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CASE NUMBER: S-22-0265

IN THE SUPREME COURT, STATE OF WYOMING

NORTHERN ARAPAHO TRIBE, a)	
Federally-recognized Indian Tribe and)	
THE WIND RIVER HOTEL & CASINO)	
an enterprise wholly owned by an arm of))	
the Northern Arapaho Tribe,)	
)	
Appellants)	
(Plaintiffs),)	
)	
v.)	S-22-0265
)	
BALDWIN, CROCKER & RUDD, P.C.)	
and KELLY RUDD,)	
)	
Appellees)	
(Defendants).)	

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

Appellants Northern Arapaho Tribe and the Wind River Hotel & Casino (hereinafter referred to as “Appellants” or the “Tribe”) filed their *Complaint* against Appellees Baldwin, Crocker & Rudd, P.C. and Kelly Rudd (hereinafter collectively referred to as “BCR”) on July 29, 2019, seeking an injunction for the return of documents, seeking an injunction for the returns of funds, seeking an equitable accounting, and asserting a conversion claim. ROA at 1, 8-10.

As it pertains to the issues on appeal and the final order being appealed from, the district court entered its *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions* on July 6, 2020; its *Order Denying in Part and Granting in Part Defendant’s Motion for Summary Judgment* on June 28, 2022; and the *Judgment in a Civil Action* following the jury trial on the Tribe’s remaining conversion claim on August 16, 2022. ROA at 418, 2028, 2318.

Appellees do not dispute the *Judgment in a Civil Action* is a final appealable order which typically merges prior interlocutory orders such as the district court’s *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions* and *Order Denying in Part and Granting in Part Defendant’s Motion for Summary Judgment*. See *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 820 (Wyo. 1994) (citing W.R.C.P. 54(b)).

However, as discussed later, the district court’s *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions* does not affect

the Tribe's substantial rights. ROA at 425-26. The district court simply ordered the Tribe to strike paragraph 52 of its *Complaint* and pay BCR's attorneys' fees incurred in bringing *Defendants' Motion for Sanctions Pursuant to W.R.C.P. 11(c)(2)*. *Id.* Despite filing *Defendants' Application for Attorneys' Fees*, BCR was never awarded attorneys' fees. *See* ROA at 446-48 (noting no order following the filing of BCR's reply brief). In other words, after the district court granted *Defendants' Motion for Sanctions Pursuant to W.R.C.P. 11(c)(2)*, the Tribe was compelled to strike only one sentence in its *Complaint*, which read: "Defendants are in possession of, upon information and belief, over \$1,000,000 of Tribal funds." ROA at 425-26.

This single sentence was part of Count III in the *Complaint* – the Tribe's accounting claim – and the district court's *Order on Plaintiffs' Motion to Dismiss Defendants' Counterclaim and Defendants' Motion for Sanctions* did nothing by way of resolving the Tribe's accounting claim¹. Because the Tribe was not ordered to pay BCR's attorneys' fees or precluded from pursuing its accounting claim at that stage, the *Order on Plaintiffs' Motion to Dismiss Defendants' Counterclaim and Defendants' Motion for Sanctions* did not affect the substantial rights of the Tribe and is not appealable pursuant to W.R.A.P. 1.05. *See In re KRA*, 2004 WY 18, ¶ 10, 85 P.3d 432, 436 (Wyo. 2004) (stating final appealable orders "must affect a substantial right, determine the merits of the controversy

¹ The Tribe's accounting claim was resolved as part of the district court's *Order Denying in Part and Granting in Part Defendant's Motion for Summary Judgment* and Appellants have raised that as their second issue on appeal.

and resolve all outstanding issues.”).

BCR agrees the Tribe timely perfected its notice of appeal. ROA at 2395-2400.

STATEMENT OF THE ISSUES

- I. Whether the *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions* is a final appealable order affecting a substantial right of the Tribe.
- II. Whether the Tribe’s appeal of the district court’s *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions* is moot.
- III. Whether the alleged Rule 11 procedural and substantive deficiencies warrant a reversal of the district court’s *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions*.
- IV. Whether the district court’s alleged “misinterpretation” surrounding paragraph 52 in the Tribe’s *Complaint* is an error of law.
- V. Whether the district court erred in granting summary judgment in favor of BCR on the Tribe’s accounting claim.
- VI. Whether the Tribe has met its burden to prove that the district court’s admission of impeachment evidence to show the Tribal witnesses’ bias, prejudice and motive was prejudicial and warrants reversal.

STATEMENT OF THE CASE

I. Nature of the Case

Up until 2019, BCR had successfully represented the Tribe since 1988. ROA at 853-54. This attorney-client relationship started to unravel in March 2019 when the Northern Arapaho Business Council (“NABC”), which consists of six elected Tribal members who assist with the day-to-day governance of the Tribe, considered retaining the law firm of Kilpatrick, Townsend and Stockton LLP (“KTS”) to evaluate the performance of James Conrad, the Wind River Hotel and Casino’s Chief Executive Officer. ROA at 902. Consistent with the Tribe’s 2002 Legal Affairs Policies and Procedures, BCR started the process of checking for conflicts-of-interest prior to KTS’ retention. ROA at 892-96; 903-05. During this process, BCR discovered KTS represented certain opioid manufacturers who were named as defendants in ongoing opioid-litigation brought by the Tribe. ROA at 916-25. Rather than meaningfully participate in the Tribe’s conflict-of-interest process, a process that other firms such as Burg Simpson, the Spence Law Firm, and other national law firms were required to participate in to protect the Tribe from hiring outside lawyers with conflicts-of-interest, KTS spun this policy and used it as a way to portray BCR as usurping the Tribe’s sovereign authority. *See generally* ROA 903-05; Trial Tr. at 860:6-11. Never having participated in the conflicts-of-interest check, KTS proceeded with Mr. Conrad’s evaluation without completing the requisite conflicts check. ROA at 903-05.

Mr. Conrad’s evaluation was just the beginning – it was the stepping stone KTS

needed to oust BCR and takeover the Tribe's extensive legal work. ROA at 899-913. And that's exactly what happened. *Id.* On June 6, 2019, the NABC terminated BCR's legal services contract with the Tribe. ROA at 975-78. The decision to oust BCR as legal counsel for the Tribe was made official on August 10, 2019, when the Tribe's supreme governing body, the Northern Arapaho General Council ("NAGC"), voted in favor of banning BCR from working for the Tribe in perpetuity. ROA at 974.

Following these maneuvers and the termination of BCR's contract, the Tribe brought this suit against BCR on July 29, 2019 setting forth four claims: (1) injunction for the return of Tribal documents, (2) injunction for the return of Tribal funds, (3) accounting and (4) conversion and civil theft. ROA at 1-13.

II. Relevant Facts and Procedural History

A. BCR's Innumerable Successes On Behalf of the Tribe.

Throughout the course of the decades-long relationship between BCR and Tribe, the number of achievements BCR obtained on behalf of the Tribe is astonishing – some with significant financial implications and others with more sentimental implications. For example, between 1995 and 2005, BCR worked to establish the Wind River Casino as the only Class III casino in the country that does not have to pay money to the state. Trial Tr. at 719:5-9. From 2005 to 2018, the casino generated somewhere between \$24 and \$36 million dollars per year, not to mention the number of job opportunities a Class III casino creates. Trial Tr. at 677:24-678:1. Also in 1995, BCR was involved in establishing a separate housing authority for the Northern Arapaho Tribe so that federal monies for

housing did not have to be equally divided between the Northern Arapaho Tribe and the Eastern Shoshone Tribe when the former had twice the number of tribal members. Trial Tr. at 678:12-680:15. Once a separate housing authority was established, the Northern Arapaho Tribe was awarded \$3 million in start-up monies as well as millions of dollars over the last several decades to provide housing for members of the Northern Arapaho Tribe. *Id.* Once Kelly Rudd later became affiliated with BCR, he brought cases against Verizon and Union Telephone for towers that were trespassing on Tribal lands and earning significant roaming fees. Trial Tr. at 1096:10-1097:19. These cases settled for nearly \$2 million dollars, increased Tribal revenue associated with lease payments nearly thirty times, and resulted in Ethete receiving a new cell phone tower for increased cell phone reception. *See id.* And just before BCR was terminated, BCR was able to procure legislation awarding the Tribe \$30 million dollars to upgrade the Ethete water system. Trial Tr. 973:12-21.

On a more sentimental level, BCR also pursued what is commonly referred to as the “eagle case.” *See* Trial Tr. at 892:7. A young Arapaho man shot an eagle as part of a Tribal ceremony and was criminally charged for doing so. Trial Tr. at 892:7-13. Upon request by the NABC, BCR was asked to look into a special permit that would allow Tribal members to hunt eagles for ceremonial purposes. Trial Tr. 892:18-25. The Northern Arapaho Tribe is now able to hunt eagles in certain locations for its ceremonies. *Id.*

Every single Tribal member who testified during this trial acknowledged BCR’s monumental successes on behalf of the Tribe. Trial Tr. at 838:12-958:14. There is a reason why BCR was the Tribe’s trusted advisors in *every* legal matter. Now, years later, after

BCR has been disparaged and run out by the Tribe's new lawyers (KTS), the Tribe seeks to recoup money it paid for BCR's invaluable, ground-breaking legal services – services that cost the Tribe 1/3 of what it pays its current lawyers. *See* Trial Tr. at 719:16-25; 753:9 (indicating BCR's \$185 hourly rate dwarfed in comparison to KTS' hourly rates which ranged from \$481 to \$671 per hour).

B. Events That Occurred Between BCR's Termination and July 29, 2019 When the Complaint was Filed That Warranted BCR's Rule 11 Motion.

Following BCR's termination as the Tribe's legal counsel, the NABC passed Resolution 1146 which ordered BCR to return any Tribal funds being held by BCR and preserve, maintain and timely return all Tribal documents. ROA at 975-78. The day after Resolution 1146 passed, the NABC directed and authorized its CPA, Dave Clark, to (a) provide BCR a Tribal bank account to which Tribal funds held in trust could be transferred; (b) obtain a final accounting supporting the funds transferred and their detail; and (c) submit final payment to BCR for outstanding invoices for legal services previously submitted to the NABC upon NABC's approval. ROA at 979-81.

On June 10, 2019, Mr. Clark provided the NABC with a scanned copy of a deposit slip showing \$879,719.48 had been successfully transferred via an intra-bank transfer from BCR's trust account to the Tribe's Severance Tax Account. *Id.* On June 11, 2019, \$49,375.85 was deposited into the Tribe's account along with \$165.71 for interest accrued. ROA at 980. On June 18, 2019, Mr. Clark went to BCR's office to review the trust account's bank statements, transactions, and supporting documents, and he confirmed that all funds in the trust account had been returned to the Tribe in full as of June 11, 2019.

ROA at 980. Mr. Clark communicated that finding to Kelly Rudd, the NABC, and the Tribe's Finance Office on or about June 19, 2019. ROA at 980, 1061.

Despite this prompt return of \$929,261.04, the Tribe filed suit against BCR more than thirty (30) days after these funds were returned to the Tribe, and in the *Complaint* drafted by KTS' lawyers, the Tribe alleged BCR was in possession of over \$1,000,000 of the Tribe's money. ROA at 1-13; *see also* March 5, 2020 Hr'g Tr. at 37:17-23 (the district court acknowledging this *Complaint* was not drafted or signed by Appellants' counsel).

This was the subject of BCR's Rule 11 Motion. On September 11, 2019 counsel for BCR emailed its Rule 11 Letter to counsel for the Tribe. ROA at 259-321, 357. The substance of this Rule 11 Letter took issue with the allegation in the Tribe's *Complaint* that BCR "repeatedly and steadfastly" refused to return Tribal funds being held in trust. ROA at 253. On October 2, 2019, counsel for the Tribe responded, in detail, to the substance of the Rule 11 Letter. ROA at 357-62. As is relevant to the Rule 11 issue before this Court on appeal, the Tribe said the following in its response:

The Northern Arapaho Tribe, and the lawyers from KTS who you mention in your letter, were at the time suit was filed against BCR and are today confident that there is a good faith basis in law and fact for the allegations contained in the *Complaint*. Upon my review of the facts and circumstances as I understand them, I fully agree with this assessment.

...

We will respond to any Rule 11 motion, should your client choose to so file, however, I believe that the more appropriate method of resolving this matter is to work together to ensure all client files and funds are returned to the Tribe in an expeditious manner. ***For the foregoing reasons, the Tribe sees no need to amend its pleadings and does not intend to do***

so.

ROA at 357, 362 (emphasis added).

Following what was interpreted as an invitation to file a Rule 11 Motion, counsel for BCR served counsel for the Tribe its Rule 11 Motion on October 22, 2019 and filed it on October 24, 2019. ROA 252-57. The substance of BCR's Rule 11 Motion was almost identical to its Rule 11 Letter. ROA at 252-321. Counsel for the Tribe responded on November 20, 2019 indicating the Tribe did not dispute that BCR returned significant funds by June 11, 2019; however, the Tribe continued to frame the issue as one of an accounting versus an allegation that BCR was wrongfully withholding over \$1,000,000 in Tribal funds. ROA at 350-51.

During the hearing on the Rule 11 Motion, the allegation that BCR "repeatedly and steadfastly" refused to return Tribal funds was discussed in conjunction with the allegation contained in paragraph 52 of the *Complaint* which reads: "Defendants are in possession of, upon information and belief, over \$1,000,000 of Tribal funds." ROA at 9.

At the hearing, counsel for the Tribe continued to frame this as an accounting issue as opposed to an allegation that BCR was withholding \$1,000,000 in Tribal funds. March 5, 2020 Hr'g Tr. at 35:14-36:20. The district court was quick to focus counsel for the Tribe back to the crux of the Rule 11 motion:

The Court: Let me read what we're talking about though, and that's why it obviously concerns their law firm and their reputation. A signed paragraph -- not in the prayer, but a signed paragraph under the accounting provision, Count 3 says, the defendants are in possession of, upon the admission [sic], information and belief, over \$1,000,000 in Tribal funds.

...

But Dave Clark gave you a pretty rough idea that there was however much in and out, there was a million over there, and you know a month or more before this pleading was filed that you had the million. That's their point; is in the pleadings – and I agree with you entirely about a prayer, prayer for relief aside, but they state as a fact as a lawyer that somebody's holding a million dollars, and that is a big deal.

Mr. Buckley: Sure.

The Court: That is a big deal. I'm not sure you would have signed this Complaint, Mr. Buckley, but we're not going to go there.

Mr. Buckley: Sure.

The Court: But you understand how the Court feels about this.

Mr. Buckley: Sure.

Id. at 36:20-37:23.

On July 6, 2020, the district court entered its *Order on Plaintiffs' Motion to Dismiss Defendants' Counterclaims and Defendants' Motion for Sanctions*. ROA at 418-426. As it relates to the Rule 11 Motion, the Tribe was required to strike paragraph 52 of the *Complaint* finding:

It is clear on the record to date that the factual underpinnings of that claim could not have been accurate on the date it was plead and Rule 11's requirement of factual basis was violated. The issue is a narrow one, whether at the time of pleading Defendants' were or are currently in possession of over \$1,000,000 of Tribal funds.

...

While Plaintiff may believe that there was some foul play by the Defendants over past accounting and overbilling (which

seems to be the implication of this claim), it was not proper to plead an inflammatory allegation of misuse or withholding of \$1,000,000 in Tribal funds without evidentiary support.

ROA at 425.

BCR's *Application for Attorneys' Fees* was never ruled on and monetary sanctions were never lodged against the Tribe. *See generally* ROA at 423-73 (noting no subsequent order on BCR's *Application for Attorneys' Fees*).

C. *The Tribe's Accounting Claim Did Not Survive Summary Judgment.*

After the district court ordered the Tribe to strike paragraph 52 of the *Complaint*, which was part of its accounting claim, the accounting claim itself was resolved on summary judgment for other reasons. ROA 2036-39. Since the onset of litigation, the Tribe's accounting claim has derived from Rule 1.15 of the Wyoming Rules of Professional Conduct and the Tribe maintained this position throughout summary judgment proceedings. ROA at 9, 1183-84.

Prior to summary judgment proceedings, the Tribe was provided every bank statement associated with the trust account at issue from 2012 through the point in 2019² when the account was closed out; every trust account transaction slip for every trust account transaction for the same period of time; and complete documentation showing the Tribe authorized each of these trust transactions in advance and in writing. ROA 1166-68

² During the course of discovery, the Parties agreed to limit the production of bank statements, trust account transaction slips, and documentation showing the Tribe authorized each trust transaction in advance and in writing from 2012 to 2019.

(showing BCR provided over 300 pages of bank statements and over 300 pages of trust account documentation to include trust transaction slips and authority for trust account transfers from 2012 to 2019).

Moreover, on June 18, 2019, before the lawsuit was even filed, the Tribe sent its own chosen accounting professional, Dave Clark, to BCR's offices and he was given unfettered access to BCR's trust account records. ROA at 980. Mr. Clark reviewed bank statements, trust transaction slips and supporting documentation for trust transactions from January 1, 2019 and June 11, 2019 and confirmed that BCR was paid for its legal services consistent with the protocol put in place by the Tribe which required NABC approval of each invoice for legal services when Tribal officials directed that such invoices be paid from trust account funds. *Id.*; *see also* Trial Tr. at 1036:14-1037:1 (Dave Clark explaining the reason he went back to January 1, 2019 was because an outside auditor had audited the trust account for a number of years prior, and Mr. Clark did not see a reason to go back and recreate those records because they had already been presented in an audit and accepted by the NABC).

On April 18, 2022, BCR filed a motion for summary judgment seeking judgment as a matter of law with respect to all four of the Tribe's claims. ROA at 787-88. After the parties were provided time to brief the issues and a hearing was held, the district court entered judgment as a matter of law in favor of BCR on the Tribe's accounting claim.

The district court made the following relevant findings: (1) the Tribe failed to show how BCR did not meet the accounting requirement set forth in W.R.P.C. 1.15; (2) an equitable accounting is not available when an adequate remedy at law exists; and (3) the

additional accounting that the Tribe seeks is not of such a complicated nature that the Tribe has an alternative basis for an equitable accounting claim. ROA at 2037-39.

D. *KTS' Actions and Words Prejudiced the Tribe Against BCR and Created a Motive and Bias Amongst Tribal Members That Fueled This Litigation and Had to Be Explored on Cross-Examination.*

KTS' approach to "competing" for the Tribe's legal work involved extensive use of the media and rhetoric formed from identity politics. KTS attorney, Keith Harper, made disparaging and inflammatory statements about BCR on August 5, 2019 during the Tribe's Public Meeting which was broadcast live on YouTube to the public. Mr. Harper made these statements one week after the *Complaint* was filed and five days before BCR was formally terminated:

As you may know the business council authorized and we filed a lawsuit against Baldwin, Crocker & Rudd. The reason we filed the lawsuit is that the firm ***refused*** to comply with certain rules regarding how a lawyer is supposed to treat their client. Let me go through some of these. When a lawyer is in an attorney/client relationship, they owe certain duties to their client.

...

So you need detailed records ***and they refused – absolutely, steadfastly refused – to return the documents of the tribe. They refused to provide the tribe's own money back to it. They provided some money, but not all the money.*** They only produced a handful of documents.

...

They make all kinds of excuses and none of them are any basis – any sound basis – to not return your own documents. So not returning your documents, not returning your funds, not providing an accounting those are the things that they have utterly failed to do. Because of that the tribe rightfully

brought a claim and we will just have to litigate it out and we will file for injunctions and a court order in order to get those documents so we can protect your interests.

ROA at 384; *see* March 5, 2020 Hr’g Tr. at 16:21.

Then, during the course of discovery in this matter, it became clear that KTS was using the rhetoric of identity politics to impugn the competence of non-Indian BCR lawyers. *See* Trial Tr. at 312:7-314:8; 638:15-640:5; 1026:12-1028:14.

During trial, two of the Tribe’s witnesses, Chairman Lee Spoonhunter and former councilmember Roy Brown admitted one of the major principal calling cards of KTS and Keith Harper was that they are Native lawyers who understand Tribal issues better than non-native lawyers like BCR. *See* Trial Tr. at 311:20-314:8; 638:15-640:5. Roy Brown admitted this fact made him skeptical “about the amount of the trust money that was being withheld.” Trial Tr. at 638:15-640:5.

As seen above, BCR’s concern was that KTS’ defamatory comments about BCR, combined with its inflammatory non-native rhetoric, informed and influenced the Tribe’s unfounded bases for the *Complaint* in this litigation – particularly the allegation that BCR was withholding over \$1 million from the Tribe. ROA at 1985-86.

Prior to trial, the Tribe sought to exclude evidence of the defamation and tortious interference lawsuit BCR filed against KTS, and one of its lawyers Keith Harper, in Federal court because it alleged that lawsuit was irrelevant and prejudicial to this case. ROA at 1641-42. In response, BCR explained that the facts underlying its defamation and tortious interference claims brought against KTS set the entire stage for this case. ROA at 1985. Specifically, BCR’s theory was that KTS’ defamatory comments about BCR, combined

with its inflammatory race-based rhetoric, informed and spawned the Tribe's unfounded bases for the *Complaint* in this litigation and called the credibility of Tribal witnesses into question, especially Lee Spoonhunter who verified the *Complaint*, and their various political motives in advancing the lawsuit.

Following the Final Pretrial Conference, the district court issued the following order pertaining to the Tribe's liminal motion to exclude evidence of the defamation and tortious interference lawsuit BCR filed against the Tribe:

Counsel are aware of the Court's concerns that Federal litigation, factually but not legally related to these proceedings should not distract the jury. However, the motives of Plaintiffs' witnesses and the context in which this litigation arose are relevant. The Court must largely await the Plaintiffs' case in chief, and the Defendants' attempt at impeachment of witness [sic] to determine whether the information about the defamation case can be admitted. But will, at this point order Defendants not to inquire as to settlement or any specific orders entered by the Federal Court or refer to that matter as vindication, etc. They will, unless the Court is convinced otherwise at trial, be limited to examination of witnesses as to the allegations that lead to change of counsel from BCR to KTS, the sources of witnesses' knowledge, and matter that provide context to the motives of the Plaintiff in bringing this litigation. Beyond that, the federal court rulings, or this Courts [sic] Rule 11 sanction itself are not to be brought to the attention of the jury without a further offer and argument.

ROA at 2065.

During trial, counsel for the Tribe re-visited this issue after opening argument seeking to admonish counsel for BCR and contending the facts underlying the Federal case were entirely off limits. Trial Tr. at 243:4-5. Counsel for BCR again explained that he did not intend to introduce rulings from the Federal case, but to cross-examine witnesses

related to their motivation and the underlying manipulation that was occurring. *Id.* at. 244:3-16; 245:1-3. In its final ruling denying the Tribe's liminal motion, the district court said the following:

I intended to allow, and will be allowing you [BCR] to establish the pushback, the reaction. I think you did it in opening, and if you do it through your witnesses and somewhat through this cross-examination, that is fair; that's what I intended.

...

So I am going to further emphasize that I do not intend that legal term, slander, defamation, those sorts of things to become a part of the case. To the extent they are fair cross-examination, and I want the record to reflect that as well, they can ask him darn near anything they have a good faith belief to ask him. And I have no pretrial power to order him not to cross. And that's what I figured would happen and it looks like It's about to happen.

Trial Tr. at 245:23-246:2; 247:15-23.

III. Rulings Presented for Review

The Tribe has appealed the district court's *Judgement in a Civil Action, Order on Plaintiffs' Motion to Dismiss Defendants' Counterclaim and Defendants' Motion for Sanctions*, and its *Order Denying in Part and Granting in Part Defendant's Motion for Summary Judgment*. The Tribe is alleging the district court erred in granting BCR's Rule 11 motion, entering judgment as a matter of law with respect to the Tribe's accounting claim, and allowing counsel for BCR to cross-examine Tribal witnesses' regarding their motive for bringing the underlying lawsuit and biases against BCR.

STANDARD OF REVIEW

I. Rule 11 Order

This Court reviews a trial court's determination on whether to impose Rule 11 sanctions for an error of law. *Horn v. Welch*, 2002 WY 138, ¶ 9, 54 P.3d 754, 758 (Wyo. 2002) (citing *Caldwell v. Cummings*, 2001 WY 106, ¶ 12, 33 P.3d 1138, 1142 (Wyo. 2001)), *overruled on other grounds by Matters of Mears*, 2018 WY 109, 426 P.3d 824 (Wyo. 2018).

II. Summary Judgment Order

In reviewing an order on summary judgment, this Court affords no deference to the district court's ruling, and instead reviews the order "in the same light as the district court, using the same materials and following the same standards." *Bogdanski v. Budzik*, 2018 WY 7, ¶ 18, 408 P.3d 1156, 1161 (Wyo. 2018) (citing *Hurst v. Metro. Prop. & Cas. Ins. Co.*, 2017 WY 104, ¶ 8, 401 P.3d 891, 895 (Wyo. 2017)). "Summary judgment is proper only when there are no genuine issues of material fact, and the prevailing party is entitled to judgment as a matter of law." *Bogdanski*, 2018 WY at ¶ 18, 408 P.3d at 1160 (citing *Gayhart v. Goody*, 2004 WY 112, ¶ 11, 98 P.3d 164, 168 (Wyo. 2004)).

The moving party bears the initial burden of establishing a prima facie case that no genuine issue of material fact exists and that summary judgment should be granted as a matter of law. *See Bogdanski*, 2018 WY at ¶ 18, 408 P.3d at 1160 (citing W.R.C.P. 56(c)). "Once a prima facie showing is made, the burden shifts to the party opposing the motion to present evidence showing that there are genuine issues of material fact." *Bogdanski*, 2018 WY at ¶ 18, 408 P.3d at 1160 (citing *Boehm v. Cody Cntry. Chamber of Comm.*, 748

P.2d 704, 710 (Wyo. 1987)). This Court may affirm an order granting summary judgment *on any basis appearing in the record*. *Johnson v. Dale C. and Helen W. Johnson Fam. Revocable Tr.*, 2015 WY 42, ¶ 17, 345 P.2d 883, 888 (Wyo. 2015) (emphasis added) (citing *Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 664 (Wyo. 2003)).

With this standard in mind and as it relates to the Tribe’s second issue on appeal, “requests for equitable relief are matters over which the district court exercises broad discretion” and requests for equitable relief are reviewed under the abuse of discretion standard. *See Jacoby v. Jacoby*, 2004 WY 140, ¶ 7, 100 P.3d 852, 855 (Wyo. 2004).

In determining whether there has been an abuse of discretion, we focus on the reasonableness of the choice made by the trial court. If the trial court could reasonably conclude as it did and the ruling is one based on sound judgment with regard to what is right under the circumstances, it will not be disturbed absent a showing that some facet of the ruling is arbitrary or capricious.

Id. (internal quotations and citations removed) (citing *Jordan v. Brackin*, 992 P.2d 1096, 1098-99 (Wyo. 1999)).

III. Admission of Alleged “Racial Inflammatory” Evidence

Evidentiary rulings are within the sound discretion of the trial court and are entitled to considerable deference. *Ortiz v. State*, 2014 WY 60, ¶ 99, 326 P.3d 883, 902 (Wyo. 2014) (citing *Silva v. State*, 2012 WY 37, ¶ 14, 271 P.3d 443, 447-48 (Wyo. 2012)). A trial court’s evidentiary rulings will not be reversed on appeal so long as there exists a legitimate basis for the trial court’s ruling. *See Ortiz*, 2014 WY at ¶ 99, 326 P.3d at 902 (citing *Lancaster v. State*, 2002 WY 45, ¶ 12, 43 P.3d 80, 87 (Wyo. 2002) (internal quotations omitted)).

“Under the abuse of discretion standard, [this Court’s] primary consideration is the reasonableness of the district court’s decision. The burden of establishing an abuse of discretion rests with the appellant.” *Singer v. Lajaunie*, 2014 WY 159, ¶ 31, 339 P.3d 277, 286 (Wyo. 2014). If this Court finds the district court erred in admitting the evidence, it must then determine whether the error affected the appellant’s substantial rights, providing grounds for reversal, or whether the error was harmless. *Id.*

The error is harmful if there is a reasonable possibility that the verdict might have been more favorable to [the appellant] if the error had never occurred. To demonstrate harmful error, [the appellant] must prove prejudice under circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

Id. (citing *Proffit v. State*, 2008 WY 103, ¶ 12, 191 P.3d 974, 977-78 (Wyo. 2008)).

ARGUMENT

I. The Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions Is Not a Final Appealable Order Affecting a Substantial Right of the Tribe.

A. This Court Lacks Jurisdiction to Afford the Tribe the Relief It Seeks Pertaining to the District Court’s Rule 11 Order.

This Court’s jurisdiction is limited to appeals from “final, appealable orders” and it has a duty to determine whether it has jurisdiction to entertain an appeal. *In re Estate of Hibsman*, 2012 WY 139, ¶ 12, 287 P.3d 757, 760 (Wyo. 2012) (citing *Plymale v. Donnelly*, 2006 WY 3, ¶ 4, 125 P.3d 1022, 1023 (Wyo. 2006)).

W.R.A.P. 1.05 defines an appealable order as:

- (a) An order affecting a **substantial right** in an action, when such order, in effect, determines the action and prevents a judgment; or
- (b) An order affecting a **substantial right** made in a special proceeding; or
- (c) An order made upon a summary application in an action after judgment; or
- (d) An order, including a conditional order, granting a new trial on the grounds stated in Rule 59(a)(4) and (5), Wyo. R. Civ. P.; if an appeal is taken from such an order, the judgment shall remain final and in effect for the purposes of appeal by another party; or
- (e) Interlocutory orders and decrees of the district courts which:
 - (1) Grant, continue, or modify injunctions, or dissolve injunctions, or refuse to dissolve or modify injunctions; or
 - (2) Appoint receivers, or issue orders to wind up receiverships, or to take steps to accomplish the purposes thereof, such as directing sales or other disposition of property.

W.R.A.P. 1.05 (emphasis added). Here, the district court’s Rule 11 order does not fit the definition of an appealable order under W.R.A.P. 1.05(a), (c-e). The Rule 11 order stemmed from a special proceeding:

In general terms, special proceedings are those which were not actions in law or suits in equity under common law and which may be commenced by motion or petition upon notice for the purpose of obtaining relief of a special or distinct type. They result from a right conferred by law together with authorization of a special application to the courts to enforce the right.

In re Estate of Hibsman, 2012 WY at ¶ 15, 287 P.3d at 761.

“The more rigorous requirement of W.R.A.P. 1.05, however, is that the order affects a substantial right.” *Id.* at ¶ 17, 287 P.3d at 761 (internal quotations omitted). Historically, the most common cases affecting substantial rights in special proceedings are those cases

that involved parental rights, the right of a criminal defendant and child custody. *Id.*

The proceeding here merely required the Tribe to strike a single paragraph embedded in its accounting claim – it did not determine the action or prevent a judgment on the Tribe’s accounting claim.³ ROA at 425-26. The Tribe **was not ordered** to pay BCR’s attorneys’ fees in bringing the Rule 11 motion or sanctioned in any other way. *Id.* Although a special proceeding occurred, no substantial right of the Tribe’s was affected by the district court’s decision; thus, this Court lacks jurisdiction to hear this portion of appeal and it must be dismissed. *See* W.R.A.P. 1.04(c) (“An appeal **will** be dismissed by either order or opinion, if the appellate court concludes it is without jurisdiction to decide the case.”).

II. The Tribe’s Appeal of the District Court’s *Order on Plaintiffs’ Motion to Dismiss Defendants’ Counterclaim and Defendants’ Motion for Sanctions* Is Moot.

Even if this Court determines the district court’s Rule 11 order is a final, appealable order, this Court still lacks jurisdiction because this issue is moot. *See Bell v. State*, 1 N.E.3d 190, 192 (Ind. Ct. App. 2013) (holding that when an appellate court is unable to provide effective relief upon an issue, the issue is deemed moot, and the appellate court will not reverse the trial court’s determination where absolutely no change in the status quo will result).

³ However, the Tribe’s accounting claim was resolved on summary judgment and is the focus of the Tribe’s second issue on appeal. *Appellants’ Br.* at pp. 30-42.

The Tribe's prayer for relief as it relates to the Rule 11 is stated as follows: "The district court's Sanctions Order should be reversed and vacated, relieving Appellants of any sanctions." *Appellants' Br.* at p. 60. What does this mean practically speaking? The only sanction ordered was requiring the Tribe to strike the notorious paragraph 52. ROA at 425-26. Reversing the district court's Rule 11 order does nothing if this Court affirms the district court's summary judgment order with respect to the Tribe's accounting claim. Moreover, in theory, if this Court were to reverse the district court's summary judgment order with respect to the Tribe's accounting claim, what does adding paragraph 52 add to the accounting claim? The allegation that was stricken would have no impact on a hypothetical scenario where the district court's order on summary judgment was reversed, and additional accounting was required. In short, the exclusion of this one sentence does not affect a substantial right of the Tribe.

In cases like this "where a party seeks judgment upon some matter which, when rendered, cannot have any practical legal effect on the case," the case is moot. *Ellington Indus. Park 25A v. Denenburg*, 642 S.W.2d 8, 10 (Tex. Civ. App. – Houston [14th Dist] 1982) (citing *Houston Indep. Sch. Dist. v. Houston Tchrs. Assoc.*, 617 S.W.2d 765 (Tex.Civ.App.—Houston [14th Dist] 1981)). "[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." *In re Rabia K.*, 212 Conn. App. 556, 561, 275 A.3d 249, 253 (2022); *see also Edgewood Vill., Inc. v. Hous. Auth. of City of New Haven*, 54 Conn. App. 164, 734 A.2d 589 (1999). Furthermore, "[t]he relief that a court must be able to provide should be meaningful; and where meaningful relief cannot

be afforded, an appeal will be dismissed as moot.” *Edgewood Vill., Inc.*, 54 Conn. App. at 167, 734 A.2d at 592 (internal quotations omitted).

While Wyoming’s jurisprudence on the mootness doctrine in the context of an appeal is sparse, Rule 9.04 of the Wyoming Rules of Appellate Procedure embodies a similar principle. W.R.A.P. 9.04 provides the following:

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded by the reviewing court.

W.R.A.P. 9.04. Said differently, an error warranting reversal by this Court must be prejudicial and affect the substantial rights of an appellant. It is the appellant who has the burden of establishing that an error is sufficiently prejudicial or injurious to warrant a reversal. *See ABC Builders v. Phillips*, 632 P.2d 925 (Wyo. 1981); *Spilman v. State*, 633 P.2d 183 (Wyo. 1981). The Tribe has failed to meet its burden here. The only argument concerning prejudice the Tribe attempts to make is that that BCR’s alleged failure to follow the strict procedural requirements of the Wyoming Rules denied it an opportunity to amend or clarify the subject allegations.⁴ *Appellants’ Br.* at 22. Prejudice following a Rule 11 order can come in two ways: substantive or monetary prejudice. The Tribe was not substantively prejudiced by the Rule 11 order because paragraph 52 does nothing by way of establishing an equitable right to an accounting claim. Further, there is no subsequent

⁴ This argument is addressed in subsequent sections of Appellees’ brief.

order requiring The Tribe to pay BCR's attorneys' fees.⁵

Even if this Court finds that the district court's sanction was prejudicial or injurious to the Tribe, the relief the Tribe seeks will not have any practical legal effect on the case nor will it be meaningful; therefore, this portion of the appeal must be dismissed as moot. *Edgewood Vill., Inc.*, 54 Conn. App. at 167, 734 A.2d at 592 (1999).

III. The Alleged Rule 11 Procedural and Substantive Deficiencies Do Not Warrant a Reversal of the District Court's *Order on Plaintiffs' Motion to Dismiss Defendants' Counterclaim and Defendants' Motion for Sanctions*.

A. The Tribe Had Zero Intent to Amend Its Complaint Negating the Intent Behind the Safe Harbor Rule.

The Tribe's primary argument related to the Rule 11 issue is BCR failed to follow the strict procedural requirements of W.R.C.P. 11(c)(2) by: (1) failing to wait the required 21 days after service of its Rule 11 motion to file the motion with the district court and (2) failing to describe the conduct that violated W.R.C.P. 11(b). The Tribe alleges that had these procedural requirements been strictly followed, it would have had an opportunity to amend or clarify the allegation that BCR was in possession of over \$1,000,000 of Tribal funds. *Appellants' Br.* at p. 22. Accordingly, the Tribe seeks reversal of the district court's order. *Id.*

⁵ Given the monstrous press coverage solicited by KTS and the Tribe in this case, BCR suspects the Tribe wants a reversal of the Rule 11 order so it can "spin" it in the local press. *See* March 5, 2020 Hr'g Tr. at 15:5-9 (referencing the widespread press coverage in this case).

Counsel for BCR acknowledges the “safe harbor” provision contained within Rule 11 requires a Rule 11 motion to be served on opposing counsel at least 21 days before it can be filed with the Court. *See* W.R.C.P. 11(c)(1)(A). “The motion is not to be filed with the court until at least twenty-one days after its service, ***in order to give opposing counsel an opportunity to correct or withdraw any allegedly sanctionable paper.***” *Edsall v. Moore*, 2016 WY 71, ¶ 13, 375 P.3d 799, 803 (Wyo. 2016) (emphasis added). In *Horn v. Welch*, the district court imposed monetary sanctions on counsel pursuant to Rule 11 for frivolous litigation tactics and failing to following a court order. *Horn v. Welch*, 2002 WY 138, ¶ 1, 54 P.3d 754, 759 (Wyo. 2002). Counsel subject to the sanctions appealed, arguing that the opposing party failed to follow the strict procedural requirement set forth in Rule 11. *Id.* at ¶ 1, 54 P.3d at 756. Under the facts and circumstances in *Horn*, this Court reversed the sanctions award because the petitioners filed a “Petition for Rule to Show Cause;” made no reference to W.R.C.P. 11 in the Petition; did not serve their Petition on opposing counsel at least 21 days before filing said petition; and the sanctions order did not describe the specific conduct at issue that was in violation of W.R.C.P. 11. *Id.* at ¶ 22, 54 P.3d at 761. The facts and circumstances in the instant case are distinguishable.

In this case, counsel for BCR served a Rule 11 notice on counsel for the Tribe on September 11, 2019; counsel for the Tribe thereafter unequivocally rejected the demand to amend the *Complaint*; served counsel for the Tribe with a separate Rule 11 Motion on October 22, 2019 and filed its Rule 11 Motion on October 24, 2019. ROA at 252-57, 259-61.

From the outset, counsel for the Tribe has had *zero intent* of amending its *Complaint*. Within three weeks of receiving counsel for BCR's Rule 11 Letter, counsel for the Tribe said the following:

The Northern Arapaho Tribe, and the lawyers from KTS who you mention in your letter, were at the time suit was filed against BCR and are today confident that there is a good faith basis in law and fact for the allegations contained in the Complaint. Upon my review of the facts and circumstances as I understand them, I fully agree with this assessment.

...

We will respond to any Rule 11 motion, should your client choose to so file, however, I believe that the more appropriate method of resolving this matter is to work together to ensure all client files and funds are returned to the Tribe in an expeditious manner. ***For the foregoing reasons, the Tribe sees no need to amend its pleadings and does not intend to do so.***

ROA at 357, 362 (emphasis added).

In the following weeks, counsel for the Tribe's position remained unchanged. Accordingly, counsel for BCR filed its Rule 11 Motion on October 24, 2019. ROA at 252. Nothing would have changed had BCR waited the full 21 days to file its Rule 11 Motion because the Tribe had rejected every single opportunity to amend the *Complaint* and to either remove the allegation in paragraph 52 or change its wording. For example, in the Tribe's *Notice of Filing Supplemental Affidavit of Lee Spoonhunter*, Mr. Spoonhunter did nothing by way of walking back the allegation that BCR was in possession of over \$1,000,000 at the time the *Complaint* was filed on July 29, 2019. ROA 398-402. Instead, Mr. Spoonhunter made statements like: "I believe it [BCR's trust account] should have

held millions of dollars of the Tribe's funds that could not be ascertained without a full accounting." ROA at 399.

Then again, in the Tribe's *Motion for Relief and Reconsideration*, there was no attempt to retract or better explain the allegation at issue, or move to amend the *Complaint* to change the wording of this allegation – even if ever so slightly. ROA at 479-96. Over and over, the Tribe has failed to understand the critical difference between saying that a trust account should have certain funds to be determined after an accounting versus the Tribe's former lawyers are currently in possession of over \$1,000,000 in Tribal funds. *Compare id.* with ROA at 9.

For the Tribe to argue it was not afforded the opportunity to correct or withdraw the allegation at issue is disingenuous. *See Appellants' Br.* at p. 28. The Tribe refused to amend its *Complaint* while the Rule 11 motion was under consideration and persisted in this refusal in multiple pleadings since the hearing on BCR's Rule 11 motion. ROA at 357-62; 398-402; 479-96. And, despite the district court's July 6, 2020 order requiring the Tribe to strike paragraph 52 of the *Complaint*, the Tribe waited until August 13, 2021 – over one year – to actually strike this allegation. ROA at 418-26; 652-53. Because the Tribe, through its words and actions, refused to correct or withdraw the allegation in paragraph 52 while the Rule 11 motion was under consideration, it negated the intent behind Rule 11's "safe harbor" provision. It would be beyond ironic to allow a party that has abused the legal process under Rule 11 to offer disingenuous argument further intended to abuse the process. This Court should not interpret the 21-day provision so as to allow it to be invoked after it has been expressly waived, as in this case.

B. *The Tribe's Argument That BCR Did Not Describe the Specific Sanctionable Conduct Is A Misleading, Form vs. Substance, Argument.*

On appeal, the Tribe also seeks reversal of the Rule 11 order because BCR's Rule 11 motion allegedly failed to describe the specific sanctionable conduct in violation of W.R.C.P. 11(b). *Appellants' Br.* at p. 24. This argument is misleading. In its September 11, 2019 Rule 11 letter, BCR provided the following information to the Tribe related to its sanctionable conduct:

Trust funds. Your Complaint alleges Baldwin, Crocker & Rudd, P.C., (BCR) has "repeatedly and steadfastly refused" to return to the Northern Arapaho Tribe (NAT) tribal funds previously deposited into the attorney trust account of BCR, (Complaint, paragraph 2). On or about June 7, BCR received a notice to transfer all trust funds to NAT by wire transfer within two (2) business days. No wire transfer instructions were tendered. BCR transferred all trust funds of NAT via intra-bank transfer on June 10 and check on June 12, 2019. You could have ascertained this information by inquiring of NAT's Finance Office, which is directly adjacent to Council Chambers. Bank transfer records are attached, (account numbers redacted), including an email from Bank Manager, Kathy Dale.

The Tribe finance department has received ongoing updates regarding the BCR Trust Account, and there was no question that *ALL* the trust funds were accounted for and back in the possession of the tribe.

Wrongfully accusing a law firm of misappropriating trust funds is extremely egregious and defamatory. Filing the complaint in light of the known facts regarding the amount which was being held in trust and was returned to the tribe warrants sanctions.

It is apparent this is a willful campaign to disparage BCR, given the public allegations of theft and wrongdoing which continue to be made by Keith Harper and other representatives of the KTS firm.

ROA on 259-60. BCR's Rule 11 letter included attachments clearly indicating that it had transferred ALL Tribal funds being held in BCR's trust account – \$929,261.04 – back to the Tribe by June 12, 2019. ROA at 259-68. This exact same information was included in BCR's Rule 11 motion filed on October 24, 2019. ROA at 254.

It is true that BCR's Rule 11 letter and motion both focused on paragraph 2 of the *Complaint*, which alleged that BCR “repeatedly and steadfastly refused” to return Tribal funds. ROA at 252-68. However, paragraph 52 also said: “Defendants are in possession of, upon information and belief, over \$1,000,000 of Tribal funds.” ROA at 9. To say that the Tribe first learned about the sanctionable allegation at the hearing when counsel for BCR targeted the allegation in paragraph 52 is disingenuous – the allegations in paragraphs 2 and 52 are identically defamatory – the only difference is that paragraph 52 went so far as to put an actual number on the amount of Tribal funds allegedly in BCR's possession and that number just happened to be almost the same amount of money BCR returned to the Tribe by June 12, 2019. *Compare* ROA at 2 *with* ROA at 9.

BCR never explicitly said it was not relying on paragraph 52 of the *Complaint* in support of its Rule 11 motion – it simply indicated that the focus of its Rule 11 motion was not on the accounting claim itself. ROA at 376 (“The allegations contained in Count III of Plaintiffs' *Verified Complaint* were not a basis for Defendants' Motion. For that reason, Defendants response to Plaintiffs' Opposition need not and will not address Plaintiffs new demand for additional accounting of tribal funds.”) (internal citation removed). BCR's arguments at the March 5, 2020 hearing should not have come as a surprise to the Tribe. Even after the March 5, 2020 hearing, when the Tribe would have been fully aware of

BCR's concerns regarding paragraph 52, the Tribe never walked back this allegation or took any initiative to modify it. *See* March 5, 2020 Hr'g Tr. at 1-47:2.

IV. The District Court's "Misinterpretation" Surrounding Paragraph 52 in the Tribe's *Complaint* Is Not An Error of Law.

The Tribe's final argument with respect to this issue is that the district court "misinterpreted" the allegation in paragraph 52 of the *Complaint* and wrongfully believed the Tribe "[was] alleging that \$1,000,000 *remained in the trust account.*" *Appellants' Br.* at p. 27. To say that BCR was "*in possession of*, upon information and belief, over \$1,000,000 of Tribal funds" is the exact same thing as saying that \$1,000,000 *remained in the trust account.* Compare ROA at 9 with *Appellants' Br.* at p. 27.

BCR and the district court join in their understanding of what paragraph 52 means – only the Tribe reads this paragraph differently.

The Complaint states in ¶ 52 that Defendants are in possession of, upon information and belief, over \$1,000,000 of Tribal funds. This is stated in the section of the Complaint regarding Claim III - accounting. It is clear on the record to date that the factual underpinnings of that claim could not have been accurate on the date it was plead and Rule 11's requirement of factual basis was violated. The issue is a narrow one, whether at the time of pleading Defendants' were or are currently in possession of over \$1,000,000 of Tribal funds. When Defendants' filed their Motion for Sanctions they asserted in good faith that this was not true, and that a representative of the Tribe's finance office had inspected the trust ledgers and confirmed that all the Tribal funds that were in the trust had been returned to the Tribe, and that this was done before the Complaint was filed. That is the state of the evidence before the Court on the issue, and while Plaintiff may believe that there was some foul play by the Defendants over past accounting and overbilling, (which seems to be the implication of this claim), it was not proper to plead an inflammatory allegation of misuse or withholding of \$1,000,000 in Tribal

funds without evidentiary support. This is particularly true where the evidence was easily at hand at the time the Complaint was filed and under any characterization now argued, this could not have been true.

ROA at 425-26.

Contrary to the Tribe's assertion, there is no misunderstanding regarding what paragraph 52 says. BCR and the Court correctly understood what the language in paragraph 52 means. Only the Tribe reads it differently and any such pleading disconnect here is the fault of the Tribe. The Tribe's failure to plead a cognizable theory of the case could have been remedied had the Tribe taken the opportunity to amend its pleading pursuant to the rule. It just never did.

Further, even if the district court ***misunderstood*** the allegation in paragraph 52 of the *Complaint*, that is not an error of ***law***, and this Court only reviews a trial court's determination on whether to impose Rule 11 sanctions for an error of law. *Horn v. Welch*, 2002 WY 138, ¶ 9, 54 P.3d 754, 758 (Wyo. 2002) (citing *Caldwell v. Cummings*, 2001 WY 106, ¶ 12, 33 P.3d 1138, 1142 (Wyo. 2001)), *overruled on other grounds by Matters of Mears*, 2018 WY 109, 426 P.3d 824 (Wyo. 2018). Similarly, the supplemental affidavit submitted by Mr. Spoonhunter did not unravel or clarify the allegation that BCR was withholding over \$1,000,000 in Tribal funds. ROA at 398-402. Accordingly, the Tribe never provided an evidentiary basis to support its allegation as required under W.R.C.P. 11(b)(3) and the district court did not commit an error of law by ordering that this paragraph be stricken. ROA at 425-26. Accordingly, the district court's Rule 11 should be affirmed.

V. The District Court's Order Granting Summary Judgment In Favor of BCR on the Tribe's Accounting Claim Should Be Affirmed.

A. Summary Judgment Is Appropriate Because BCR Satisfied the Requirements Under W.R.P.C. 1.15 and the Tribe Failed to Create a Genuine Issue of Material Fact.

The Tribe brought its accounting claim pursuant to W.R.P.C. 1.15(e) of the Wyoming Rules of Professional Conduct, which reads as follows:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. Complete records of such accounting shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

W.R.P.C. 1.15(e).

Following BCR's termination as counsel for the Tribe, BCR provided the Tribe with every bank statement associated with the trust account at issue from 2012 through the point in 2019 when the account was closed out; every trust account transaction slip for the same time frame; and complete documentation **showing the Tribe authorized each of these trust transactions in advance and in writing**. ROA 1166-68 (showing BCR provided over 300 pages of bank statements and over 300 pages of trust account documentation to include trust transaction slips and authority for trust account transfers from 2012 to 2019).

Additionally, on June 18, 2019, the Tribe sent its own chosen accounting professional, Dave Clark, to BCR's offices and he was given unfettered access to BCR's

trust account records. ROA at 980. Dave Clark reviewed bank statements, trust transaction slips and supporting documentation for trust transactions from January 1, 2019 and June 11, 2019. *Id.*; *see also* Trial Tr. at 1036:14-1037:1 (Dave Clark explaining the reason he went back to January 1, 2019 was because an outside auditor audited the trust account for a number of years prior and Mr. Clark did not see a reason to go back and recreate those records because they'd already been presented in an audit and accepted by the NABC). **His review showed the funds present in the trust account immediately preceding the dates of disbursement were returned to the Tribe and the Tribe's casino in full. *Id.***

By providing every trust account transaction slip, every bank statement associated with the trust account and documentation showing the Tribe authorized each trust transaction, an accounting has already been performed. Nothing in Rule 1.15(e) of the Wyoming Rules of Professional Conduct requires more. *See* W.R.P.C. 1.15(e). Moreover, the rule does not require retrospective re-accounting of payments explicitly authorized by a client for legal services after they were performed because the attorney has already earned those fees. *See e.g. In re Discipline of Brussow*, 2012 UT 53, ¶¶ 15-17, 286 P.3d 1246, 1250–51 (Utah 2012) (accounting requirement limited to unearned fees held in trust); *see also Chicago Architectural Metals., Inc. v. Bush Constr. Co., Inc.*, 2022 IL App. (1st) 200587, 201 N.E.3d 148, 460 Ill. Dec. 490 (2022) (finding an equitable accounting claim unnecessary where defendant had already tendered financial information when it turned its discovery material over to plaintiff and equitable accounting would provide no more information than that which was already contained in the ledgers.).

Candidly, the Tribe was never interested in more than what has already been

provided – rather its strategy all along has been to assert an accounting claim framed as a highly generalized suggestion of wrongdoing and lie in wait for its anticipated un-pled, undisclosed ambush. Specifically, the Tribe’s expert, Daniel Costello, claimed to identify \$5.5 million of withdrawals from the Tribe’s trust account that were “inadequately documented” in that BCR’s billing statements contained “vague and incoherent explanations” that do not adequately account for why BCR withdrew funds from the trust account *Appellants’ Br.* at pp. 35-36 (citing ROA at 676-711). Against that backdrop, the Tribe has tried to advance a theory that BCR bears the burden of proof to justify its withdrawals from the trust account, and is required to replenish the trust account for those time entries and corresponding withdrawals Mr. Costello labeled as “vague and incoherent” despite prior Tribal approval for these withdrawals, with all doubts being resolved against BCR. *Appellants’ Br.* at p. 34-36 (citations omitted). This was the ambush the Tribe planned all along.

But at no point prior to this lawsuit did the Tribe question the legal work described in BCR’s invoices. Every single invoice was ***reviewed, approved and paid*** by a majority of the NABC. Trial Tr. at 276:6-17 (Chairman Spoonhunter admitting he frequently reviewed BCR’s bills); Trial Tr. at 280:24-25 and 281:1-2 (Chairman Spoonhunter admitting there was no evidence that money was being withheld by BCR); Trial Tr. at 868:1-11 (Councilmember Addison explaining that a majority of the Northern Arapaho Business Council approved bills); Trial Tr. 894:12-895:16 (Dean Goggles explaining that during his three terms as a councilman, BCR’s bills were presented to them, BCR made itself available to answer questions regarding its bills, the bills were reviewed by the

NABC, and signed off by a majority of the NABC); Trial Tr. 913:20-914:22 (Ron McElroy testifying that from 2004 to 2012, when he was the Casino's CFO, he was paying BCR's bills on behalf of the Tribe and he would go review detailed bills even when a bill had been approved by a majority of the NABC). There was never a question about what legal work BCR was doing on behalf of the Tribe, and even though that narrative was manufactured for purposes of litigation, it has absolutely no bearing on whether an accounting was already performed pursuant to Rule 1.15(e). That is the pleading disconnect this case has suffered from since the beginning – allegations that critique the measure of detail associated with particular time entries is far different from establishing the right to an equitable accounting claim or evidence that an accounting has not been performed.

In the context of the facts of this case, an accounting answers one simple question – whether the debits from the trust account match the amount billed on BCR's invoices and deposited into its bank account. *See* 1A CJS Accounting § 6. That type of examination can be done, and already has been done, with the records provided to the Tribe. Prior to the filing of this lawsuit, each payment to BCR for legal services was explicitly approved by a majority of the NABC.

The Tribe had an outside auditor audit the trust account annually in the years leading up to 2019. And the Tribe's own CPA, Dave Clark, reviewed bank statements, trust transaction slips and supporting documentation for trust transactions from January 1, 2019 and June 11, 2019 and confirmed that BCR was paid for its legal services consistent with the protocol put in place by the Tribe. This protocol required NABC approval of each invoice for legal services when Tribal officials directed that such invoices be paid from

trust account funds. ROA at 979-81; *see also* Trial Tr. at 1036:14-1037:1 (Dave Clark explaining the reason he went back to January 1, 2019 was because an outside auditor audited the trust account for a number of years prior and Mr. Clark did not see a reason to go back and recreate those records because they'd already been presented in an audit and accepted by the NABC).

Given the prior extensive auditing the trust account has undergone, in addition to the financial records BCR previously provided to the Tribe, the district court found the Tribe failed to create a genuine issue of material fact as to what further accounting must be provided to comply with BCR's ethical obligations and the district court's order granting summary judgment in favor of BCR on the Tribe's accounting claim should be affirmed. *See* ROA at 1518-27; 2037.

B. Summary Judgment Is Appropriate Because the Tribe Had An Adequate Remedy at Law.

Wyoming does not provide any independent cause of action for an accounting. *See Bear Peak Res., LLC v. Peak Powder River Res., LLC*, 2017 WY 124, 403 P.3d 1033 (Wyo. 2017).

Under Wyoming law, “an equitable claim for an accounting is not cognizable ***where an adequate remedy exists at law.***” *Id.* (emphasis added) (citing *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 51 Fed. Appx. 786, 800 (10th Cir. 2002)). “The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is ... ***the absence of an adequate remedy at law, and the plaintiff must be able to show that the accounts between the parties are of such a complicated***

*nature that only a court of equity can satisfactorily unravel them.” Escobar, Inc. v. Barwest Grp., Civil Action No. 20-cv-02771-PAB-STV, 2021 WL 4319572, at * 5 (D. Colo. Sept. 22, 2021) (internal quotations omitted) (emphasis added) (citing *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 964–65 (10th Cir. 2009)); see also 1 Am. Jur. 2d Accounts and Accounting § 55.*

The absence of an “adequate remedy at law” is a necessary prerequisite to maintain an equitable accounting claim, and is in addition to other requirements necessary to establish equity jurisdiction. *See* 1A C.J.S Accounting §§ 9, 14; *see also McNeill Family Tr. v. Centura Bank*, 2003 WY 2, ¶ 17, 60 P.3d 1277, 1285 (Wyo. 2003) (“Yet another mainstay of equitable relief is that equity will not be invoked if an adequate remedy at law exists.”) (citing *Texaco, Inc. v. State Bd. of Equalization*, 845 P.2d 398, 402 (Wyo. 1993)).

In its briefing, the Tribe attempts to argue that its conversion claim is not an adequate remedy at law because it places the burden on the Tribe. *Appellants’ Br.* at p. 40 (“The Tribe’s remedy at law was inadequate because the Tribe bore the burden of proving conversion whereas under the equitable claim, Appellees bear the burden of justifying their withdrawals from the trust account.”). This assertion misunderstands the jurisprudence on an equitable accounting claim.

The Tribe must show the **absence** of an adequate remedy at law. It is irrelevant that a conversion claim may require a more arduous showing by the Tribe because the Tribe would bear the burden of proof. *Id.*; *see also Appellants’ Br.* at p. 40. So long as a plaintiff’s injury “may be compensated by an award of monetary damages then an adequate remedy at law exists.” *Combs v. Shelter Mut. Ins. Co.*, 551 P.3d 991, 1002 (10th Cir. 2008)

(citing *Coxcom, Inc. v. Oklahoma Secondary Schs. Athletic Ass’n*, 143 P.3d 525, 529 (2006)); see e.g. *Gate Techs., LLC v. Delphix Cap. Mkts., LLC*, No. 12 CIV 7075(JPO), 2013 WL 3455484, at *8 (S.D.N.Y. 2013) (holding an accounting claim cannot coexist where plaintiff can obtain all the information they seek in their existing claim at law and money damages are equally available in their claim at law); *Sammie Invs., LLC v. Strategica Cap.Assocs., Inc.*, 247 So. 3d 596, 600 (Fla. 3d DCA 2018) (“The test for unavailability of an adequate remedy at law, under these requirements, is whether a judgment can be obtained.”) (citing *Lopez-Ortiz v. Centrust Sav. Bank*, 546 So. 2d 1126, 1127 (Fla. 3d DCA 1989)). The application of this law is especially appropriate where the payments at issue are shown to have been explicitly approved and directed by the Tribe. See generally Trial Tr. at 276:6-17; 868:1-11; 894:12-895:16; 913:20-914:22.

Here, the Tribe’s conversion claim is an adequate remedy at law because if BCR truly did unlawfully withdraw Tribal funds held in trust, these improper debits would be reflected on the trust transaction slips and bank statements BCR provided to the Tribe and serve as evidence to substantiate a conversion claim. Further, if a conversion claim was proven, the Tribe would be entitled to a money damages. ROA at 2296. The Tribe obtained all the accounting information it needed to prove its conversion claim and money damages were equally available under this claim.

This is not a case where BCR is conflating different types of accounting claims as the Tribe alleges. *Appellants’ Br.* at p. 43-44. These claims are apples to apples. Rather, the Tribe simply cannot show there is a **complete absence** of an adequate remedy at law.

The district court ensured that the Tribe had an adequate remedy of law by allowing

the Tribe to try its conversion claim and allowing the jury to consider BCR's bills dating all the way back to 2012, a look-back period BCR objected to and continues to take issue with. In addition, because the party seeking the accounting has the burden of proof as to the right to an additional accounting and because the Tribe cannot make the requisite showing, the district court properly granted summary judgment. *See* 1A C.J.S. Accounting § 56 (discussing the burden of proof lies with the party who seeks an equitable accounting).

C. Summary Judgment Is Supported By Various Affirmative Defenses.

Since this Court may affirm an order granting summary judgment *on any basis appearing in the record*, this Court should consider the affirmative defenses raised by BCR in its summary judgment briefing. *See Johnson v. Dale C. and Helen W. Johnson Family Revocable Tr.*, 2015 WY 42, ¶ 17, 345 P.2d 883, 888, (Wyo. 2015) (emphasis added) (citing *Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 664 (Wyo. 2003)).

The doctrine of account stated⁶ may be used by a defendant seeking to prevent the reopening of a paid account and has been described as follows:

[A]n account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or another. Under this doctrine, a party who receives an account is bound to examine it, and if that party admits that the account is correct, it becomes a stated account and is binding on both parties.

⁶ Although not relied on in this exact context, the Wyoming Supreme Court has previously recognized the doctrine of account stated in *Miracle v. Barker*, 136 P.3d 678 (Wyo. 1943).

In re Rockefeller Ctr. Props., 241 B.R. 804, 819 (S.D.N.Y. 1999) (internal citations omitted); *see also* 1A C.J.S. Accounting § 37 (acknowledging that an accounting will be denied where there has been a stated account).

Under this doctrine, where an account is rendered showing a balance, “the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown. *Shaw v. Silver*, 95 A.D.3d 416, 943 N.Y.S.2d 89 [1st Dept. 2012]; *see also Cushman v. Kadmon Corp., LLC*, 174 A.D.3d 1141, 1142, 105 N.Y.S.3d 878, 879 [1st Dept. 2019]. Partial payment, not to mention full payment the Tribe made on most invoices, likewise demonstrates acquiescence and confirms an account stated. *Morrison Cohen Singer & Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52, 786 N.Y.S.2d 155, 156 [1st Dept. 2004]. Because the Tribe’s payment towards BCR’s invoices demonstrates acquiescence to the statements’ correctness, it renders establishing the reasonableness of the fees irrelevant and unnecessary. *Shaw*, 95 A.D.3d at 417, 943 N.Y.S.2d at 90. “It is well settled that the court can determine on summary judgment what constitutes a reasonable time to object to a statement of account.” *Id.* (citing *Kramer Levin Nessen Kamin & Frankel v. Aronoff*, 638 F. Supp. 714, 720 (S.D.N.Y. 1986)) (granting summary judgment where almost three years passed before a bill was questioned).

Here, the Tribe challenged BCR’s time entries from 2012-2019. ROA at 1111-1158. There are no equitable considerations that would prevent the Tribe’s silence from being deemed acquiescence to the correctness of BCR’s bills – they have not alleged fraud,

mistake or any other equitable consideration to justify its extremely untimely delay in requesting an accounting for invoices it accepted and approved. ROA at 9-10. It is entirely unconscionable for the Tribe to challenge some of BCR's billing entries that are nearly ten years old, especially when the Tribe has already paid for and received the benefit of those services, then claim some right to a refund based on "vagueness" of a bill. ROA at 676-711.

A close relative of the doctrine of account stated are the affirmative defenses of laches and equitable estoppel. *See* 1 Am. Jur. 2d Accounts and Accounting § 60 ("Also, laches may constitute a bar to an action for an accounting."); *see also* 1A C.J.S. Accounting § 38. "Laches is defined as such delay in enforcing one's rights that it works to the disadvantage of another." *Ultra Res., Inc. v. Hartman*, 2010 WY 36, ¶ 123, 226 P.3d 889, 929 (Wyo. 2010) (citing *Dorsett v. Moore*, 2003 WY 7, ¶ 9, 61 P.3d 1221, 1224 (Wyo. 2003)). There are two elements which must be shown to establish the defense of laches – inexcusable delay and injury, prejudice or disadvantage to the defendants or others." *Cathcart v. Meyer*, 2004 WY 49, ¶ 13, 88 P.3d 1050, 1058 (Wyo. 2004) (citing *Dorsett*, ¶ 9, 61 P.3d at 1224). "Application of the equitable defense of laches depends upon the circumstances of each case and is addressed to the sound discretion of the district court." *See Cathcart*, ¶ 13, 88 P.3d at 1058; *see also Thompson v. Bd. of Cnty. Comm'rs*, 2001 WY 108, ¶ 7, 34 P.3d 278, 279 (Wyo. 2001).

The defense itself is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is . . . and at the same time it certainly works in furtherance of justice, for so strong is the desire of

every man to have the full enjoyment of all that is his, when a party comes into court and asserts that he has certain rights, of whose existence he has had full knowledge, ***and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found his alleged rights either never existed, or had long since ceased.*** The length of time during which the party neglects the assertion of his rights which must pass in order to show laches varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and ***the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.***

Anderson v. Wyoming Dev. Co., 154 P.2d 318, 346 (Wyo. 1944) (citing *Halstead v. Grinnan*, 152 U.S. 413 (1894)) (emphasis added).

The Tribe cannot at this point in time prevail in retrospective critiques of some (but not all) of BCR's specific billing entries. The Tribe was regularly offered the opportunity to discuss any billing questions with BCR, and every invoice was explicitly approved. ROA at 1163-64. *See generally* Trial Tr. at 276:6-17; 868:1-11; 894:12-895:16; 913:20-914:22. Allowing the Tribe to contest some of BCR's billing entries is prejudicial in that some of the entries the Tribe challenged are four to ten years old, and relate to accounts that were long-ago paid by previous Tribal administrations that saw the value and benefit of the legal services provided. Under these circumstances, allowing the Tribe to reopen an account that has already been zeroed out would unjustly expose BCR to claims considered non-existent or settled long ago. *See* ROA at 980.

Similar to laches, equitable estoppel "is applied to prevent an injury arising from actions or declarations which are acted upon in good faith and which would be inequitable

to retract.” *Squaw Mountain Cattle Co. v. Bowen*, 804 P.2d 1292, 1297 (Wyo. 1991) (citing *Roth v. First Sec. Bank of Springs*, 684 P.2d 93, 96 (Wyo. 1984)). Here, BCR lacked any knowledge, prior to the filing of this lawsuit that the Tribe had any issue with any of its specific time entries dating back to 2012 for work that, at the time, met the Tribe’s approval. ROA at 1163-64. Indeed, the Tribe paid for these services long ago. Allowing the Tribe to contest some of these time entries, for which they have already paid, would require BCR to recall and explain discrete, nearly decade-old charges for a new set of client-representatives. This exercise alone is inequitable and summary judgment should be affirmed on one or more of these affirmative defenses.

VI. The Tribe Has Not Met Its Burden to Prove The District Court’s Admission of Alleged “Racially Inflammatory Evidence” at Trial Was Prejudicial.

A. The Tribe’s Motivation for Bringing This Lawsuit and Its Prejudice Against BCR Were Relevant and Appropriate Topics for Cross-Examination.

The events leading up to BCR being terminated as legal counsel for the Tribe and the filing of this lawsuit against BCR are crucially important content for the claims at issue.

Up until 2019, BCR had successfully represented the Tribe since 1988. ROA at 853-54. This attorney-client relationship started to unravel in March 2019 when the NABC considered retaining the law firm of KTS to evaluate the performance of James Conrad, the Wind River Hotel and Casino’s Chief Executive Officer. ROA at 902. Consistent with the Tribe’s Legal Affairs Policies and Procedures, BCR started the process of checking for conflicts prior to KTS’ retention. ROA at 892-96; 903-05. BCR raised serious, legitimate concerns during the conflict check process, but KTS was unwilling to meaningfully

participate in this process, and proceeded with Mr. Conrad's evaluation without completing the requisite conflicts check. ROA at 903-05, 992.

Following Mr. Conrad's evaluation, KTS started injecting itself into all facets of the Tribe – its casino, the appropriateness of the Tribe Legal Affair Policies and Procedures, and other matters, and in May 2019, drafted a letter to BCR indicating BCR no longer represented the Tribe on any gaming-related matters. ROA at 905-06. Then, the unsurprising happened. On June 6, 2019, the NABC terminated BCR's legal services contract with the Tribe. ROA at 975-78. On August 5, 2019, one week after the *Complaint* was filed and five days before the NAGC, the Tribe's supreme governing body was scheduled to vote on BCR's status as the Tribe's legal counsel. KTS attorney, Keith Harper, made the following statement that was broadcast on YouTube and shared across various social media platforms:

Look I am going to be very, very blunt, very candid. I have not seen any situation like this in my 25 years of practicing law. First all, let me talk about the law firm of Baldwin, Crocker & Rudd. As you may know the business council authorized and we filed a lawsuit against Baldwin, Crocker & Rudd. The reason we filed the lawsuit is that the firm *refused* to comply with certain rules regarding how a lawyer is supposed to treat their client. Let me go through some of these. When a lawyer is in an attorney/client relationship, they owe certain duties to their client.

...

What an accounting is a detailed analysis of everything that has been deducted from that account. It is your money. They are holding your money. They are holding the tribe's money. If they are holding the tribe's money, then they have to tell you what they did with that money. If they had an expenditure, why did you have that expenditure? How did it benefit your

client? If you say you worked this hour – okay – what did you do for that hour?

What product did you create? What meeting did you go to? So you need detailed records ***and they refused – absolutely, steadfastly refused – to return the documents of the tribe. They refused to provide the tribe’s own money back to it. They provided some money, but not all the money.*** They only produced a handful of documents.

...

They make all kinds of excuses and none of them are any basis – any sound basis – to not return your own documents. So not returning your documents, not returning your funds, not providing an accounting those are the things that they have utterly failed to do. Because of that the tribe rightfully brought a claim and we will just have to litigate it out and we will file for injunctions and a court order in order to get those documents so we can protect your interests.

ROA at 384, 992-93; *see* March 5, 2020 Hr’g Tr. at 16:21.

The decision to oust BCR as legal counsel for the Tribe was made official on August 10, 2019, when the NAGC voted in favor of banning BCR from working for the Tribe in perpetuity. ROA at 974.

That is the background that frames this entire case. As a result, motive and bias became the foundation of this lawsuit and were crucial topics for cross-examination of the Tribe’s fact witnesses. *See Broussard v. State*, 2017 WY 73, ¶ 23, 396 P.3d 1016, 1026 (Wyo. 2017) (referring to prior case law holding that testimony which shows a relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party, is properly characterized as evidence of bias) (citing *Garner v. State*, 2011 WY 156, ¶ 13, 264 P.3d 811, 817-18 (Wyo. 2011)).

The partiality of a witness is subject to exploration at trial, and is always

relevant to discredit the witness and affecting the weight of his testimony. [This Court has recognized] that the exposure of a witness' motivation in testifying is a proper and important function of [cross-examination].

Lawrence v. State, 2007 WY 183, ¶ 17, 171 P.3d 517, 523 (Wyo. 2007) (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *see also Hannon v. State*, 2004 WY 8, ¶ 22, 84 P.3d 320, 332 (Wyo. 2004) (holding that questions properly directed at revealing bias are a permissible basis of impeachment and are relevant and admissible).

Defense counsel should ordinarily be given wide latitude when cross-examining a witness about credibility or bias. Counsel should be allowed to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Counts v. State, 2012 WY 70, ¶ 32, 277 P.3d 94, 105 (Wyo. 2012) (citing *Hannon*, 2004 WY at ¶ 22, 84 P.3d at 331-32).

The Tribe cites *Cole v. State* and *Bird v. Glacier Elec. Coop, Inc.* for the “core principle” that excluding illegitimate references to race from judicial proceedings is a prerequisite to a fair trial. *Cole v. State*, 2017 WY 87, ¶ 11, 399 P.3d 618, 620-21 (Wyo. 2017) (citing *Carter v. State*, 2010 WY 136, ¶ 6, 241 P.3d 476, 480 (Wyo. 2010)). BCR does not disagree that this core principle exists; however, this Court has explicitly recognized there are circumstances where a party may legitimately reference race, one of which is when race is used as means of establishing motive. *Id.* (citing *Carter*, 2010 WY at ¶ 11, 241 P.3d at 482).

In *Cole*, the prosecutor made this statement:

The joyride, ladies and gentleman, is across town, not 70 miles away to Newcastle. And, ladies and gentleman, an African

American man in Wyoming is still not allowed to steal a car and take the police on a high-speed chase. It doesn't matter what race he is. A white person is not allowed to do that either, nobody is allowed to do that.

Cole, 2017 WY 87, ¶ 10, 399 P.3d at 620. This Court held that because the prosecutor referenced race only to emphasize that race is irrelevant because the law prohibits everyone from stealing a vehicle, the defendant's conviction must be affirmed. *Id.* at ¶ 12, 399 P.3d at 621. In this case and at this trial, the racial references were equally *de minimis* in that they were not intended to and did not inflame the passions or prejudice of the jury, but were rather used to establish bias. *Id.* at ¶ 10, 399 P.3d at 620.

The facts and circumstances in *Bird* are distinguishable. In *Bird v. Glacier Elec. Coop., Inc.*, owners of a construction corporation and enrolled members of Blackfeet Tribe sued an electric cooperative seeking recognition and enforcement of judgment owners had obtained against the cooperative in Blackfeet Tribal Court on contract, defamation and other claims. The Ninth Circuit held that because the construction corporation's closing argument in Tribal Court offended fundamental fairness and violated due process by appealing to racial bias, the grant of comity to Tribal Court judgment was precluded. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1153 (9th Cir. July 10, 2001). After a trial saturated with racial overtones, Bird made statements in closing argument that repeatedly appealed to racial and ethnic prejudice – Bird included mention of General Custer, analogies to “killing” and “massacre” of Indians, contrasts between “white man's magic” and the “lowly” Indians, reference to the cavalry riding into town to kill an Indian business, and remarks about the lands of the Indian people being taken by “conquering people.” *Id.*

at 1140. Not only was there no evidence in the record that the electric cooperative's manager even used such disparaging terms, the tribal court record and testimony were completely devoid of any support that the electric cooperative held such racist attitudes. *Id.* at 1151.

This case is easily distinguishable from the facts and circumstances of the *Bird* case. The record and testimony in this case is replete with evidence that the Tribe was poisoned against its non-native lawyers; the discussion of this context at trial was specifically for the purpose of impeachment and exploring motive, bias and prejudice and was not intended to incite or inflame the jury. *See* Trial Tr. at 312:7-314:8, 638:15-640:5. This case could not have been tried in vacuum – as the Tribe wants – without providing the jury with this background information.

Even if this alleged “racially inflammatory evidence” was somewhat prejudicial, it must be *unfairly prejudicial* to justify overturning the jury's verdict. *Vahai v. Gertsch*, 2020 WY 7, ¶ 77, 455 P.3d 1218, 1238 (Wyo. 2020).

Rule 403 is weighted in favor of admissibility, allowing evidence to come in unless prejudicial effect substantially outweighs probative worth. It is to be used sparingly, because it excludes evidence which is concededly relevant and probative. Rule 403 does not allow the exclusion of evidence simply because it is prejudicial. All of the evidence against appellant is prejudicial. The evidence must be *unfairly* prejudicial before its prejudicial effect is weighed against its probative value. Unfairly prejudicial evidence is evidence which will likely stimulate an excessive emotion or ... awaken a fixed prejudice ... and thus dominate the mind of the [jury] and prevent a rational determination of the truth.

Id. The alleged “racially inflammatory evidence” the Tribe complains about is not

widespread. In their appellate brief, the Tribe mischaracterizes the degree of emphasis BCR’s counsel placed on race during the trial. The topic of race was only discussed with three witnesses; mostly by way of impeaching these witnesses with their own deposition testimony. *See* Trial Tr. at 311:20-314:8; 638:6-640:5; 1026:24-1027:4; 1027:8-13; 1027:24-1028:7. The evidence in the record does not stimulate excessive emotion or dominate the mind of the jury such that rational determination of the truth is impossible – it was used to call the witnesses’ motive, bias, prejudice and credibility into question and once that task was accomplished, the cross-examination continued on to other subject matters.⁷ *See* Trial Tr. at 312:7-314:8, 638:15-640:5. For that reason, the Tribe cannot establish there was any prejudice whatsoever that arose from addressing these matters.

⁷ In its brief, the Tribe states it should have been permitted to inform the jury of the “actual findings” of the Federal court in the other case, which were “favorable to KTS and expressly vindicated the KTS attorneys on nearly every issue.” *Appellants’ Br.* at p. 53. That is a blatant misstatement. Judge Skavdahl ruled that BCR was entitled present its defamation claim against KTS to the jury, despite KTS’ assertion of sovereign immunity, qualified immunity, litigation privilege and attorney-client privilege. *See Baldwin v. Harper*, Case No. 20-CV-160-SWS, 2021 WL 7208646, at * 14-18 (D. Wyo Dec. 16, 2021). KTS was certainly not “vindicated” by Judge Skavdahl’s ruling which is why it settled with BCR just days before trial.

B. *The Alleged “Racially Inflammatory Evidence” Admitted at Trial Does Not Warrant Reversal and Remand for a New Trial.*

Prior to trial, the Tribe filed several motions *in limine*. As is relevant to its third issue on appeal, the Tribe filed a motion *in limine* to preclude BCR from mentioning the defamation case it filed in Federal court against the Tribe’s new attorneys. ROA at 1642. In response, BCR argued it had the right to explore the bases for the Tribe’s allegations contained in its *Complaint*, and to the extent these bases were improperly influenced or untruthfully informed by KTS’ defamatory comments, BCR must be able to cross-examine Tribal witnesses’ biases and what evidence they have in support of their conversion claim. ROA at 1986.

In its *Order on Pretrial Conference*, the district court stated:

Counsel are aware of the Court’s concerns that Federal litigation, factually but not legally related to these proceedings should not distract the jury. However, the motives of Plaintiffs’ witnesses and the context in which this litigation arose are relevant. The Court must largely await the Plaintiffs’ case in chief, and the Defendants’ attempt at impeachment of witness [sic] to determine whether information about the defamation case can be admitted. But will, at this point order Defendants not to inquire as to settlement or any specific order entered by the Federal Court or refer to the matter as vindication, etc. They will, unless the Court is convinced otherwise at trial, be limited to examination of witnesses as to the allegations that lead to change of counsel from BCR to KTS, the source of witnesses’ knowledge, and matters that provide context to the motives of the Plaintiff in bringing this litigation. Beyond that, the federal court [sic] rulings, or this Courts [sic] Rule 11 sanction itself are not to be brought to the attention of the jury without a further offer and argument.

ROA at 2059. In accordance with the district court’s *Order on Pretrial Conference*, counsel for BCR’s opening statement tracked the district court’s pre-trial ruling:

So this case is about credibility of witnesses, it's about motive, and it is about bias. Because here's the other tragedy. My clients are not Native American, but they've spent 30 years or more trying to help, not only the Northern Arapaho Tribe but some other tribal people around the country as well as some other clients. The KTS lawyers from Washington, D.C., one of their big calling cards was, hey, we're Native American. We're from different tribes around the country, and you should only trust Native American lawyers. So there was a subtle hint that you can't trust BCR lawyers because they're not Native Americans, which is a tragedy given if you look at the track record of what my clients did.

ROA at 148:16-25; 149:1-3. Counsel for the Tribe raised an objection following opening statements asking the Court to again preclude BCR from introducing evidence about the federal case. *See* Trial Tr. at 238:1-243:12. Notably, counsel for BCR did not mention the Federal case during his opening statement. *See* Trial Tr. at 125:1-149:18.

After providing the factual backdrop, specifically KTS' August 5, 2019 YouTube broadcast, counsel for BCR said the following:

This was a pattern of a knowing predatory attack by Washington, D.C. lawyers for the sole purpose of getting the Tribe as a client, and its lucrative casino revenue, as well as all the other revenue that comes from a lot of the cases that they have on the Reservation. More importantly, it eliminates BCR as competition, who have been here on the ground for 30 years helping the Tribe. If we can slander them so badly, if we can make them look so bad in the eyes of the tribal members, they'll never get hired again.

ROA at 142:7-12. Nothing about this statement references the Federal case; it simply identifies the false statements being made about BCR and implies that these statements led to the termination of BCR as the Tribe's legal counsel and the prejudice and bias that

ultimately infiltrated the rank and file within the Tribe. The district court agreed and ruled as follows:

All right. Again, you've hit on it; I've said it in my own way. There's a difference even between relevance and proper and appropriate cross-examination. If it goes to credibility you can ask him how tall he is. Doesn't matter if it was described in discovery or sworn to in a discovery deposition or not. So I take the broad view you may confront witness, and you may do so.

ROA at 249:18-25. With that final ruling, counsel for BCR elicited the following testimony during cross-examination of two Tribal witnesses, starting with Chairman Lee Spoonhunter:

Q: I want to talk to you about a more sensitive subject, Mr. Spoonhunter. For all those years you had this close relationship with Andy, with Berthenia, and later when Kelly Rudd came on in '05, personally that was never a concern to you that they were not Native American, was it?

A: I never had a personal relationship or good relationship with Berthenia Crocker.

Q: So let's just leave it with Andy and Kelly. You never had concerns that they weren't Native American, did you?

A: No.

Q: But as KTS came and started dealing with you and tried to get your work, they were telling you and other Council members that you should only trust Native American lawyers to do your legal work, weren't they?

A: I don't recall that being said.

Q: Didn't they specifically tell you that they're Native American lawyers so they understand your issues better than white lawyers?

A: I don't know

Q: Do you have your deposition in front of you?

A: Yes.

Q: Let's go to page 181, line 2. Tell me when you're there. You there?

A: Yes.

Q: Question: Was one of the major principal calling cards

of KTS, of Keith Harper and others, that we are Native lawyers so we understand your issues more than white lawyers?

A: That was something they had told us, yes.

...

Q: And you were asked again on page 183, line 5. Kind of reiteration of the same thing. Question: But what their – but their calling card was essentially that. We're Native lawyers. We understand issues better than your white lawyers. That's what they were telling you. And your answer: That they – Indian people understanding Indian people better than anyone else. That was what they were trying to do to help promote themselves, wasn't it?

...

A: Yes.

Trial Tr. at 311:20-314:8.

Roy Brown, former member of the NABC, testified similarly:

Q: And I know you were not on the forefront of this, sir, but you were in attendance when Keith Harper had a meeting that was broadcast on YouTube and there were things being said about my clients. You recall that?

A: Yes.

Q: You knew, based on what you observed what was being said by Mr. Harper, was causing lot of frustration among tribal members, wasn't it?

A: At the meeting, yes.

Q: Part of the message that you heard from Keith Harper was that Native American lawyers protect your interests much better than non-Natives, true?

A: That wouldn't be what I remember hearing, or my interpretation of his statements.

Q: Let me have you just turn quickly, sir, to page 95 of your deposition line 24. Go ahead and turn to page 96, line 4. What I ask you the question: Do you remember him saying something like that? And your answer: I feel like I got the sense that the message was more or less that the native folks

would understand and protect the interest of other Native folks. And then my next question is: Better than white lawyers would? And your answer: I mean, I think better than non-Natives. So that was the message that Keith Harper was portraying, among other things, at these meetings, agree?

A: Yes, that Native lawyers would understand Native American interests.

Q: Even you, who had such a good working relationship with BCR, that you thought they were honest, they were responsive to the Tribe's needs, who you came out of that meeting even you were on the fence of wondering, wow, maybe they betrayed the Tribe, weren't you?

A: I was skeptical about the amount of the trust money that was being withheld.

Trial Tr. at 638:6-640:5. Dave Clark, the Tribe's hand-picked CPA, was the only other witness to testify regarding KTS' race-baiting tactics:

Q: Okay. And you put something interesting in this [referencing Defendants' Exhibit CC] Is it the preference of the Business Council for me to submit my contractually-required 20-day notice to terminate our contract? Doing so makes it a clean, relatively painless way to terminate our contractual relationship and rids the Tribe of one more white guy.

...

Q: Did you have a sense, based on this, there was some behind-the scene effort to rid the Tribe of all the non-native consultants?

A: It was my belief at that time that that's what was going on based on conversations I've had with tribal members, and just observing activities

...

Q: Did you hear statements and things being made that KTS was perpetuating this idea that the Tribe should only trust Native American lawyers?

A: I believe I heard something like that, but I do think it

was after this e-mail was sent.

Q: You just – you pointed this out just based on what you were seeing and who was getting their termination notices?

A: And conversations I had, yes.

Trial Tr. at 1026:24-1027:4; 1027:8-13; 1027:24-1028:7.

These cross-examination questions were geared towards illuminating the political context that created motive, bias and credibility problems for certain witnesses on a particular side of the political struggle within the Tribe, the source of this bias and when it arose – especially in the context of Chairman Spoonhunter who was the individual who verified the *Complaint* in this case. See ROA at 1-13. Counsel for the Tribe objected following the above-outlined cross-examination of Chairman Spoonhunter and that objection was sustained. Trial Tr. at 314:13-17 (finding that the subsequent question did not fall under impeachment). Counsel for the Tribe did not object during the relevant portions of Roy Brown and Dave Clark’s cross-examinations on a Rule 403 basis. See Trial Tr. at 639:20-640:7; 1028:8-25.

Despite the sparsity of this alleged “racially inflammatory evidence,” the Tribe believes a reversal and remand for new trial is warranted. “In order to show a defendant’s substantial rights were affected warranting reversal, a reasonable probability must exist, based on the whole record, that the verdict would have been more favorable to him if the error had not been committed.” *Griggs v. State*, 2016 WY 16, ¶ 123, 367 P.3d 1108, 1142 (Wyo. 2016) (citing *McGinn v. State*, 2015 WY 140, ¶ 13, 361 P.3d 295, 299 (Wyo. 2015)); see also W.R.A.P. 9.04 (annotations citing *Trujillo v. State*, 750 P.3d 1334 (Wyo. 1988)).

Looking at the record as a whole, there is not a reasonable probability the verdict

would have been in favor of the Tribe had the district court excluded the alleged “racially inflammatory evidence.” In order to prove a claim of conversion, the Tribe had to prove the following by a preponderance of the evidence:

1. They had legal title to the converted property;
2. They either had possession of the property or the right to possess it at the time of the conversion;
3. The Defendants exercised dominion over the property in a manner which denied the Plaintiffs their rights to use and enjoy the property;
4. In those cases where the Defendants lawfully, or at least without fault, obtained possession of the property, the Plaintiffs made some demand for the property’s return which the defendant refused; and
5. The Plaintiffs have suffered damage by the loss of the property.

ROA at 2296. Seeing this pattern instruction as problematic and not accurately capturing the facts and circumstances of this case, counsel for BCR argued for an additional, clarifying instruction:

In order to prove a claim for conversion, Plaintiffs bear the burden of proving by a preponderance of the evidence that Defendants billed and received payment from Plaintiffs for legal work that was not actually performed.

ROA at 2299. Counsel for the Tribe did not object to this instruction. Trial Tr. at 1203:12-1205:21.

With the backdrop of these instructions, not a single witness testified that BCR received payment for legal work it did not perform and every single witness who testified in the Tribe’s case-in-chief admitted they had no evidence BCR received payment for legal work it did not perform. *See* Trial Tr. at 151:4-1184:16. The Tribe’s own expert did not render an opinion as to whether BCR actually performed the legal work it billed for. *See*

ROA at 671-718. And the attorneys of BCR testified they performed all of the legal work they billed for. *See* Trial Tr: 470:4-18, 718:16-19, 1063:5-12, 1085:19-1162:4..

In its third issue on appeal, the Tribe is trying to rely on their current lawyers' own misdeeds and mischaracterize it as BCR trying to interject race into the case. Fundamentally, the suggestion that BCR improperly introduced "racially inflammatory evidence" is disingenuous. The case that BCR presented at trial involved testimony from four current or former NABC councilmembers and a longtime consultant of the Tribe who worked closely with BCR for the majority of the time period at issue in the case. This compelling testimony described BCR's lawyers as a positive, effective and a mutually respectful attorney-client relationship that helped advance certain key policy objectives of the Tribe. *See* Trial Tr. at 838:12-1000:23. The evidence at trial demonstrates that BCR lawyers dedicated much of their life's work towards advancing the rights of Native Americans. The issue of "race" came into the case from the Tribe's own political dynamic where certain factions and individuals created emphasis on race to advance their own political objectives. **More importantly, the issue of "race" impugned KTS, not the Tribe and there is no point in the trial transcript where BCR or counsel for BCR advanced any biased, racially inflammatory or prejudiced perspective against the Northern Arapaho Tribe.**

The testimony the Tribe relies on in its brief to this Court from Chairman Spoonhunter, Councilmember Brown, and Mr. Clark did not go to the ultimate question of whether BCR converted the Tribe's money, it did not inflame or incite the passions of the

jury, and was not overemphasized at trial.⁸ In fact, looking at the trial transcript as a whole, discussion on this topic was minuscule in relation to other topics elicited during the witnesses' examinations. BCR won this case because Kim Cannon, BCR's expert, testified BCR's bills were formatted consistent with its ethical obligations, BCR did not engage in overbilling, and BCR's rate were more than reasonable when compared to other practicing attorneys in Wyoming. Trial Tr. at 758:18-784:4. Cannon further de-bunked the allegations that "block" billing was not acceptable, and required repayment of those monies to the Tribe. *Id.* Further, the Tribe's expert, Mr. Costello, did not endeavor to learn about the type of work BCR did for the Tribe, or determine whether the work BCR billed for was actually performed, making it impossible for him to opine on the reasonableness of BCR's bills. *See* Trial Tr. at 785:2-9. More problematically, KTS' own bills were in a block-billing format and Mr. Costello obstinately refused, to the detriment of his own credibility, to acknowledge this fact. ROA at 526:3-532:13; *see also* Trial Ex. VVV. This expert testimony combined with the fact that not a single witness testified BCR billed for work it did not perform explains why the Tribe failed to prove its conversion claim, and leads to the conclusion that even if the district court had excluded cross-examination related to a witness's bias, motive and prejudice, the jury verdict would be identical. *See* Trial Tr.

⁸ Had the testimony from Chairman Spoonhunter, Councilmember Brown or Mr. Clark inflamed or incited the passions of the jury, a juror would have likely seen a question of this nature following the respective witnesses' testimony. That did not occur. *See generally* ROA at 731, 1043, 1162-66, 1182-83.

at 151:4-1184:16.

For these reasons, reversal and remand for a new trial is inappropriate because the Tribe cannot show that a reasonable probability exists, based on the whole record, that the verdict would have been more favorable to it had the district court excluded the alleged “racially inflammatory evidence.”

CONCLUSION

The crux of the Tribe’s appeal is a request to override a jury verdict that found BCR did not convert Tribal funds. There is no indication the jury was inflamed or incited by KTS’ unsavory tactics that were introduced at trial. That evidence was secondary to the presentation of evidence at trial, which dwarfed in comparison to the volume of uncontroverted evidence that the Tribe reviewed and approved all of BCR’s bills, paid for BCR’s legal services, and had no evidence whatsoever BCR billed for legal work it did not perform. The Tribe never has been and never will be able to prove a claim of conversion, and regardless of the district court’s evidentiary admissions at trial, there are no circumstances in which a different jury verdict would have resulted in this case.

For the reasons stated above, BCR respectfully requests the Court affirm the district court’s Rule 11 order, affirm the district court’s order on summary judgment, and uphold the jury verdict in this case.

RESPECTFULLY SUBMITTED this 23rd day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Brief of Appellees* was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System this 23rd day of March, 2023 on the following parties. The original plus six copies were sent to the Wyoming Supreme Court by United States Mail this 23rd day of March, 2023. I have accepted the terms for e-filing. I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, this document is an exact copy of the written document filed with the Clerk. I also certify that this document has been scanned for viruses and is free of viruses.

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/s/ Zara S. Mason

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