting *Wong Kee Jun v. City of Seattle,* 143 Wash. 479, 505 (1927)).

It should be noted that Defendants argue in their MTD that the Nevada Supreme Court cited to *Dickgieser* when articulating the requirements of an inverse condemnation claim in *Fritz*, which suggests that the State's intent to condemn property for public use should be an element of an inverse condemnation claim. However, *Dickgieser* actually states that no intention whatsoever is required. The government's argument actually suggests that Nevada does not require any intent. In fact, in *Fritz* Nevada's Supreme Court cited to both a Washington Supreme Court case and a California Supreme Court case when articulating the elements of an inverse condemnation claim in Nevada. In both of these states no intent is required and the government is strictly liable in inverse condemnation claims. For this reason, and in light of other inverse condemnation cases in Nevada (none of which require any governmental intent to be established) it is arguable that Nevada may allow plaintiffs to establish inverse condemnation claims under strict liability theory.

The United States Supreme Court has held that a taking occurs where government action destroys the value of property "whether with an intent and purpose of extinguishing the property value or not." *Armstrong v. United States*, 364 U.S. 40, 48 (1960). *See also Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922) (government is liable for a taking "even if the possible legal consequences were unforeseen").*

But for more than 80 years, Washington courts have held the government's intent is immaterial, focusing instead on the nature of the damage to private property that was caused by government action: [W]henever property is thus taken, voluntarily or involuntarily, by the sovereign state . . ., the courts must look only to the taking, and not the manner in which the taking was consummated. *Wong Kee Jun*, 143 Wash. at 505; *Dickgieser*, 153 Wn.2d at 541; *Boitano v. Snohomish County*, 11 Wn.2d at 675; *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283 (1989), review denied 114 Wn. 2d 1016 (1990).

See also Alan Romero, Takings by Floodwaters, 76 N.D. L. Rev. 785, 815 (2000) ("When the government causes water to invade private land, the government's inanimate agent physically enters and occupies the land. . . . It makes no difference that . . . the government might not have intended to take the land.").

In *Great Northern Railway Co. v. State*, 102 Wash. 348 (1918) Washington's Supreme Court held, "To deprive one of the use of his property is depriving him of his property; and the private injury is thereby as completely effected as if the property itself were physically taken. Accordingly," the court held, "*any use of land for a public purpose which inflicts an injury upon adjacent land, such as would have been actionable if caused by a private owner, is a taking and damaging within the meaning of the Constitution*."

see also *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 14-16 (1976) (unintended damages caused by vibrations from airport traffic noise constituted a taking); *Martin v. Port of Seattle*, 64 Wn.2d 309, 310-15 (1964) (noise related damage caused by low-altitude overflights constituted a taking); *Ulery v. Kitsap County*, 188 Wash. 519, 523 (1936) (construction of a highway that caused surface water to flow onto and damage plaintiffs property constituted a taking).

Like Washington, the California Supreme Court has interpreted the Takings Clause of the California Constitution' to hold a government entity liable for "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not.'" *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263-64, 398 P.2d 129 (1965). Tort concepts like fault and negligence are not applicable. *Bunch v. Coachella Valley Water Dist*., 15 Cal. 4th 432, 436, 935 P.2d 796 (1997). The California courts focus on the nature of the damage and whether the government action caused the damage as the touchstones distinguishing a taking from a tort.

So as not to confuse inverse condemnation with tort concepts such as foreseeability, the California courts developed a "substantial cause" standard. *See Belair v. Riverside County Flood Control Dist*., 47 Cal. 3d 550, 559, 764 P.2d 1070 (1988); *Arvo Van Alstyne, Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J. 431, 435-38 (1968-1969) (warning that constitutional cause should not be confused with the tort concept of proximate cause). Under this standard, the landowner must demonstrate ""a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury.'" *Belair*, 47 Ca1.3d at 559 (citations omitted) (government may avoid liability upon showing that the damage was caused solely by an unforeseen and supervening cause). This is the same standard that this Court applied in *Dickgieser*, 153 Wn.2d at 541-42. Thus, where a landowner has demonstrated cause, the question of whether or not the government contemplated the resulting damage when it made the public improvement is immaterial.

Although the federal courts have developed a unique approach to distinguishing takings from torts, they too hold that intent is not a necessary element to an inverse condemnation claim. *Hansen v. United States*, 65 Fed. Cl. 76, 81 (2005) (The Takings Clause "contains no state of mind requirement."). The federal courts apply a disjunctive analysis for distinguishing takings from torts, whereby property loss may constitute a compensable taking if the government intended to invade the property interest *or the damage was caused by the government activity*. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). The history of this analysis is informative because it demonstrates that the "damage caused by a government act" test arose from case law interpreting the Takings Clause; whereas, the "intent" inquiry arose from a "jurisdictional quirk" in how takings claims were pleaded to the Court of Claims for a period of time when the court did not have direct jurisdiction over constitutional claims. *Hansen*, 65 Fed. Cl. at 96, 106-10.

Similar to Washington and California, the early federal takings cases addressing the tort-taking distinction focused on the irrelevance of intent to the takings analysis. See, e.g., *Pumpelly v. Green Bay Co*., 80 U.S. 166, 177¬78 (1871). In *Pumpelly*, the government's construction of a

dam caused a lake to flood which almost completely destroyed the plaintiffs property. Id. at 177. The damage was collateral to the government project, and there was no intent to appropriate the plaintiffs property. Id. at 167-68. The government argued that its actions did not constitute a taking because the damage was a "consequential result" of an otherwise valid exercise of government power. Id. at 177. The *Pumpelly* Court rejected this argument, holding that collateral and unintended damage to private property resulting from a government project can result in a taking:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.
>
> Id. at 177-78.

The "damage caused by a government act" test was further refined in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. at 330. In this case, the government had installed a battery of cannons on the top of a hill that could only be fired over the plaintiff's property. Id. at 328-29. The plaintiff sued, arguing that the cumulative effect of the government's firing of the cannons constituted a taking. Id. The *Portsmouth* Court agreed, concluding that evidence of successive acts of trespass would warrant a finding that the government had imposed a servitude on the plaintiff's property for which compensation should be made, regardless of the fact that it did not intend to appropriate plaintiff's property. Id. at 329-30.

The federal courts' extension of the takings inquiry to consider the government's intention finds its origin in the enabling statute that limited the Court of Claims' jurisdiction. *Hansen*, 65 Fed. Cl. at 96, 106-10. For a period of time, the Court of Claims lacked the authority to consider direct constitutional claims.[1] And as a result, the court considered takings claims as claims for assumpsit based on a breach of implied contract theory. See id. at 107 (citing cases). In short, a plaintiff asserting a claim under implied contract

[1] Congress created the Court of Claims in 1855 to exercise jurisdiction over "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Hansen, 65 Fed. Cl. at 106 n.41 (citing Act of February 24, 1855, ch. 122, 10 Stat. 612 (1855)). Between its inception and the adoption of the Tucker Act, ch. 359, 24 Stat. 505 (1887), the Court of Claims interpreted its enabling statute as strictly limiting its jurisdiction and concluded that it could not exercise jurisdiction over torts or direct constitutional claims. Hansen, 65 Fed. Cl. at 106-07.

theory argued that the Takings Clause constituted a governmental promise to compensate property owners for damage to his or her private property. See id. at 107-08. Thus, the early takings cases from this period extended the takings inquiry to consider intent as a distinguishing characteristic of compensable takings under an implied contract theory. See *Klebe v. United States*, 263 U.S. 188, 191-92 (1923); *United States v. N. Am. Transp. & Trading Co*., 253 U.S. 330, 333-34 (1920); *Tempel v. United States*, 248 U.S. 121, 130-31 (1918).

After the Tucker Act broadened the court's jurisdiction to include constitutional claims, the court issued a series of decisions reconciling the divergent "damage caused by a government act" and "intent" analyses. E.g., *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955); see also *Berenholz v. United States*, 1 Cl. Ct. 620, 627 (1982) ("An intent to appropriate may be implied from the facts of the case. The facts need only demonstrate that the invasion of property rights was the result of acts the natural and probable consequences of which were to effect such an enduring invasion." (citations omitted)). Like Washington, this test holds that evidence of the government's intent is immaterial where the landowner has demonstrated that a public works project caused damage to private property. *Ridge Line*, 346 F.3d at 1355-56.

In its MTD, Defendants cite a litany of cases from other states such a Tennessee, Arkansas and Oregon for the rule that a taking cannot exist unless there is an intentional act by the government. The defendants cite to *National By-Products, Inc. v. City of Little Rock By and Through Little Rock Regional Airport Com'n*, 916 S.W.2d 745, 323 Ark. 619 (Ark., 1996) for the rule that Arkansas' just compensation clause requires that a municipality act so as to substantially diminishes the value of a landowner's land, and its actions are shown to be intentional. *Citing Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990). In *Robinson* the Arkansas Supreme Court concluded that the intent necessary in a takings claim is the same as that required in a nuisance claim, citing Rest. Torts 2d, § 825(b), comment (d): "when one knows that an invasion of another's interest in [301 Ark. 232] the use and enjoyment of land is substantially certain to result from one's conduct, the invasion is intentional."

Defendants imply that Plaintiffs failed to allege that the defendants acted intentionally, and sought compensation for damages as opposed to a taking. However, plaintiffs have alleged that the acts and omission of Defendants were willful. Nevada's Supreme Court has held that "willful" is synonymous with "intentional." *Cox v. State* (Nev., 2016). *Willful*, Black's Law Dictionary (10th ed. 2014) (willful means "[v]oluntary and intentional, but not necessarily malicious"). Plaintiffs have alleged that the actions of the defendants proximately and directly caused the damages to their property interests. Plaintiffs do not just allege damages to their property interests, but allege "loss" of homes, "loss" of personal property, "loss" of outbuildings, "loss" of timber, "loss" of landscaping and "loss" of aesthetic value. These constitute permanent, substantial and peculiar damages amounting to a taking.

Alaska's Supreme Court has held that "if an owner is denied productive use of his or her property, that may be a taking regardless of the mental state of the involved government

official, whether it be malicious, negligent, non-negligent but mistaken, or non-negligent and non-mistaken. *Cannone v. Noey,* 867 P.2d 797, 801 n.7 (Alaska 1994).

Nevada's Supreme Court recently decided that government liability in a reverse condemnation claim requires that the government be substantially involved in actions that unreasonably injure the property of others, and that the taking must be proximately caused by the government, meaning that the government action must be a substantial cause of the damages. *Fritz v. Washoe Cnty*., 376 P.3d 794, 132 Nev. Adv. Op. 57 (Nev., 2016), citing *Clark v. Powers*, 611 P.2d 1072, 1077 (1980), *and Gutierrez v. Cty. of San Bernardino,* 198 Cal.App.4th 831, 130 Cal.Rptr.3d 482, 485 (2011).

Thus, in Nevada, a taking occurs when the government actions are a substantial cause of unreasonable injuries to private property interests. In *Fritz*, the State approved plat maps which altered upstream drainage systems and resulted in flooding to properties during rain storms. Nevada's Supreme Court held that the government involvement coupled with the unreasonable injury to property amounted to a taking. The defendants in this case would argue that because the State did not intend to flood the property of the plaintiffs there could be no taking under Nevada law. However, the Supreme Court obviously did not interpose this requirement into Nevada's inverse condemnation elements. The defendants could potentially argue that the State should have known that its actions in approving the plat maps would result in the flooding of upstream properties, and thus, intended the resulting damages. This argument could reconcile its position with *Fritz*. However, this same argument could be applied to the instant case; Plaintiffs should have known that their actions would result in the damages to the plaintiffs properties alleged in the Amended Complaint.

The plaintiffs in this case seek to have the court add an "intent to condemn" as a seventh element of inverse condemnation. Intent to condemn has never been required by Nevada courts. In cases like this one involving takings claims based on physical invasion of property, all that must be shown is that there was a physical invasion and a resulting substantial injury. *Buzz Stew, LLC v. City of N. Las Vegas*, 341 P.3d 646, 650 (Nev., 2015); *Cnty. of Clark v. Powers*, 611 P.2d 1072, 1075 n. 3, 1076 (1980). **In *Powers* the court relied on *Pumpelly* where the court held that and unintended damage to private property resulting from a government project can result in a taking.** *It appears that Nevada does not require any intent.*

It should also be recognized that the Nevada Supreme Court has recognized that the Nevada Constitution defines takings more broadly than the United States Constitution. *Vacation Village, Inc. v. Clark County, Nev*, 497 F.3d 902 (9th Cir., 2007). The defendants argue that plaintiffs have incorrectly attempted to seek compensation for damages to property as opposed to a taking of property. The defendants suggest that a taking can only occur if there is a permanent occupation resulting in a transfer of title to the government. However, under U.S. Supreme Court case law, federal case law and Nevada case law, a taking may occur where government actions substantially interfere with an owners right of use, possession and transfer, and where there is a peculiar injury born by plaintiffs not born by the public at large or where the damage to property is unreasonable. In Nevada, when a portion of property is severed by a taking, the owner is entitled to compensation for the portion taken, and damages for the diminution in value

caused to the remaining parcel by the severance. *Kingsbury Gen. Improvement Dist. No. 2*, 84 Nev. 88, 436 P.2d 813 (1968); *NRS 37.110. 1*.[2] Where five trees are destroyed by governmental action, the owner may be compensated for the value of the trees, and damages for the diminution in value to the remaining parcel caused by the destruction of the trees. Where fire destroys a home, outbuildings, trees and landscaping, the owner may recover compensation for the taking of all property destroyed, and may also receive damages for diminution in value to his remaining parcel that was not severed. Thus, in Nevada, while the language of the takings clause to the state constitution does not mention "damages" like California's clause, property damages may be sought in addition to compensation for property taken.

c. Physical Invasion.

The Takings Clause of the U.S. Constitution provides that private property shall "not be taken for public use, without just compensation." *U.S. Const. amend. V.* Similarly, the Nevada Constitution provides that "[p]rivate property shall not be taken for public use with just compensation having first been made." *Nev. Const. art. 1, § 8(6)*.

In its Motion to Dismiss ("MTD") the defendants argue that there are two ways in which State of Nevada may "take" property: (1) by a "direct government appropriation *or physical invasion of private property*"; or (2) by enacting a regulation that is "so onerous that its effect is tantamount

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[2] The court, jury, commissioners or master must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a large parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

4. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subsection 2 of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken.

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad between such railroad and other adjoining lands of the defendant; and the costs of cattle guards where fences may cross the line of such railroads.

As far as practicable, compensation must be assessed for each source of damages separately.

NRS 38.110.

to a direct appropriation or ouster." *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 388 P.3d 970, 974 (Nev. 2017) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)). *MTD: p. 5 of 20*.

Defendants argue that fire damage to a home outside the burn perimeter of a controlled fire fails to satisfy any of these definitions. The defendants argue that the plaintiffs' property was not subject to any regulation, there was no interference with the right to access plaintiffs' property and there was no physical invasion of plaintiffs' property by the State.

Defendants argue there was no physical invasion because the State did not grant itself possession or reserve part of the plaintiffs' property for itself (citing to *McCarran International Airport v. Sisolak*, 137 P.3d 1110, 1122 (Nev., 2006)). *MTD: p. 6 of 20.* In this argument the defendants mistakenly rely on the per se regulatory taking standards to assert that no non-regulatory physical invasion of property is alleged in plaintiffs' complaint.

In *McCarran International Airport* the court recognized that there are two categories of regulatory action that will be deemed *per se* takings for Fifth Amendment purposes: (1) when a government regulation requires an owner to suffer a permanent physical invasion of his property; (2) when a government regulation completely deprives an owner of all economic benefit of property. *Id*. at 1122. In determining whether the property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space. *Id*.

The defendants argue that there was no "taking" by physical invasion of property in this case because there was no regulation granting the State physical possession of the plaintiffs' property. The defendants' argument demonstrates a failure to grasp the legal principles intrinsic to "takings" as it asserts that plaintiffs' property was not subject to any regulation at all, while arguing that there was no physical invasion under the regulatory *per se* takings test.

The defendants suggestion that physical invasion requires a regulatory appropriation implies that no taking may occur absent regulation. The United States Supreme Court has held that a government physically occupies an owner's property where it *deprives the owner of the rights to possess the property*, to exclude others from the property, *to the use of the property*, and to transfer the property. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 436 (1982).

As discussed above, the destruction and damages to Plaintiffs' property interests caused by fire amounted to a physical invasion which substantially interfered with Plaintiffs' property interests, and there was accordingly a per se taking.

"Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation" *YMCA v. United States*, 395 U. S. 85, 92 (1969).

A physical invasion of property can constitute a taking of property even if not a permanent physical occupation. In *United States v. Causby*, 328 U.S. 256 (1946), the frequent regular

flights of the government's low flying aircraft over the property owner's land destroyed the property's use as a chicken farm and was a taking within the meaning of the Fifth Amendment.

The United States Supreme Court has also utilized the physical invasion standard to determine whether certain acts constitute a taking. In *Pumpelly v. Green Bay & Mississippi Canal Co*., 13 Wall. 166, 80 U.S. 166, 20 L.Ed. 557 (1872), defendant, pursuant to statutory authority, constructed a dam which caused water to overflow and remain continuously on plaintiff's land. The court held that this was a taking within the meaning of the Wisconsin Constitution. The court stated:

> * * * (W)here real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further. (80 U.S. at 181, 20 L.Ed. at 561)

It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. *United States v. Cress No 84 United States v. Achilles Kelly No 718*, 243 U.S. 316, 328 (1917). While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. *Id*.

These cases suggest that the physical occupation by fire in this case amounted to a per se taking. The defendants arguments that there was no taking in this case because there was no physical invasion, regulatory taking or appropriation of plaintiffs' right of access is misguided.

d. <u>A Taking is Determined by the Character of the Government's Interference</u>

Given "the nearly infinite variety of ways in which government actions or regulations can affect property interests," no "magic formula" exists in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. ——, ——, 133 S.Ct. 511, 518, 184 L.Ed.2d 417 (2012).

"[A] direct government appropriation or physical invasion of private property," for example, is a taking, as is a government regulation that authorizes a permanent physical invasion of private property or "completely deprive[s] an owner of all economically beneficial use of her property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537–38, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (internal quotation omitted). A taking also occurs when a government entity requires an unlawful exaction in exchange for approval of a land-use permit. *State v. Eighth Judicial Dist. Court of State*, 351 P.3d 736, 131 Nev. Adv. Op. 41 (Nev., 2015). Nearly all other takings claims "turn on situation-specific factual inquiries." *Id. Citing Arkansas Game* at 518.

The U.S. Court of Appeals for the Federal Circuit, for example, has recognized that even where no government regulation is at issue, a taking occurs if the government has "taken steps that directly and substantially interfere[ ] with [an] owner's property rights to the extent of rendering

the property unusable or valueless to the owner." *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed.Cir.2013).

The U.S. Supreme Court has utilized a balancing test to determine whether governmental action amounts to a substantial interference and thus a taking of private property under the Fifth Amendment for more than 100 years. In creating the balancing test the court explained: "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial that determines whether it is a taking." *United States v. Cress*, 243 U.S. 316, 328 (1917).

The defendants argue in their MTD that because the fire was temporary, it was not a permanent invasion and interference with plaintiffs' property. *Citing Asap Storage, Inc. v. City of Sparks,* 173 P.3d 734 (Nev., 2007). *MTD" p. 8, ln 6-11.* Defendants' reliance on *Asap Storage, Inc*. for the position that a taking requires a permanent, continuous, or inevitably recurring interference with property rather than a one-time occurrence is imprudent. The plaintiff in *Asap Storage*, *Inc*. alleged a taking based on an interference with his right to access his property during a flood. In rejecting the plaintiffs claim Nevada's Supreme Court recognized that the plaintiff was only barred from entering his property for 48 hours during the flood, and the short interference weighed against a "substantial interference" with his right to access property. In reaching its decision, the court relied on a Utah case, *Rocky Mountain Thrift v. Salt Lake City*, where the Utah Supreme Court held that a substantial interference did not exist when the government barred vehicles from entering a street abutting several businesses for two weeks after a flood. In reaching its decision the Utah Supreme Court focused on the fact that the business owners alleged a taking based on a "temporary, one-time occurrence" rather than a "permanent, continuous, or inevitably recurring interference with property rights [that is] usually associated with and requisite in a compensable taking."

Once again, defendants initially acknowledge that the allegations in the complaint do not implicate a "right of access" taking claim, yet, proceed to argue that there was no permanent, continuous or reoccurring interference with property as required in a right to access case. Where fire destroys property so that it can no longer be possessed and used the fire has resulted in a permanent occupation as well as a substantial interference with the property. Once property is destroyed by fire, the fire can no longer invade the destroyed property, and it is impossible for the invasion by fire to be continuous or reoccurring.

In *Beverly v. United States*, 902 F.2d 32 (6th Cir. 1990) the plaintiffs owned farm land that was damaged by "unauthorized helicopter training exercises". Despite the unauthorized nature of the conduct, and despite no substantial interference with plaintiffs' property, the court found the plaintiffs alleged a viable 5th Amendment takings claim.

The following cases from California[3] illustrate additional examples of takings claims (alleged in inverse condemnation actions) were the government did not physically invade the property in the manner the defendants in this case allege is necessary for a taking to occur:

Land Stability:

Public entities are usually liable in inverse condemnation for damage caused by disturbance of land stability. *Holtz v. Superior Court*, 3 C3d 296 (1970). Land stability cases arise when a public entity moves soil or rock or its activities cause the removal of the land's support. Examples are displacement and deposit of fill matter for highway construction, excavation for a public project and blasting that disturbs he soil and causes landslides.

A public entity is liable for damage to real property caused by a landslide when the faulty design and construction of street improvements accepted and approved by the defendant-city was a concurrent substantial cause of the earth movement. *Blau v. City of Los Angeles* 32 CA3d 77 (1973).

When a city's groundwater pumping program caused substidence resulting in structural damage to plaintiff's property, the court found the city liable and rejected the city's claim that it was responding to an alleged emergency created by a drought and thus had immunity under its police powers. *Los Osos Valley Assoc. v. City of San Luis Obispo*, 30 CA4th 1670 (1994).

Flooding:

A public body may be liable for flood damage caused to private property caused by a steepening road grade (*Newman v. City of* Alhambra, 179 C 42 (1918) or paving a road, resulting in less absortion and more runoff of water (*Andrew Jergens Co. v. City of Los Angeles*, 103 CA2d 643 (1941).

Negligent omissions may create inverse condemnation liability. *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 CA3d 683, 696.

Airline Interference

City of Atlanta v. Starke, Ga. Ct. App., 1989 -- Owners of residential property next to city-owned airport sued the city for trespass, nuisance, and inverse condemnation. Held: property owners could prevail on inverse condemnation even though the value of their properties had increased due to overall increases in property value in plaintiffs' neighborhood. (384 S.E.2d 419, 192 Ga.App. 267).

As the cases above illustrate, the government can substantially interfere with a private land owner's use and enjoyment of his property without physically invading the property. The reviewing court considers the duration and frequency of the actions complained of when balancing whether a substantial interference is present, but it does not reach its decisions based

[3] California has numerous published opinions addressing takings in inverse condemnation actions. Nevada's Supreme Court has not addressed these issues very often and there is limited case law.

upon duration and frequency alone as suggested by Defendants. The critical factor is whether the government has deprived the property owner of his use of property in light of the underlying facts. *See YMCA v. United States*, 395 U.S. 85, 92 (1969).

Defendants argue that Plaintiffs conflate tort law with constitutional takings, and allege torts rather than takings in their complaint. In their MTD Defendants allege: "a tort is what Plaintiffs' are alleging in their Amended Complaint when they assert a taking claiming that Defendants' actions were reckless, willful and/or negligent, and that such acts and omissions were the direct cause of the damage to Plaintiffs' real and personal property interests." *MTD: p. 7 of 20*. Relying on *Sloat v. Turner*, *563 P.2d 86, 89 (Nev., 1977)*, Defendants assert, "*Sloat's* holding makes the unmistakably clear separation of tort law and the law of eminent domain that Plaintiffs ignore in their Amended Complaint." *MTD: p. 7 of 20*. The defendants' reliance on, and interpretation of *Sloat* conforms to a series of injudicious interpretations and misapplications of case law to support its arguments and positions.

In *Sloat* the court held that NRS 37.110(3) was incorrectly applied by the district court where there was no "taking" implicated by the facts. However, in *Sloat*, the court recognized that NRS 37.110(3) applied when State action inflicts actual physical damage to property which substantially impairs or extinguishes a right in the property which is directly connected to the ownership thereof. *Sloat*, at 89-90. *Hence, the Sloat court defined a taking as a* ***substantial impairment or extinguishment of a right connected to the ownership of property***. The *Sloat* court further concluded that the plaintiffs had no right of access to the property, prescriptive easement or otherwise at the time the property was condemned, and absent interference with an existing right or damage to the property, the state could not be charged with liability pursuant to NRS 37.110(3). *Id*. at 90. Had the plaintiff in *Sloat* actually held an existing property right that was substantially interfered with or extinguished by the State he could have sought damages under NRS 37.110(3) in connection with a takings claim.

e. <u>Nuisance v. Taking</u>

In *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), the court held that when government (or a private party acting pursuant to explicit government authority) uses land in such a way as to create a nuisance, the action rises to the level of a taking when the burden placed on the plaintiff is "peculiar and substantial." *Id*. at 557.

The first time that the Supreme Court addressed the issue of a government created or authorized nuisance was in 1883, in the case of *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883). The plaintiff in that case sued its neighbor for nuisance because the latter operated a locomotive repair facility that spewed smoke, cinders, and dust into the air, while producing loud noises and offensive smells. *Id*. at 321. The neighbor argued that it was immune from liability because it was authorized by Congress to operate a railroad (as well as related facilities such as locomotive repair shops). *Id*. at 321, 330. The Court rejected the railroad's immunity argument by noting that the Congressional authority was accompanied by an "implied qualification" that the operation of the railroad would not unreasonably interfere with the property rights of others. *Id*. at 331. The first was that there could be no liability for

consequential harms that result from the reasonable and expected use of a duly-authorized business such as a railroad.38 The Court deemed such harms as damnum absque injuria, that is, a loss without legal injury.39 There will always be, the Court reasoned, some inconveniences that result from living in a modern society with technology such as railroads.40 In order for society to benefit fully from the advances offered by that technology, the inconveniences cannot be compensable. *Id*.

The Court also made a second point by distinguishing between injuries that result from the operation of the railroad that are shared by the community in general and a claim by a property owner of a "special inconvenience and discomfort not experienced by the public at large. *Id*. at 332. The Court, in effect, distinguished between a public and a private nuisance. The fundamental distinction between the two is that the former affects the public generally while the latter impacts property owners in their use and enjoyment of land. Although Congress could authorize (and immunize) acts which would otherwise constitute a public nuisance, it could not do the same with acts that created a private nuisance. *Id*. at 332.

The distinction between the harm arising from a public nuisance and that arising from a private nuisance goes to the issue of burden distribution. If the government (or, as in Fifth Baptist Church, a private party acting pursuant to explicit governmental authority) imposes harms as a result of a socially useful land use (such as the operation of a railroad) on large segments of the community, no liability will attach. The Court in Fifth Baptist Church concluded that the harms that resulted from the reasonable and normal operation of the railroad were not compensable because they were outweighed by the social utility of the railroad. *Id*. at 331. Congress has the authority to immunize acts that would otherwise constitute a nuisance as long as the harms are distributed widely throughout the community. *Id*. at 332. Congress, however, lacks the power to impose a significant (vertical) burden when that burden is not sufficiently distributed horizontally, that is, when it places the burden on only a handful of owners. *Id*.

Although the Court in Fifth Baptist Church was clearly cognizant of the plaintiff's property rights, it did not explicitly refer to the Takings Clause. The Court did so, however, thirty years later in *Richards v. Washington Terminal Co*., 233 U.S. 546, 553 (1914). Richards also involved a nuisance lawsuit brought by a property owner against a railroad whose operation was authorized by Congress and to which Congress had granted the power of eminent domain. *Id*. 551-52. The plaintiff's property was near railroad tracks operated by the defendant; it was also next to the entrance of a railroad tunnel built and used by the defendant. *Id*. at 548-49.

As in Fifth Baptist Church, the Court in Richards distinguished between consequential damages that are the result of the reasonable and normal operation of the railroad, which are widely shared by the community, and those burdens that are endured by only a handful of property owners. *Id*. 553-54. As a result, the fact that the locomotives which ran next to the plaintiff's property emitted noise, gases, dust, dirt, and smoke did not impose liability on the defendant. If railroads are to be held liable for damages that result from the reasonable and normal operation of their business, the Court noted, "the practical result would be to bring the operation of railroads to a standstill." *Id*. at 555.

The gases and smoke that wafted onto the plaintiff's property as a result of the operation of the tunnel's ventilation system, however, were a different matter altogether because they led to a "special and peculiar damage to the plaintiff." *Id*. at 557. While the harm incurred by the plaintiff as a result of his close proximity to the tracks, in other words, was shared by the many owners who also owned property adjacent to the path of the railroad, the harm associated with the operation of the tunnel was special and peculiar to the plaintiff. *Id*. **The Court concluded that "the acts of Congress in the light of the Fifth Amendment, [could not be construed to] authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him**." *Id*.

By reason of the location of the plaintiff's property in Richards, namely, near the tunnel's entrance, he incurred a type of harm that was peculiar (or special) when compared to other property owners in the area. *Id*. at 557. The burden imposed by the railroad's operation of the tunnel, in other words, was not sufficiently distributed among property owners. *Id*. In addition, the severity of the burden (as represented by the concentration of gases and smoke emitted by the tunnel's ventilation system) was substantial enough so as to constitute a taking even if the Congressional authorization had immunized the railroad from nuisance liability based on the tunnel-related harm. *Id*.

"There is no analytical inconsistency between tort and takings theories. Both a tort and a taking can be made out on the same set of operative facts." "See *Clark v. United States*, 19 Cl. Ct. 220, 222-23 (1990). *See also Palm v. United States*, 835 F. Supp. 512, 516 (N.D. Cal. 1993) ("The cluster of facts that constitute a claim for an unconstitutional taking and those that indicate the torts of nuisance or trespass are similar in many respects. Both involve situations of unlawful entry onto an owner's property or infringement of an owner's right to use and enjoyment of her property.").

Nevada's Supreme Court has recognized that plaintiffs may be compensated under both tort and takings theories in the same action. In *Clark County v. Powers*, 611 P.2d 1072, 96 Nev. 497 (Nev., 1980), the plaintiffs acquired various properties in Clark County, and developed those lands for residential use. Commencing in 1967, the development of the lands west of respondents' parcels resulted in the alteration, diversion, channeling, and acceleration of rain, nuisance, underground, and flood waters onto respondents' properties. The County participated actively in the development of these lands, both by its own planning, design, engineering, and construction activities and by its adoption of the similar activities of various private developers as part of the County's master plan for the drainage and flood control of the area. The cumulative effect of these activities was to increase and accelerate the flow of waters through the ephemeral stream, to divert waters normally draining into the Flamingo Wash into the ephemeral stream, and to alter and divert the natural course of the ephemeral stream; the waters as increased, accelerated, and diverted cascaded over the entire length of the plaintiffs parcel. By 1975, and continuing through the early part of 1976, the plaintiffs parcel was deluged by a constant flow of water. The collecting waters interfered seriously with plaintiffs' use and enjoyment of their land, and became a breeding ground for stench, mosquitoes, and disease. Plaintiffs filed this suit in the district court, based upon theories of inverse condemnation, nuisance, and trespass, seeking

to be made whole for these injuries. The court made an appropriate award of damages based on the nuisance and trespass claims. In addition, the court found that the County had taken the Powers parcel in its entirety: the property no longer had a practical use other than as a flood channel. The court awarded just compensation. **The court awarded both trespass damages and just compensation against Clark County**. Nevada's Supreme Court affirmed. *County of Clark v. Powers*, 611 P.2d 1072, 1074–75, 1077 (Nev. 1980).

Unlike in Nevada, in some states a landowner can sue for trespass or for inverse condemnation but not for both. These states include, Idaho (*Boise Valley Constr. Co. v. Kroeger*, 105 P. 1070, 1073–74 (Idaho 1909)), Nebraska (*Dishman v. Neb. Pub. Power Dist*., 482 N.W.2d 580, 582 (Neb. 1992) (citing *Slusarski v. County of Pl*atte, 416 N.W.2d 213 (Neb. 1987)); *Parriott v. Drainage Dist. No. 6 of Peru*, 410 N.W.2d 97, 100 (Neb. 1987) (citing *City of Omaha v. Matthews*, 248 N.W.2d 761 (Neb. 1977)), and Tennessee (*Meighan v. U.S. Sprint Commc'ns Co*., 924 S.W.2d 632, 640–41 (Tenn. 1996); *Betty v. Metro. Gov't of Nashville & Davidson County*, 835 S.W.2d 1, 8 (Tenn. Ct. App. 1992). However, these states differ in their reasons for treating trespass and inverse condemnation as alternative actions. In Tennessee, a statute expressly provides that they are alternative. Nebraska has a similar statute, but its courts had treated the actions as being alternative even before the statute's enactment. The courts' rationale was to give landowners the option of avoiding the burden of pursuing an inverse condemnation action. The Idaho courts rely on the usual rule concerning an injured party's right to choose its remedy. For example, in a case involving a railroad that built its line on the plaintiff's land before condemning it, the Idaho Supreme Court analogized the case to an action for conversion of personal property.

While actual physical invasions frequently are present in takings cases, some courts nonetheless have recognized that a taking does not necessarily depend on whether a government action physically invades a plaintiff's property. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 395 (1922) (governmental regulation went so far as to constitute a taking).

The Oregon Supreme Court became one of the first modern courts to recognize the taking by nuisance theory, in Tlwrnburg v. Port of Portland, 376 P.2d 100 (Or. 1962). In Thornburg, the plaintiff sought compensation for the noise disturbance that occurred when jet aircraft landed at a nearby airport. *Id.* It was impossible for the plaintiff to recover under an airspace easement theory because many of the aircraft passed adjacent to and not directly over the plaintiff's property. *Id.* Nonetheless, the court held that the nuisance resulting from the noise of the aircraft could constitute a taking. The court suggested that it is illogical to claim the government takes an easement over private property when aircraft fly directly over the land, but does not take an easement when aircraft fly a few feet to either side of the property owner's airspace. According to the court, the infringement on the plaintiff's use and enjoyment of its land is the same in either case. Thus, a taking may occur whenever a governmental entity acts in a way that substantially deprives landowners of the useful possession of their property, either by repeated trespass or by repeated non-trespassory invasions that amount to a nuisance.

In *Martin v. Port of Seattle*, 391 P.2d 540 (Wash. 1964) for example, the plaintiffs claimed a decline in property value due to the Port of Seattle's damaging and taking of their property

through nearby low-altitude jet aircraft flights. *Id*. at 540. The Washington Supreme Court held that there could be a taking and damaging of property, within the meaning of a state constitutional provision, by airplane operations and flights regardless of whether the planes flew directly over the plaintiff's land. The Martin court suggested that it is not the location of the undesirable activity, but rather the interference with the landowners' enjoyment of their land, that determines whether a court should award them compensation. Moreover, the court could not accept the premise that recovery for interference with their land should be based upon something so trivial as whether part of an airplane's wing passes through some fraction of an inch of the airspace directly above their property. The landowners in Martin, according to the court, were not seeking recovery for a technical trespass but rather for a combination of circumstances, caused by the nearby flights that interfered with the use and enjoyment of their land.

These cases magnify the shortcoming in the defendants' argument that there must be an ongoing physical invasion for a taking to occur.

f. Unintended Fire Damage as Taking

An accident relating to the operation of an electric transmission line can give rise to inverse condemnation liability. In *Pacific Bell Tel. Co v. Southern Cal. Electric Co.* 208 CA4th 1400, 1404, the court held an electric utility could be liable for inverse condemnation when a bird strike to an energized power line caused a ground fault that sent electricity through a telephone company's underground line, burning several of them.

In *Marshall v. Department of Water & Power* 219 CA3d 1124 (1990) property owners and insurers recovered in an inverse condemnation action for fire losses caused by downed power lines.

Aetna Life & Casualty Co. v. City of Los Angeles, 216 Cal.Rptr. 831, 170 Cal.App.3d 865 (Cal. App. 2 Dist., 1985): Inverse action for damages resulting from fire caused by sparks from electrical power transmission lines. In this case plaintiffs pleaded causes of action for negligent maintenance of a dangerous condition of public property and for inverse condemnation. The trial was bifurcated to permit a determination of liability before introduction of evidence of damages. Pursuant to agreement of the parties the trial court sat as trier of fact on the inverse condemnation issue, while a jury heard the same evidence to determine the question of negligence. After five weeks of trial the trial court rendered judgment for plaintiffs on the inverse condemnation issue. The jury returned a verdict in favor of defendants on the negligence issue.

Trinco Inv. Co. v. United States, 722 F.3d 1375 (Fed. Cir., 2013): The United States Court of Federal Claims found that plaintiffs failed to plead facts sufficient to support a takings claim against the Government following the destruction of 1,782 acres of plaintiffs' merchantable timber as a result of a United States Forest Service fire management effort. The appellate court reversed and remanded finding that plaintiffs plead sufficient facts to state a claim for relief as a takings claim that is plausible on its face.

Defendants argue that other courts have dismissed similar inverse condemnation theories based on damages from an escaped controlled burn. The defendants cite to the Colorado case *Am.*

Family Mutual Ins. Co. v. Am. Nat'l Prop. and Cas., 370 P.3d 319 (Colo. Ct. App. 2015), for the position that damage resulting from an escaped controlled burn cannot be the basis of an inverse condemnation claim. Defendants allege that the Colorado Court of Appeals dismissed the plaintiffs' inverse condemnation claims as there was no taking, because the damage to the plaintiffs' property was not part of the controlled burn plan and was the opposite of what the Colorado Forest Service had intended.

Defendant's analysis of *Family Mutual Ins*. is misguided. The court did not find that no "taking" occurred. Rather the court recognized that the plaintiffs had conflated the difference between the "taking" and "public use" elements of a Colorado inverse condemnation claim. Under Colorado law, a "taking" may be established where the governmental act has the natural consequences of taking the property. However, even where the taking element is shown, the plaintiff must establish that the taking was for a public purpose.

> An inverse condemnation claim under the Colorado Constitution requires that the taking itself be accomplished for a public purpose. See, e.g., *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 921 (Colo.1993) (inverse condemnation claim requires that the government or public entity have intended to use the condemned property for a proper public purpose); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 174 (Colo.App.2002) ("In reviewing the condemning authority's finding that a proposed taking is for public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit."); *State Dep't of Highways v. Denver & Rio Grande W. R.R. Co*., 757 P.2d 181, 183 (Colo.App.1988) ("[T]he purpose of the condemnation must be for the public benefit.").
>
> All of the inverse condemnation claims in this case were based on the Takings Clause of the Colorado Constitution. Colo. Const. art. II, § 15. No claims were pleaded under the Takings Clause of the United States Constitution. U.S. Const. amend. V. As all parties concede, one of the elements of a claim for inverse condemnation under Colorado law is that there must be a public purpose for the taking. *Kobobel v. State, Dep't of Natural Res*., 249 P.3d 1127, 1133 (Colo.2011). **We express no opinion whether the "public use" element of the Takings Clause of the Fifth Amendment of the United States Constitution as applied by the United States Supreme Court is identical to the "public purpose" requirements under Colorado law**. See *Kelo v. City of New London,* 545 U.S. 469, 480, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005); see also *Steamboat Lake Water & Sanitation Dist. v. Halvorson*, 252 P.3d 497, 504 (Colo.App.2011) (discussing the Kelo amendment found in section 38–1–101(1)(b)(I), C.R.S.2014). **Similarly, we express no opinion whether, under the circumstances presented in this case, the result of a claim under the Fifth Amendment's Takings Clause would have been the same as the result prescribed by Colorado law**. See *Hansen v. United States*, 65 Fed.Cl. 76 (2005).

In *Am. Family Mut. Ins.*, the court held that there were no allegations in the complaint that the government intended to use the condemned property for a public purpose. As such, the "public use" element was not sufficient plead in the Complaint and the inverse condemnation action was dismissed.

Defendants argue that the court dismissed the inverse condemnation claim as there was no taking because the plaintiffs' property was not part of the burn plan. The court recognized that because the plaintiffs' property was not in the burn plan it could not be inferred that the government intended to condemn the plaintiffs' property for a public use. The court dismissed the complaint on the "public use" element and never even addressed whether there was a cognizable claim for a "taking."

In Nevada, there is no similar constitutional requirement that the state intend to condemn the damaged property for a public purpose. Most state courts addressing this issue have held that inverse condemnation damages must "grow out of" a public use rather than being the result of a negligent or wrongful governmental act. *See Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990).

In *Brewer v. Alaska,* 341 P.3d 1107 (2014) the Alaska Supreme Court held that backfires set by State in land designated as a "Full Management Option" fire protection area which destroyed plaintiffs property located within the FMO land amounted to a taking for a public use. While the state officials did not intend to condemn the plaintiffs' property, when the State conducted the burnouts on the property it was exercising an essential aspect of its police power. This is sufficient to show a public use, whether the burnouts were intended to benefit primarily other state lands, as the landowners allege, or primarily the landowners, as the state alleges.

Returning to *Fritz*, when the state adopted the plat map it did not intend to cause flooding that substantially damaged properties upstream. Unlike in Colorado, the fact that the state did not intend to condemn the plaintiffs' property when it adopted the plat map did not prevent the taking from being a "public use" under Nevada's inverse condemnation law. The defendant's reliance on *Am. Family Mut. Ins.*, is misplaced.

The defendants also rely on *Thune v. United States*, 41 Fed. Cl. 49 (1998). In this case the plaintiffs' hunting camp was damaged when a controlled burn escaped after high winds. The plaintiffs alleged that because the government was negligent in maintaining and controlling the fire his loss constituted a taking. The court held that the destruction of the hunting camp was not a direct, natural and probable consequence of the project functioning as designed. Instead the damage resulted from intervening government impropriety or unanticipated natural events. As such, no intent to do an act, the natural consequences of which was to take plaintiffs property could be established.

The plaintiff in *Thune* argued that the wind changes and possibility the fire could escape was foreseeable, however, the district court had previously found that the USFS conducted daily onsite measurements of wind speed and the day the fire was ignited the forecast showed favorable wind conditions. *In this case, the wind changes and possibility the fire could escape were foreseeable*. Also, the government propriety alleged in this case preceded the design of the

burn plan, and the government's negligence was not an intervening event. Furthermore, it is arguable that Nevada law does not require any intent to do an act, the natural consequences of which would be to condemn property.

g. Public Use

Defendants acknowledge that as articulated in *Fritz*, an essential element of an inverse condemnation claim is that the plaintiff proves the state actor damaged private property for a public use. *MTD: p.14 of 20*. The defendants point out that the *Fritz* court cited to the Washington Supreme Court's decision, *Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005) to establish the elements of inverse condemnation. Before addressing the defendant's argument, it should be noted that, as mentioned above, in *Dickgieser* Washington's Supreme Court recognized that intent is not an element of a takings claim, and where a landowner has demonstrated cause, the question of whether or not the government contemplated the resulting damage when it acted is immaterial. *Dickgieser* at 534-35; 541-42. By relying on *Dickgieser* Nevada's Supreme Court suggested that the government's intent to condemn property is immaterial, all required is proximate cause and unreasonable damages.

The defendants rely on *Dickgieser* for the position that a taking in the State of Washington only occurs if the state's interference with private property is a "necessary incident to the public use of the state land. *Fitzpatrick v. Okanogan Cty.*, 283 P.3d 1129, 1137. The *Fitzpatrick* court explained that "necessary incident" means the same thing as "a consequence" of the government action at issue. *Id*.

There is no reason to believe that the Nevada Supreme Court would adopt the requirement in Washington pertaining to the "public use" element of an inverse condemnation claim. Yet, even if it did, the allegations in the Amended Complaint suggest that the interference with Plaintiffs' property was a consequence of the complained of action by the plaintiffs.

The defendants return to the Colorado case *Am. Family Mut. Ins.* to argue that the Colorado Supreme Court found the "public use" element lacking in nearly identical circumstances to this case. *MTD: p.15 of 20*. However, as explained above, the defendants overlooked the fact that Colorado's Supreme Court has a unique requirement that plaintiffs in inverse condemnation actions must establish that the state intended to condemn the damaged property for public use. The defendant clumsily lumps this case together with the "public use" requirements articulated by the Washington Supreme Court in *Dickgieser*. The rules in Colorado and Washington cannot be more dissimilar. In Washington, there is no requirement that a plaintiff in an inverse condemnation establish the intent of the government (amounting to somewhat of a strict liability rule) while in Colorado it must be shown that the state intended to condemn the property for a public use.

The differences in state pleading requirements demonstrate that each state, as well as the federal government differ with respect to the elements of "taking" "public use" and the necessary intent intrinsic to each. No existing inverse condemnation case in Nevada has required plaintiffs to prove that the government intended the consequences of its actions, which is essentially a

specific intent requirement. Likewise, no Nevada cases suggest that actions amounting to a taking must be a "necessary incident" to the use of state land for a public purpose.

III. Statutory Immunity

NRS 527.126(4) provides:

> The State of Nevada, an agency of this state or any political subdivision or local government of this state, or any officer or employee thereof, is not liable for any damage or injury to property or persons, including death, which is caused by a controlled fire that is authorized pursuant to this section[4], ***unless the fire was conducted in a grossly negligent manner***.

Both Division of Forestry and University of Nevada defendants claim that they immune from liability under the statute. The DOF defendants allege that they are immune from the strict liability claim because under the statute they are liable for only damages caused by controlled fires conducted in a grossly negligent manner. The UNR defendants assert that they are immune from all of Plaintiffs' claims under this statute. The UNR defendants argue that because Plaintiffs failed to allege facts supporting a viable claim for gross negligence they are immune from all alleged liability in the Amended Complaint.

NRS 41.038 states:

> The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 *and any statute which expressly provides for governmental immunity*, …

This statute does not immunize agents of the state or its political subdivisions from liability in an inverse condemnation action. The right to just compensation for private property taken for the public use is guaranteed by both the United States and the Nevada Constitutions. *U.S.Const. amend. V*; *Nev.Const. art. 1, § 8*.

The United Sates Supreme Court has recognized that just compensation trumps sovereign immunity. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, *California*, 482 U.S. 304 (1987). The sovereign immunity defenses such as discretionary immunity and failure to inspect immunity are not available to the governmental entity because the right to just compensation for private property taken for a public use cannot be abridged or

[4] A legal question exists as to whether the fire was in fact authorized under this section given likely deficiencies with the formation, adoption and execution of the written burn plan (attached to UNR Defendants' MTD) which raises questions to be addressed following discovery. – This issue is a double edge sword. *If not authorized there may no right to bring an inverse condemnation action*. However, as select cases above demonstrate, in some cases even unauthorized acts under the color of law and police powers may give rise to takings claims.

impaired by statute. *Alper v. Clark County,* 571 P.2d 810 (Nev., 1977) *cert. denied*, 436 U.S. 905 (1978).

Neither NRS 527.126(4), NRS 41.038, NRS 41.032 (discretionary immunity) or any other statutory immunity is applicable to a takings claim brought as an inverse condemnation action.

In addition, the language of NR S41.038 itself states the State of Nevada consents to have its liability determined according to the same legal rules applied to civil actions against natural persons and corporations. An inverse takings claim cannot be filed against natural persons and corporations, but only against the state and its agents acting in official capacities.

The UNR defendants argument that the Amended Complaint fails to allege sufficient facts supporting a claim for gross negligence is boilerplate and not worthy of additional ink (or 1s and 0s).

The UNR defendants argue that they are immune from all causes of action under the discretionary immunity statute. However, as mentioned above, inherent in the concept of a constitutional right is that its protection does not depend on the political acceptance of the right at stake. Thus, political accountability is an unacceptable method for securing constitutional rights; the Constitution protects even the unpopular or politically inexpedient. Accordingly, discretionary and other categorical immunities are inappropriate for constitutional torts; a law of constitutional torts must place pressure on the government to conform all of its conduct to the Constitution. *See e.g.*, *Wilson v. Ramacher*, 352 N.W.2d 389, 395 (Minn., 1984) (**The defense of discretionary immunity does not, of course, apply to inverse condemnation**.)

IV. Trespass & Nuisance

Defendants argue in their MTD that Plaintiff's trespass claims must fail because they do not and cannot allege facts supporting the element of intent. According to Defendants, intent must be demonstrated by a conscious desire to cause the consequences of one's acts, and a belief that the consequences are substantially certain to occur.

In the comment on Clause (a) of § 158 at 278 it is stated in part:

i. Causing entry of a thing. The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing, either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land ... In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.

Addressing the definition, scope and meaning of "intent", section 8A of the Restatement (Second) of Torts says:

The word "intent" is used ... to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

And we find in comment b at 15:

Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

In this case, the Defendants failure to extinguish and control the fire after deciding to terminate the controlled burn was substantially certain to result in a wildfire that would most likely spread to and damage Plaintiffs' property. Accordingly, there was the requisite intent in this case to support a trespass claim.

In *Elton v. Anheuser-Busch Beverage Group, Inc*., 58 Cal.Rptr.2d 303, 50 Cal.App.4th 1301 (Cal.App. 4 Dist., 1996), the court held:

> "An entry may also be accomplished by setting in motion an agency which, when put in operation, extends its energy to the plaintiff's premises to its material injury." (75 Am.Jur.2d, Trespass, § 11, p. 16, fn. omitted.) [50 Cal.App.4th 1307] Thus, intangible intrusions such as noise or vibrations may constitute a trespass if they cause actual physical damage as opposed to merely a diminution in market value (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937, 55 Cal.Rptr.2d 724, 920 P.2d 669). Even damaging electronic signals sent by a computer "hacker" can constitute a trespass to personalty. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566, fn. 6, 54 Cal.Rptr.2d 468.) **While no California case has previously decided that a fire can constitute a trespassory invasion, other states have**. The Supreme Court of Washington has held that an action for trespass lies to recover damages caused when a spark was negligently cast from the defendant's property onto the plaintiff's property, igniting a fire. (*Zimmer v. Stephenson* (1965) 66 Wash.2d 477, 403 P.2d 343, 345.) Alleging facts even closer to those at issue here, the plaintiffs in *Martin v. Union Pacific Railroad Company* (1970) 256 Or. 563 [474 P.2d 739] claimed that the defendant railroad negligently caused a fire to occur on its right of way and negligently permitted the fire to escape and spread onto the plaintiffs' land. (474 P.2d at pp. 739-740.) The Oregon Supreme Court held that "[t]he spread of the fire from defendants' land onto plaintiffs' land was an intrusion of a character sufficient to constitute a trespass." (Id., p. 740; accord, Koos v. Roth (1982) 293 Or.670, 652 P.2d 1255, 1267-1268 [spread of fire from defendant's field to plaintiff's property was a trespass].) We agree. It would be difficult to justify a distinction between damage caused by the thermal energy of a fire and that caused by the kinetic energy of vibrations. Certainly, an invasion by fire presents a potential for damage and destruction which is at least as great as that presented by vibrations. When negligently inflicted with resulting actual damage, either may constitute a trespass. Since it is undisputed that the fire in this instance caused actual damage to the plaintiffs' property, and since

> the jury expressly found that those damages were caused by the defendant's negligence, the invasion of the fire onto the plaintiffs' property constituted a trespass. The trial court erred by finding to the contrary."

Likewise, the Supreme Court of Oregon held that a trespass or a nuisance may arise out of intentional, negligent, reckless or ultrahazardous conduct; where in *Martin v. Union Pac. R. Co*., 474 P.2d 739, 256 Or. 563 (Or., 1970), it held: "In Furrer v. Talent Irrigation Dist., 90 Or.Adv.Sh. 399, 466 P.2d 605 (1970), we explained that negligence and trespass are not comparable concepts: 'The briefs treat negligence as if it were a coordinate with trespass and nuisance. As explained in the Restatement of Torts, Introduction to Chapter 40 at 221 (1939), negligence describes the defendant's conduct whereas trespass and nuisance describe the invasion of plaintiff's interest in land. Thus either a trespass or nuisance may arise out of intentional, negligent, reckless, or ultrahazardous conduct.' 466 P.2d at 611, fn. 5. Whether the invasion of the plaintiff's interest is direct or indirect is immaterial in determining whether the invasion is trespassory."

The federal district court of Nevada recognized that the theory of negligent trespass applies in Nevada in *Gcm Air Group, LLC v. Chevron U.S.A., Inc. (d.nev. 11-4-2011)*, 3:07-CV-168-RCJ-WGC. (D. Nev. Nov. 4, 2011), where the court recognized that:

> Pursuant to the Restatement (Second) of Torts "[o]ne who recklessly or negligently . . . enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest." Restatement (Second) of Torts § 165. "The harm may be an impairment of the physical condition of the land or an invasion occurring on the land of some other legally protected interest of the possessor, connected with his interest of exclusive possession." Restatement (Second) of Torts § 165, cmt. c.

In this case, because there was actually harm caused to the physical condition of Plaintiffs' land which was caused by Defendants who recklessly or negligently caused fire to enter the Plaintiff's land, Defendants are liable under a trespass theory.

Likewise, because Defendant's substantially interfered with the Plaintiffs' use and enjoyment of their property, an action for nuisance is also proper.

V. Strict Liability

Strict Liability has been adopted by Nevada's Supreme Court as defined in the Restatement (Second) of Torts, section 519 (1977): "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." *Valentine v. Pioneer Chlor Alkali Co. Inc*., 864 P.2d 295, 109 Nev. 1107 (Nev., 1993).

Section 520 of the Restatement (Second) of Torts sets forth six factors relevant to a determination of whether an activity is abnormally dangerous: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. **These factors are necessarily fact specific**. *Valentine v. Pioneer Chlor Alkali Co. Inc*., 864 P.2d 295, 109 Nev. 1107 (Nev., 1993).

In this case, a fact specific inquiry is needed to decide whether the complained of actions of Defendants in this case were abnormally dangerous. If the actions were abnormally dangerous, Defendants should be strictly liable for the damages caused to Plaintiffs' property.

Defendants argue that because NRS 527.126 holds that the state enjoys immunity from liability absent gross negligence. The statute actually states that the State of Nevada "is not liable for any damage or injury to property or persons, including death, which is caused by a controlled fire that is authorized pursuant to this section, unless the fire was conducted in a grossly negligent manner."

There is no requirement under NRS 527.126 that the Plaintiff must plead gross negligence. It is possible that a fire controlled fire could be conducted in a grossly negligent manner which results in damages caused by negligent trespass or nuisance. Further, this statutory immunity is inapplicable to inverse condemnation claims. **Thus, if a Plaintiffs establish that the actions of the State were abnormally dangerous, then Plaintiffs should be entitled to recover under an inverse condemnation claim without establishing any intent on behalf of the State Defendants.**

VI. Subrogation Issues

NRS 12.130 allows, before the trial commences, "any person . . . who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both" to intervene in an action under the Nevada Rules of Civil Procedure (NRCP). *American Home Assurance Co. v. Dist. Ct*., 147 P.3d 1120, 1124 (Nev., 2006). To intervene under NRCP 24(a)(2), an applicant must meet four requirements: (1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely. Determining whether an applicant has met these four requirements is within the district court's discretion. *Id*. at 1126.

Here, unless the insurer can show that the Plaintiffs do not adequately represent its interests it has no right to intervene under NRCP 24(a)(2). Like in *American Home Assurance Co*., if the insurance companies file a motion to intervene, Plaintiffs can file a motion opposing the motion to intervene. If the insurance companies cannot establish that their interests are not adequately represented by Plaintiffs their motion to intervene will be denied.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOSEPH G. and CAROL GANZ, husband wife, DEBRA L. SHELTRA, individually, MERL F. STEWART, individually, and as Trustee of the MERL. F. STEWART TRUST; RICHARD D. and CATHELINE M. ASH, husband and wife; SUSAN HOFFMAN, individually and as Trustee of the HOFFMAN LIVING TRUST, DENNIS S. SHINN, individually and as Trustee of the SHINN LIVING TRUST, ALLEN R. and EDENIR COPELAND, husband and wife; JEFFERY J. and LAUREN D. NELSON, husband and wife, MICHAEL MOSS, individually, DENNIS HOF, individually and as Trustee of MOUNDHOUSE – 2000 TRUST,

Plaintiffs,

v.

STATE OF NEVADA *ex rel* DIVISION OF FORESTRY; STATE OF NEVADA *ex rel* UNIVERSITY OF NEVADA BOARD OF REGENTS ON BEHALF OF UNIVERSITY OF NEVADA - RENO; ABC CORPORATIONS 1-20; BLACK & WHITE COMPANIES 1-20; and DOES 1-20, inclusive,

Defendants,

Case No. CV17-00300
Dept. No. 15

UNIVERSITY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendant State of Nevada *ex rel.* Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Reno (hereinafter, "University"), hereby moves to dismiss Plaintiffs' First Amended Complaint on the basis that it fails to state a claim upon which relief may be granted in favor of Plaintiffs or against the University.

This motion is brought pursuant to NRCP 12(b)(5), NRS 41.032(2), and NRS 527.126(4), and is based upon the following memorandum of points and authorities and upon all of the pleadings and documents on file herein.

Background

The University is the owner of the Whittell Forest and Wildlife Area. First Amended Complaint, ¶ 12. Plaintiffs allege that in October of 2016, a wildfire damaged their property in the Franktown Road area of Washoe Valley. *Id.* ¶ 29. The wildfire, which came to be known as the Little Valley Fire, began a week after co-defendant State of Nevada *ex rel.* Nevada Division of Forestry ("NDF"), concluded a controlled burn on the University's property. *Id.* ¶¶ 28-29. Plaintiffs are suing the University and NDF, asserting claims for Inverse Condemnation, Strict Liability, Gross Negligence, Nuisance and Trespass.

As detailed more fully below, Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted, and therefore must be dismissed, because the University is entitled to discretionary-act immunity under NRS 41.032(2), as well as governmental immunity under NRS 527.126(4). Moreover, Plaintiffs have failed to state a viable claim for inverse condemnation, nuisance, or trespass.

Legal Standard

Nevada Rule of Civil Procedure 12(b)(5) requires the Court to dismiss a complaint that fails to state a claim upon which relief can be granted. When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the pleading liberally and consider

well-pled factual allegations as though they were true. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 226–227, 181 P.3d 670, 672 (2008). However, the Court need only accept "fair" inferences arising from the pleading. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Moreover, the Court is not required to "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *See W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (interpreting substantively identical Fed. R. Civ. P. 12(b)(6)); *see also Sproul Homes of Nev. v. State*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (plaintiff cannot survive a motion to dismiss when its "complaint is replete with generalizations and conclusory matter."). Dismissal is appropriate where Plaintiff "could prove no set of facts, which, if true, would entitle [him] to relief." *Buzz Stew*, 124 Nev. at 226–227, 181 P.3d at 672; *Edgar v. Wagner* 101 Nev. 226, 227, 699 P.2d 110, 111 (1985) (court must dismiss complaint which fails to "set[] forth allegations sufficient to make out the elements of a right to relief.").

Although a court's consideration of matters outside the pleading will generally convert a motion to dismiss to a motion for summary judgment, *see* NRCP 12(b), "such conversion is *not* triggered by a court's 'consideration of matters incorporated by reference or integral to the claim' ". *Baxter v. Dignity Health*, 131 Nev., Adv. Op. 76, 357 P.3d 927, 930 (2015) (emphasis in original). Specifically, in addition to exhibits physically attached to the complaint, a court "may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Id.* (citations omitted); *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (providing that "the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on" a NRCP 12(b)(5) motion).

Discussion

I. Plaintiffs' claims against the University are barred by the discretionary-act immunity doctrine.

NRS §41.032 immunizes the University and its officers and employees from tort actions relating to their performance or failure to perform a discretionary function or duty:

> Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against . . . an officer or employee of the State or any of its agencies or political subdivisions which is:
>
> . . .
>
> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NRS 41.032(2); *see also Univ. of Nev., Reno v. Stacey*, 116 Nev. 428, 434, 997 P.2d 812, 816 (2000) (applying NRS 41.032 to bar suit against the University).

In *Martinez v. Maruszczak*, the Nevada Supreme Court adopted the federal *Berkovitz-Gaubert* test to determine when discretionary-act immunity attaches, abrogating the "planning-versus-operational" and "discretionary-versus-ministerial" tests previously used. 123 Nev. 433, 443-47, 168 P.3d 720, 726-29 (2007). Under the new two-part test, "to fall within the scope of discretionary-act immunity, a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy." *Id.* at 446-47, 168 P.3d at 729. Plaintiffs' First Amended Complaint, and documents referenced therein and subject to judicial notice,[1] make clear that both parts of the federal test are satisfied here.

A. The University's alleged conduct with respect to the controlled burn was "based on considerations of social, economic, and political policy".

Plaintiffs' First Amended Complaint largely fails to distinguish between the roles and alleged acts or omissions of NDF and the University, instead generically referring to the alleged conduct of all "Defendants" collectively. *See generally*, First Amended

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[1] *Baxter*, 131 Nev. Adv. Op. 76, 357 P.3d at 930 (court may consider "matters incorporated by reference or integral to the claim" without converting motion to dismiss); *Breliant*, 109 Nev. at 847, 858 P.2d at 1261 ("court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint").

Complaint. Despite Plaintiffs' inartful pleading,[2] Nevada law and the Prescribed Fire Plan for this controlled burn demonstrate that the University was not the entity charged with planning, initiating, controlling, managing, or supervising the controlled burn. *See e.g.,* NRS 572.122(1) (designating the NDF State Forester Firewarden as the "Authority" capable of authorizing controlled burns); NRS 527.126 (requiring the qualified agency conducting the controlled burn to submit and follow written plan approved by the Authority); *see also* Exhibit 1 (the Prescribed Fire Plan submitted and approved by NDF), a public document of which this Court may take judicial notice.

However, even if such conduct could be attributed to the University, skipping to the second part of the *Berkovitz-Gaubert* test, there can be no dispute that the discretionary conduct alleged here is susceptible to public policy analysis.[3] Indeed, Plaintiffs themselves identify the public policy considerations inherit in the University's decision to request NDF to conduct the controlled burn. *See e.g.,* First Amended Complaint ¶ 17 ("wildfire prevention and research"). Thus, the second part of the discretionary-act immunity test is satisfied. *See Thune v. United States*, 872 F. Supp. 921, 924 (D. Wyo. 1995) (complaint barred by discretionary-act immunity because decision to conduct controlled fire as part of effort to increase elk population "was clearly based upon the consideration of public policy.").

B. The University's alleged conduct was discretionary, and Plaintiffs have failed to identify any "specific and mandatory" authority limiting that discretion.

An act is discretionary if it "involve[s] an 'element of judgment or choice.' "

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[2] *See e.g., Canales v. Gatzunis*, 979 F. Supp. 2d 164, 170 (D. Mass. 2013) ("In order to satisfy the minimal requirements of notice pleading, a plaintiff cannot 'lump' multiple defendants together and must 'state clearly which defendant or defendants committed each of the alleged wrongful acts.' "); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008).

[3] *Martinez*, 123 Nev. at 445-46, 168 P.3d at 728 ("focus" of this second prong "is not on the employee's subjective intent" in exercising discretion, "but on the nature of the actions taken and on whether they are susceptible to policy analysis. Thus, the court need not determine that a government employee made a conscious decision regarding policy considerations" to meet the second prong) (internal citations and quotation marks omitted).

Martinez, 123 Nev. at 445, 168 P.3d at 728. Conversely, an act is not discretionary where it violates a "specific and mandatory" statute, regulation, or policy that dictates the act to be taken. *See Kelly v. United States,* 241 F.3d 755, 759 (9th Cir. 2001); *Kennewick Irr. Dist. v. United States,* 880 F.2d 1018, 1026 (9th Cir. 1989) (discretion is removed where "a specific and mandatory regulation or statute or policy . . . creates clear duties incumbent upon the governmental actors."). Importantly, allegations that the governmental entity abused its discretion, or otherwise acted negligently, are "irrelevant" in deciding whether discretionary-act immunity applies. *See* NRS 41.032(2) (discretionary-act immunity applies "whether or not the discretion involved is abused."); *see also Kennewick Irr. Dist.,* 880 F.2d at 1029 ("negligence is simply irrelevant" to discretionary function analysis).

Here, even if the University were the governmental entity charged with planning, initiating, controlling, managing, or supervising the controlled burn, which it is not, each of those acts undoubtedly involved an "element of judgment or choice". *See Thune v. United States,* 872 F. Supp. 921, 924 (D. Wyo. 1995) (concluding Forest Service employee decisions regarding planning and setting of controlled burn that subsequently escaped were based on "many different factors" including temperature, wind, weather forecast, time of season, and policy behind controlled burns, requiring employee to make discretionary judgments); *McDougal v. U.S. Forest Serv.*, 195 F. Supp. 2d 1229, 1236-1238 (D. Or. 2002) (concluding Forest Service conduct of approving prescribed natural fire,[4] not reducing fuel prior to fire, allocating limited financial resources to manage the fire, and allowing the fire to exceed prescribed limits before declaring it a wildfire all involved discretionary judgments).

Moreover, Plaintiffs' First Amended Complaint fails to identify any "specific and mandatory" statute, regulation, or policy limiting that discretion, particularly with regard

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[4] A prescribed natural fire is a fire started by natural causes that is then managed and allowed to continue to burn within a predetermined area "to accomplish established [forest] management objectives" similar to an intentionally ignited prescribed burn. *See id.* at 1235.

to the University. In this regard, the only "specific and mandatory" authority Plaintiffs identify is the obligation to "draft, complete, approve . . . sign" and then follow a written burn plan. *See* First Amended Complaint, ¶¶ 18-19. As noted above, however, the University is not the entity charged with those tasks. *See* NRS 572.122(1); NRS 527.126. In any event, NDF did in fact draft, complete, approve, and sign the written Prescribed Fire Plan, (*see* Exhibit 1), and the First Amended Complaint is devoid of any allegation that NDF failed to follow its approved plan. Plaintiffs fail to identify any other specific and mandatory authority limiting NDF's discretionary decision to proceed with the burn, nor do they identify any other specific and mandatory authority limiting NDF's discretionary decisions as to how the burn would be managed, supervised, or controlled. More importantly, Plaintiffs have not and cannot identify any specific and mandatory authority that "creates [any] clear duties incumbent upon" the University with respect to the controlled burn. *See Kennewick Irr. Dist.,* 880 F.2d at 1026. Thus, because the University's participation in the controlled burn was discretionary and susceptible to public policy analysis, Plaintiffs' First Amended Complaint must be dismissed. *See United States v. Gaubert,* 499 U.S. 315, 324-25, 111 S.Ct. 1267, 1274-75 (1991) (to "survive" a motion to dismiss complaint must allege facts supporting a finding that the challenged actions are not the kind subject to discretionary-act immunity).

II. Plaintiffs' claims against the University are barred by governmental immunity under NRS 527.126(4).

Chapter 527 of the Nevada Revised Statutes permits controlled fires if authorized by the appropriate Authority. NRS 527.122 defines "Authority" as "the State Forester Firewarden, or a local government, whichever is charged with responsibility for fire protection in the area where a controlled fire is to take place."

When a controlled fire is authorized by the appropriate Authority, the State, any state agency or any political subdivision of the state is immune from liability for property damage or personal injury caused by the controlled fire, absent gross negligence. This immunity is found in NRS 527.126(4):