

1 RADFORD J. SMITH, CHARTERED  
2 RADFORD J. SMITH, ESQ.  
3 Nevada State Bar No. 002791  
4 64 N. Pecos Rd., Suite 700  
5 Henderson, Nevada 89074  
6 T: (702) 990-6448  
7 F: (702) 990-6456  
8 Email: rsmith@radfordsmith.com

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Tracie K. Lindeman  
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6 MITCHELL D. STIPP, ESQ.  
7 Nevada Bar No. 007531  
8 7 Morning Sky Lane  
9 Las Vegas, Nevada 89135  
10 T: (702) 378-1907  
11 F: (702) 483-6283  
12 Email: Mitchell.Stipp@yahoo.com

11 Attorneys for Respondent/Cross-Appellant Mitchell Stipp

12 **IN THE SUPREME COURT OF**  
13 **THE STATE OF NEVADA**

14 CHRISTINA CALDERON STIPP,  
15 Appellant/Cross-Respondent,  
16  
17 v.  
18 MITCHELL DAVID STIPP  
19 Respondent/Cross-Appellant.

SUPREME COURT CASE NO.: 57327

20 **FAST TRACK STATEMENT AND RESPONSE<sup>1</sup>**

- 21
- 22 **1. Name of party filing this fast track statement and response:** Mitchell David Stipp.
- 23
- 24 **2. Name, law firm, address, and telephone number of attorney submitting this fast track**
- 25 **statement and response:** Radford J. Smith, Esq., Radford J. Smith, Chartered, 64 N. Pecos Road, Suite
- 26

27 <sup>1</sup> The Court ordered Mitchell to file a combined fast track statement and response. *See* Order/Procedural-Order dated April  
28 18, 2011 (Document No. 11-11508). In its order, the Court did not specify the page limitation applicable to Mitchell's  
combined filing, and the NRAP are silent on the issue; therefore, Mitchell has filed simultaneously herewith a motion for  
permission to file his Fast Track Statement and Response of a maximum of 25 pages.

1 700, Henderson, Nevada 89074, 702-990-6448, and Mitchell David Stipp, Esq., 7 Morning Sky Lane,  
2 Las Vegas, Nevada 89135, 702-378-1907.

3 **3. Judicial district, county, and district court docket number of lower court proceedings:**

4 Eighth Judicial District, Clark County, State of Nevada, Case No. D-08-389203-Z.

5 **4. Name of judge issuing judgment or order appealed from:** Judge Frank Sullivan.

6 **5. Length of trial or evidentiary hearing.** There was no trial or evidentiary hearing.

7 **6. Written order or judgment appealed from:** Written decision entered by the district court on  
8 November 4, 2010.

9 **7. Date that written notice of the appealed written judgment or order's entry was served:** The  
10 written decision of the district court was faxed to Radford J. Smith on November 4, 2010.

11 **8. If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in**  
12 **NRAP 4(a)(4), specify the following: (a) type of motion, and the date and method of service of the**  
13 **motion, and date of filing, and (b) date of entry of written order resolving the tolling motion:** N/A

14 **9. Date notice of appeal was filed:** Christina filed her notice of appeal on December 2, 2010, and  
15 Mitchell filed his notice of cross-appeal on December 15, 2010.

16 **10. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP**  
17 **4(a), NRS 155.190, or other:** NRAP 4(a).

18 **11. Specify the statute, rule or other authority, which grants this court jurisdiction to review**  
19 **the judgment or order appealed from:** NRAP 3A(b)(1).

20 **12. Pending and prior proceedings in this court:** Case No. 57876 concerns an appeal by Mitchell  
21 of the district court's order from the hearing on December 1, 2010.

13. **Proceedings raising same issues:** Case No. 57876 concerns an appeal by Mitchell of the district court's order from the hearing on December 1, 2010, which does not raise the same legal issues Mitchell raises in Case No. 57327.

14. **Procedural history.**

The district court issued its stipulated Decree of Divorce on March 6, 2008 (the "Decree"). App., Vol. I, pgs. 226-232; Vol. II, pgs. 233-270.<sup>2</sup> The Decree incorporates a February 20, 2008 Marital Settlement Agreement ("MSA"). App., Vol. II, pg. 236 (lines 15-24). The parties agreed in the MSA to have joint legal and physical custody of their children, Mia, born October 19, 2004, and Ethan, born March 24, 2007. App., Vol. II, pg. 245 (Article I, Section 1.1).

On December 17, 2008, Christina moved to be designated "primary physical custodian" of the children. App., Vol. II, pgs. 271-399. Mitchell opposed Christina's motion and filed a countermotion seeking additional time with the children. App., Vol. III, pgs. 400-519.<sup>3</sup> Though voluminously briefed, (App., Vol. II, pgs. 271-399, Vol. III, pgs. 400-519, 526-606, and 614-639), the district court, Judge Frank Sullivan, denied all motions and countermotions without findings. App., Vol. IV, pgs. 640-644.

On April 27, 2009, Mitchell filed his motion for reconsideration or in the alternative a motion to modify the timeshare arrangement. App., Vol. IV, pg. 645-661. Mitchell filed his affidavit in support of his motion on April 28, 2009. R.App. pgs. 1-24.<sup>4</sup> On June 2, 2009, Christina filed a motion to continue the hearing scheduled for June 4, 2009 and to extend the time for filing of her responsive

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<sup>2</sup> Christina's counsel failed to contact Mitchell or his counsel to confer and attempt to reach an agreement concerning the possibility of filing a joint appendix as required by NRAP 30(a). Rather than prepare a separate complete appendix, Mitchell cites herein to Christina's appendix (App., Vols. I-VIII) as filed on March 31, 2011 (Document No. 11-09742), and to his brief appendix (R. App. pgs. 1-198) filed simultaneously herewith. Furthermore, in violation of NRAP 30(b), Christina's counsel included in Christina's appendix transcripts, pleadings, and orders from hearings held by the district court on October 6, 2010 and December 1, 2010, which are not essential to the decision of issues presented by the appeals. App., Vol. I, 172-225; Vol. VI, pgs. 1143-1235; Vol. VII, pgs. 1356-1451; Vol. VIII, pgs. 1460-1494, 1515-1521, 1607-1673.

<sup>3</sup> The copy of Mitchell's opposition and countermotion included in Christina's appendix does not include the exhibit cover sheets.

<sup>4</sup> Christina fails to include an accurate copy of Mitchell's affidavit in her appendix. See App., Vol. IV, pgs. 666-674.

1 pleading. App., Vol. IV, pgs. 675-681. On June 3, 2009, Mitchell filed his opposition and response to  
2 Christina's motion to continue and extend time. App., Vol. IV, pgs. 682-697. At the hearing on  
3 Mitchell's motion held on June 4, 2009, the district court ordered the parties to attend mediation, but  
4 also scheduled an evidentiary hearing to resolve outstanding issues if mediation was unsuccessful.  
5 App., Vol. IV, pg. 698; *see also* App., Vol. 1, pgs. 33-60.

6  
7 The parties attended mediation and modified the terms of the MSA through a stipulation and  
8 order signed by the parties on July 8, 2009 and entered by the district court on August 7, 2009 ("SAO").  
9 App., Vol. IV, pgs. 716-719. The SAO provided Mitchell additional time with the children, and the  
10 parties remained joint legal and physical custodians. *Id.*

11  
12 In the weeks following the entry of the SAO, the parties' daughter, Mia, began suffering the ill  
13 effects of a constant barrage of disparagement from Christina about Mitchell and his new wife, Amy.  
14 App., Vol. IV, pgs. 720-790.<sup>5</sup> Also, on August 27, 2009, this Court issued its opinion in *Rivero v.*  
15 *Rivero*, 216 P.3d 213 (Nev. 2009) (hereinafter "*Rivero II*"), in which it re-defined "joint physical  
16 custody" as requiring each parent to have physical custody of the children at least 40 percent of the time  
17 (or 146 days). On October 29, 2009, Mitchell filed his motion to confirm the parties as joint physical  
18 custodians under *Rivero II*, and to modify the parties' timeshare arrangement to grant Mitchell equal  
19 time with the children. App., Vol. IV, pgs. 720-790.

20  
21 On November 30, 2009, Christina, in proper person, filed her opposition and countermotions.  
22 By her countermotions, Christina moved to set aside the SAO, moved for discovery of Mitchell's  
23 personal financial affairs, and moved for partition of alleged omitted assets. App., Vol. V, pgs. 791-912.  
24 Mitchell filed his opposition and reply to Christina's opposition and countermotions on December 7,  
25 2009. *Id.* at 913-970. Christina filed her reply to Mitchell's opposition on December 8, 2009. *Id.* at

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27  
28 <sup>5</sup> The copy of Mitchell's October 29, 2009 motion included in Christina's appendix does not include the exhibit cover sheets.  
Exhibit A is pgs. 748-759; Exhibit B is pgs. 760-761; and Exhibit C is pgs. 762-790.

1 972-980. The district court held a hearing on December 8, 2009 and ordered a child custody evaluation  
2 to be performed by Dr. John Paglini. *Id.* at 981-988. At the hearing, the district court also ruled that  
3 each party would bear his/her own attorney's fees and costs associated with the pleadings before the  
4 court. *Id.* at 985 (paragraph 6). After the hearing, Christina engaged Donn Prokopius, Esq. to represent  
5 her.

6  
7 On January 28, 2010, after Mitchell propounded discovery, Christina filed a motion to stay  
8 discovery pending the completion of the child custody evaluation. *Id.* at 998-1012. At the hearing on  
9 February 3, 2010, Judge Sullivan announced his order limiting discovery to the children's school records  
10 and treatment records from Dr. Joel Mishalow and Dr. Melissa Kalodner, both of whom had treated Mia,  
11 and the deposition of Dr. Mishalow for the limited purpose of deciphering the somewhat illegible  
12 contents of Dr. Mishalow's records. App., Vol. VI, pgs. 1132-1137. At that hearing, Judge Sullivan  
13 also denied Christina's counter motions for discovery of Mitchell's personal financial affairs, and for  
14 partition of alleged omitted assets. *Id.* at pg. 1136 (paragraph 4).

15  
16 On February 15, 2010, Christina filed a motion for reconsideration/clarification of the district  
17 court's order from the hearing on December 8, 2009. *Id.* at 1032-1050. Mitchell filed an opposition and  
18 counter motion for sanctions under EDCR 7.60 on March 8, 2010. R.App. pgs. 25-141.<sup>6</sup> The district  
19 court held a hearing on April 13, 2010, and denied Christina's February 15, 2010 motion. App., Vol.  
20 VI, pgs. 1138-1140. While the district court denied both parties' requests for attorney's fees at that  
21 time, it ordered that it would review those requests at the hearing of May 6, 2010 after review of Dr.  
22 Paglini's child custody evaluation.  
23  
24  
25  
26  
27

28 <sup>6</sup> Christina excludes the exhibits from the filed copy of Mitchell's opposition and counter motion in her appendix. See App., Vol. VI, pgs. 1051-1076.

1 Dr. Paglini completed his child custody evaluation and submitted the report to the district court  
2 on April 29, 2010.<sup>7</sup> Mitchell filed a supplement on May 3, 2010 pursuant to which he submitted to the  
3 district court that (a) an evidentiary hearing should be held on Mitchell's pending custody motion and  
4 that discovery should be permitted with respect to child custody matters, or alternatively the district  
5 court should grant his motion confirming the parties as joint physical custodians and provide him an  
6 equal timeshare arrangement, and (b) Christina should reimburse Mitchell \$16,250 for the costs of the  
7 child custody evaluation and \$5,000 for his attorney's fees and costs of opposing Christina's motion for  
8 reconsideration/clarification of the district court's order from the hearing on December 8, 2009, which  
9 was heard and denied by the district court on April 13, 2010. R.App. pgs. 142-198.<sup>8</sup> Christina also  
10 filed a supplement on May 5, 2010. App., Vol. VI, pgs. 1102-1131.  
11

12  
13 The district court held a non-evidentiary hearing on May 6, 2010 to consider the findings and  
14 recommendations of Dr. Paglini and the other motions and matters pending before it. App., Vol. 1, pgs.  
15 147-171. The district court took the matters before it under advisement (including the parties'  
16 supplements) and indicated at the hearing that it would issue a written decision. *Id.*  
17

18 On July 5, 2010, the district court case was administratively reassigned from Judge Frank  
19 Sullivan in Department O to Judge William Potter in Department M.

20 On November 4, 2010, Judge Sullivan issued his written decision from the May 6, 2010 hearing  
21 (the "Appealed Order"). App., Vol. VIII, pgs. 1495-1514. In that order, Judge Sullivan confirmed the  
22 parties as joint legal and physical custodians and expanded Mitchell's timeshare by placing them in his  
23 care on the third Friday of each month from 9:00 am to 6:00 pm. *Id.* at 1514.  
24  
25

26  
27 <sup>7</sup> Mitchell, by separate motion filed simultaneously with his Fast Track Statement and Response, has requested that Dr.  
Paglini's report be available to this Court as part of its review of Mitchell's appeal.

28 <sup>8</sup> Christina excludes the exhibits from the filed copy of Mitchell's supplement in her appendix. *See* App., Vol. VI, pgs. 1077-  
1101.

1 **15. Statement of Facts.**

2 The Statement of Facts contained in Christina's Fast Track Statement is composed in large part  
3 of disputed arguments upon which the district court made no findings whatsoever, or findings contrary  
4 to the allegations contained in her Statement of Facts. For the purpose of the appeal, Mitchell has  
5 limited his analysis to the facts upon which the district court rendered its decision regarding custody.

6 One of the essential pillars of Christina's argument on appeal is that there were no facts or events  
7 that occurred between the date of entry of the SAO on August 7, 2009 and the filing of Mitchell's  
8 motion on October 29, 2009 that support the district court's decision. Appellant's Fast Track Statement,  
9 pg. 9 (lines 14-17) and p. 10 (lines 7-11). Contrary to Christina's contention, the district court expressly  
10 found that the manifestation of emotional problems exhibited by the parties' daughter, Mia, during that  
11 period, and the root cause of those issues, were the facts upon which the court adjudicated Mitchell's  
12 October 29, 2009 motion. App., Vol. VIII, pgs. 1507-1510, 1512.

13 Specifically, shortly after the entry of the SAO, Mia began to evidence problems, which Mitchell  
14 believed were caused by Christina's disparagement of Mitchell and his new wife, Amy, to Mia. App.,  
15 Vol. IV, pgs. 720-790 (specifically pgs. 724-726, 748-752, 756 (paragraph 14)), and 760-761; App.,  
16 Vol. V, pgs. 913-970 (specifically pgs. 928-935, 948-950, and 960-961). Mia's problems became so  
17 severe that both parties placed her into psychological counseling after entry of the SAO. App., Vol. IV,  
18 pgs. 726-728, 751-752; App., Vol. V, pgs. 932-935, 948-950, 954-959. The crux of Mitchell's October  
19 29, 2009 motion was to seek more time with Mia to help combat Christina's disparagement and attempts  
20 at alienation. App., Vol. IV, pgs. 720-790.

21 In the Appealed Order, the district court confirmed that Mia's emotional problems forming the  
22 basis of Mitchell's motion had occurred after entry of the SAO. App., Vol. VIII, pgs. 1507-1510, 1512.  
23 Specifically, the district court found that Mitchell had sought treatment for Mia from Dr. Kalodner to  
24

1 address the “re-manifestation” of Mia’s clothing issues and behavioral issues related to Mia’s defiant  
2 behavior when she was made to wear clothing, and Mia’s anger outbursts and emotional meltdowns.  
3 App., Vol. VIII, pg. 1507 (lines 1-8). Indeed, Judge Sullivan specifically identified that only Mia’s  
4 clothing issues had commenced in December of 2008, but by the use of the word “re-manifestation,” he  
5 acknowledged, as Mitchell had observed, that these issues re-appeared and others had emerged (anger  
6 outbursts and emotional meltdowns) after entry of the SAO on August 7, 2009. *Id.* Dr. Kalodner first  
7 evaluated Mia on September 11, 2009. R.App. pgs. 177.

9 In the paragraphs following his identification of Mia’s issues, Judge Sullivan ostensibly  
10 addresses the cause of those issues by quoting Dr. Kalodner’s observations of Mia in which Mia’s  
11 statements confirmed Christina’s disparagement of Mitchell and Amy, and Christina’s attempts at  
12 alienation. App., Vol. VIII, pg. 1507. Indeed, Judge Sullivan identified the “re-manifestation” of Mia’s  
13 clothing issues, and her anger outbursts and emotional meltdowns, as well as the need for Mia to  
14 undergo “extensive psychological treatment” for those issues, as one of the distinct events demonstrating  
15 a “substantial *change* in circumstances” justifying a change of custody. App., Vol. VIII, pg. 1512. The  
16 record of the case and the findings of the district court do not support Christina’s argument that the court  
17 based its decision on events occurring prior to entry of the SAO on August 7, 2009.

20 On appeal, Christina repeats her claims that Mitchell abused alcohol, and failed to identify traffic  
21 charges (then unadjudicated) relating to alcohol use as part of his pleadings before the district court at  
22 the hearings on February 24, 2009 and June 4, 2009. These claims were addressed appropriately by the  
23 district court through referral of Mitchell by Dr. Paglini to an expert, Dr. Michael Levy. Both Dr. Levy,  
24 and then Dr. Paglini who reviewed Dr. Levy’s work, came to the conclusion that alcohol usage by  
25 Mitchell was “not currently a problem as alleged by Plaintiff.” App., Vol. VIII, pg. 1508. Dr. Paglini’s  
26 conclusion on that issue was expressly quoted by the district court in its findings. *Id.*



Perhaps the most important finding of the district court supporting its ultimate order granting Mitchell additional time and confirming his status of joint physical custodian was the court's recognition of the conclusions of Dr. Paglini in the child custody evaluation as follows:

THE COURT FURTHER FINDS that based upon Dr. Paglini's Child Custody Evaluation in which he found that the children are very bonded with each parent, that both parents provide excellent care for the children, that both parents are very involved in the children's lives, and that the children are surrounded by lots of love in each parental household, it is apparent that joint legal and physical custody is in the best interest of the children.

**16. Issues on Appeal.**

(a) Did the district court correctly determine the physical custody status of the parties under *Rivero II*?

(b) Did the district court apply the correct legal standard for the modification of the physical custody and/or the timeshare arrangement of the parties?

(c) Was either party entitled to an evidentiary hearing?

(d) Was the evidence used by the district court to support its findings of fact barred by the doctrine of res judicata?

(e) Did the district court err in failing to grant Mitchell an equal timeshare arrangement?

(f) Did the district court err in failing to appoint a parenting coordinator?

(g) Did the district court err in failing to award the specific attorney's fees, costs and expenses requested by the parties?

Christina has not argued in her Fast Track Statement that the district court erred by failing to grant her countermotion to set aside the SAO. Therefore, Christina ostensibly concedes that the district court's denial of her November 30, 2009 countermotion to set aside the SAO (App., Vol. V, pgs. 791-912) was an appropriate exercise of the district court's discretion. App., Vol. VIII, pgs. 1495-1514.

17. **Legal Argument, including authorities:**

In her Fast Track Statement, Christina asks this Court to reverse the district court's grant of additional time with the children to Mitchell pursuant to the Appealed Order, instruct the district court to determine that the prior timeshare arrangement of the parties grants her primary physical custody, and declare Christina the prevailing party and award her attorney's fees and costs. Appellant's Fast Track Statement, p. 13, lines 13-20. In essence, Christina requests that this Court ignore the findings of the district court that the best interests of the children would be served by the parties acting as joint physical custodians, ignore the court's tacit finding that adequate cause existed for a hearing on custody, and refuse to grant Mitchell a hearing on the issue of custody if the court finds that the timeshare is not joint physical custody. As discussed below, Mitchell agrees with Christina that the district court erred in failing to make specific findings supporting portions of its decision, and that the matter should be remanded to the district court for further findings on such matters. Contrary to Christina's position, however, should the district court find that the timeshare does not meet the standard for joint physical custody in *Rivero II*, the district court should be directed to hold an evidentiary hearing on Mitchell's motion for a change in physical custody of the children.

(a) ***Standard of Review.***

This Court reviews the district court's decision regarding custody (including changes in timeshare) for an abuse of discretion. *Rivero II*, 216 P.3d at 226 (citing *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996)). The district court has broad discretion in child custody matters, but substantial evidence must support the court's findings. *Id.* (citing *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007)). Substantial evidence is "evidence that a reasonable person may accept as adequate to sustain a judgment." *Id.* (citing *Ellis*, 123 Nev. at 149).

1           (b)     ***The District Court's Determination of Physical Custody Requires Remand for Further***  
2 ***Findings.***

3           When considering whether to modify a physical custody arrangement, the district court must first  
4 determine what type of physical custody arrangement exists between the parties. *Id.* While providing a  
5 precise number for the determination of physical custody (40 percent of the days of the year), *Rivero II's*  
6 nebulous criteria for determining what constitutes a "day" negates any certainty under the judicially  
7 created formula.  
8

9           Specifically, under *Rivero II*, the terms of a parties' custody arrangement will control except  
10 when the parties move the district court to modify the custody arrangement. *Id.* In that circumstance,  
11 the district court must apply the definitions of custody as set forth in *Rivero II*. Essentially, the court  
12 must review the parties' custody arrangement under the "40% annually" standard that this Court  
13 prescribed in that decision.  
14

15           Under the formula in *Rivero II*, joint physical custody is defined as a party having a child in his  
16 or her "physical custody" approximately three days per week. *Id.* at 227. Mitchell's timeshare  
17 arrangement with the children under MSA as modified by the SAO provided him normal visitation with  
18 the children weekends from 6:00 p.m. on Fridays until 6:00 p.m. on Sundays except as follows: (1) on  
19 the first weekend of the month, Christina has the right to have the children on the weekend in which case  
20 Mitchell's time is Wednesday at 6:00 p.m. until Friday at 6:00 p.m.; and (2) on the second and fourth  
21 weekends of the month, Mitchell's weekend visitation begins on Thursdays at 6:00 p.m. App., Vol. II,  
22 pg. 257-259; Vol. IV, pgs. 716-719. Thus, Mitchell had the children in his physical custody all or part  
23 of three or four days each week.  
24  
25

26           Arguably, the fact that Mitchell has the children in his physical custody only six hours on some  
27 of those days is irrelevant under the *Rivero II* criteria. This Court stated in *Rivero II*:  
28

1 In calculating the time during which a party has physical custody of the child, the district  
2 court should look at the number of days during which a party provided supervision of the  
3 child, the child resided with the party, and during which the party made the day-to-day  
4 decisions regarding the child. The district court should not focus on, for example, the  
5 exact number of hours the child was in the care of the parent, whether the child was  
6 sleeping, or whether the child was in the care of a third-party caregiver or spent time with  
7 a friend or relative during the period of time in question.

8 216 P.3d at 225. On those days Mitchell has the children six hours of time (like all other times Mitchell  
9 has visitation with the children), he provides for their supervision, they reside at his home, and he makes  
10 day-to-day decisions regarding activities, clothing, food, bathing, and sleep. App., Vol. IV, pgs. 731;  
11 R.App. pg. 155-156.

12 Here, Judge Sullivan found that the timeshare arrangement as set forth in the MSA as modified  
13 by the SAO likely did not constitute joint physical custody as set forth in *Rivero II*. App., Vol. VIII, pg.  
14 1511. He determined, without any findings analyzing his determination, that Mitchell had a minimum  
15 of 131 days and a maximum of 143 days of physical custody per year, which he concluded failed to  
16 meet the 40 percent requirement (or 146 days). *Id.* Judge Sullivan's failure to provide findings  
17 explaining his determination is error. Since *Rivero II* does not grant any bright line criteria for the  
18 determination of days, the method or reasoning of a district court's calculation of days is essential for  
19 even a basic review of any custodial order. Indeed, were this Court simply to find that such  
20 determinations were within the broad discretion of the district court, this Court's intent for more  
21 certainty in the definition of physical custody would be lost, as the district courts could (as they do now)  
22 use wildly different criteria for the determination of what constitutes a "day."

23 This error is also present in the final determination by Judge Sullivan. Judge Sullivan granted  
24 specific time to Mitchell with the intent to grant him joint physical custody under the *Rivero II* criteria.  
25 App., Vol. VIII, pgs. 1512-1513. With the additional time he granted to Mitchell, nine more hours on  
26  
27  
28

1 the third Friday of each month, Judge Sullivan indicated that Mitchell had joint physical custody. *Id.*  
2 Again, however, Judge Sullivan failed to provide any findings explaining his calculation.

3       Upon remand, the district court must clarify its findings regarding the application of the *Rivero II*  
4 criteria because different legal tests apply to the request for modification of primary physical custody  
5 and joint physical custody. *Rivero II*, 216 P.3d at 222, 227. A modification to a joint physical custody  
6 arrangement is appropriate if it is in the children's best interests. *Id.* at 227 (citing NRS 125.510(2)). A  
7 modification of a primary physical custody arrangement, however, is appropriate only when there is a  
8 substantial change in the circumstances affecting the children and the modification serves the children's  
9 best interests. *Id.* (citing *Ellis*, 123 Nev. at 150).

11       That part of the district court's order that is clear, however, is that it believed that it was in the  
12 best interests of the children that Mitchell continue to have joint physical custody, and that there were  
13 sufficient facts justifying a change of custody even if it found that Mitchell's prior timeshare was not  
14 joint physical custody. The district court should be permitted on remand to review the parties' timeshare  
15 arrangement to provide further findings in support of its order.

17       **(c) *Should the District Court Upon Remand Conclude that Mitchell's Timeshare is not***  
18 ***Joint Physical Custody, Mitchell and Christina are Entitled to an Evidentiary Hearing Upon***  
19 ***Mitchell's Motion to Modify Custody.***

20       Christina correctly argues that if Judge Sullivan ordered a modification of custody, she was  
21 entitled to an evidentiary hearing. In *Moser v. Moser*, 108 Nev. 572, 574, 836 P.2d 63, 66 (1992) this  
22 Court held:

23       Litigants in a custody battle have the right to a full and fair hearing concerning the  
24 ultimate disposition of a child. At a minimum, observance of this right requires that  
25 before a parent loses custody of a child, the elements that serve as a precondition to a  
26 change of custody must be supported by factual evidence. Furthermore, the party  
27 threatened with the loss of parental rights must be given the opportunity to disprove the  
evidence presented.

28 *Id.* at 574 (citing *Matthews v. District Court*, 91 Nev. 96, 97, 531 P.2d 852 (1975)).

1 If upon remand the district court again concludes that Christina actually had primary physical  
2 custody, the Court's order addressing Mitchell's request for an equal timeshare arrangement, or any  
3 arrangement granting him 40 percent or more of the days with the children, would require an evidentiary  
4 hearing. Mitchell welcomes that opportunity. Indeed, Christina has steadfastly avoided any evidentiary  
5 hearing or even discovery in this matter. App., Vol. VI, pgs. 1102-1131; Vol. V, pgs. 998-1012.

7 If on remand, however, the district court determines that the parties actually had joint physical  
8 custody of the children, the parties would not be entitled to an evidentiary hearing because any award of  
9 additional time does not change custody. *Moser*, 108 Nev. at 574. Even in that case, the district court  
10 must still make specific factual findings supporting its determination that any award of additional time  
11 to Mitchell was or is in the best interests of the children. *See Rivero II*, 216 P.3d at 226 (citing *Ellis* 123  
12 Nev. at 149). Because that issue involves the determination of factual issues, the district court, in its  
13 discretion, could hold an evidentiary hearing to resolve any factual dispute.

15 Christina ostensibly argues upon appeal that there would be no basis for an evidentiary hearing  
16 upon remand because Mitchell cannot demonstrate adequate cause for a hearing based upon facts  
17 occurring after entry of the SAO. Appellant's Fast Track Statement, pg. 10 (lines 22-28). In *Rooney v.*  
18 *Rooney*, 109 Nev. 540, 853 P.2d 123 (1993), this Court found that a district court has discretion to  
19 summarily deny a motion to modify custody without holding an evidentiary hearing if the moving party  
20 cannot demonstrate "adequate cause" for a hearing. "Adequate cause" arises where the moving party  
21 presents a prima facie case for modification. *Id.* To constitute a prima facie case, it must be shown that  
22 (a) the facts alleged in the affidavits are relevant to the grounds for modification; and (b) the evidence is  
23 not merely cumulative or impeaching. *Id.* (citing *Roorda v. Roorda*, 25 Wash. App 849, 611 P.2d 794  
24 (1980)).

1 Here, Christina's argument that the district court cannot find adequate cause for a hearing for  
2 change of custody is frivolous because the district court actually ordered a change of custody based upon  
3 the written evidence submitted to it. App., Vol. VIII, pgs. 1507-1510, 1512. Logic tells us that if the  
4 district court finds adequate cause for change, it would find adequate cause for a hearing on a change.  
5 Christina ignores that the district court's findings specifically address Mia's emotional problems that  
6 occurred and became a serious issue during the time between the entry of the SAO and Mitchell's  
7 October 29, 2009 motion. Mitchell's motion is supported by affidavits, which are attached thereto, that  
8 are relevant to the grounds for modification, and his May 3, 2010 supplement includes the findings of  
9 Dr. Paglini (as set forth in the child custody evaluation) and attaches the treatment notes of Dr. Kalodner  
10 (including her letter to Mitchell dated December 4, 2009), upon which the district court based its  
11 claimed change of custody. App., Vol. IV, pgs. 748-761; R.App. pgs. 142-198; App., Vol. VIII, pgs.  
12 1507-1510, 1512.

15 Christina, apparently recognizing that Dr. Paglini's findings present a problem to her "no  
16 adequate cause for hearing" argument, attacks the district court's use of those findings in the Appealed  
17 Order. Appellant's Fast Track Statement, pg. 8 (lines 24-27) and pg. 9 (lines 11-13). The basis of  
18 Christina's argument, however, is her erroneous assertion that the district court cannot rely upon Dr.  
19 Paglini's factual determinations as evidence. *Id.* Christina's position is incorrect.

21 EDCR 5.13(c) provides that a child custody report "may be received as direct evidence of the  
22 facts contained therein that are within the personal knowledge of the specialist who prepared the report."  
23 Here, the child custody evaluation was based on "extensive clinical interviews, review of discovery  
24 documentation, extensive collateral interviews of family and friends, psychological testing of both  
25 parents, brief interviews of Mia, home visits and family observations," all performed by Dr. Paglini.  
26 The bulk of Dr. Paglini's report was based upon the interviews, testing, home and family observations  
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1 he conducted, all of which was within his personal knowledge, and all of which was properly relied  
2 upon by the district court under EDCR 5.13(c).

3 Equally frivolous is Christina's argument that the standard for holding an evidentiary hearing on  
4 Mitchell's motion should be whether Christina "emotionally abused" Mia. Appellant's Fast Track  
5 Statement, pg. 8 (lines 17-22). Her citation for this proposition is an off the cuff remark made by the  
6 district court during the middle of argument. That standard does not appear in any order of the district  
7 court, and was not part of its analysis in the Appealed Order. Statements made by a court at hearing  
8 have no legal affect whatsoever until contained in a signed and filed written order. *Rust v. Clark Cty.*  
9 *School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). It was the standard in *Ellis*, not  
10 "emotional abuse," that the district court tacitly, and correctly, concluded was the proper legal standard  
11 for a modification of custody. App., Vol. VIII, pg. 1512..

14 **(d) *The Factual Findings Made by the District Court to Confirm Mitchell's Joint Physical***  
15 ***Custody Status and Award Additional Timeshare are not Barred from Consideration Based on the***  
16 ***Doctrine of Res Judicata.***

17 As discussed above, Christina argues that the issues raised in Mitchell's October 29, 2009  
18 motion, and the facts upon which the district court based its findings, occurred prior to entry of the SAO,  
19 and thus were not a proper basis for Mitchell's motion. Appellant's Fast Track Statement, pg. 9 (lines  
20 14-17) and p. 10 (lines 7-11). Contrary to Christina's claims, the bases for Mitchell's claims were facts  
21 arising after the entry of the SAO, and in any event addressed issues that had never been previously  
22 adjudicated by the court.

23 Christina argues upon appeal that the district court was precluded under *McMonigle v.*  
24 *McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994), from considering Mitchell's October 29, 2009  
25 motion. Appellant's Fast Track Statement, pg. 9 (lines 14-26). She argues that the district court was  
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1 limited to considering only facts and circumstances that existed between entry of the SAO and the filing  
2 of Mitchell's October 29, 2009 motion. *Id.* at pg. 10 (lines 7-11).

3 Although the requirement of proving a substantial change in circumstances is not applicable to a  
4 request to modify a joint physical custody arrangement, the doctrine of res judicata is still applicable.  
5 See *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997). The Court concluded in *Mosley* that "when  
6 a judge makes a decision on child custody, such a decision should not be subject to modification if  
7 substantially the same set of circumstances that were present at the time the decision was made remains  
8 in effect." *Id.* at 58. In other words, "some change" in circumstances must have occurred even in a  
9 request to modify a joint physical custody arrangement.  
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11 The doctrine of res judicata does not prevent the district court from considering Mitchell's  
12 October 29, 2009 motion. Christina denies in her November 30, 2009 countermotion ever making  
13 negative statements about Mitchell and Amy to Mia and claims Mia's behavioral and emotional  
14 problems existed before entry of the SAO. App., Vol. V, pgs. 819-825; 845-850. After considering the  
15 evidence before it, the district court rejected Christina's argument when it found that Mia's behavioral  
16 and emotional problems re-manifested, and others had emerged (anger outbursts and emotional  
17 meltdowns), recognized Mia's need for extensive psychological treatment, and noted the spontaneous  
18 statements Mia made to Dr. Kalodner during treatment, all of which occurred after entry of the SAO as  
19 confirmed by the child custody evaluation performed by Dr. Paglini and Dr. Kalodner's treatment notes  
20 included as part of Mitchell's supplement filed on May 3, 2010. App., Vol. VIII, pg. 1512; R.App., pgs.  
21 169-170, 174-198. The district court at the hearing on May 6, 2010 even stated that it believed Christina  
22 made negative comments about Mitchell and Amy to Mia when the court provided: "Did you [referring  
23 to Christina] make comments; absolutely." App., Vol. I, pg. 163 (line 18). Accordingly, the record of  
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1 the case and the findings of the district court do not support Christina's argument that the court based its  
2 decision on events occurring prior to entry of the SAO on August 7, 2009.

3 Even if the Court accepts the manner in which Christina frames the issue on appeal, Mitchell  
4 contends that the question of what circumstances have changed "since the most recent custodial order"  
5 requires more than comparing the dates of alleged incidents with the date of a court order. The "prior in  
6 time" prohibition does not necessarily encompass items that have occurred prior to the last custody  
7 hearing (i.e., statements made to Mia by Christina or clothing, behavioral or emotional problems  
8 experienced by Mia), but only matters that were actually raised in that hearing. In other words, even  
9 circumstances that have occurred earlier in time than entry of the SAO but have never been made the  
10 subject of a court decision may justify a change in custody or visitation. *See Castle v. Simmons*, 120  
11 Nev. 98, 86 P.3d 1042 (2004).  
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14 Mitchell has never alleged in any pleadings or at any hearing prior to his October 29, 2009  
15 motion that Christina has emotionally abused Mia or that Mia has been impacted at all by negative  
16 statements Christina has made to Mia. At the hearing on June 4, 2009, the district court referred the  
17 parties to mediation, vacated the hearing scheduled for July 2, 2009 on Christina's motion to continue  
18 and Mitchell's opposition and response, and scheduled an evidentiary hearing with regard to custody.  
19 App., Vol. IV, pg. 698; *see also* App., Vol. 1, pgs. 33-60. The evidentiary hearing scheduled by the  
20 district court with respect to custody never occurred. Instead, the parties entered into the SAO on July 7,  
21 2009, which settled only the matters raised by Mitchell's April 27, 2009 motion. App., Vol. IV, pgs.  
22 716-719. Mitchell's April 27, 2009 motion does not raise the same issues as his October 29, 2009  
23 motion. *Compare* App., Vol. IV, pg. 645-661 and R.App. pgs. 1-24 *with* App., Vol. IV, pgs. 720-790.  
24 Mitchell raised for the first time in his October 29, 2009 motion the issue of emotional abuse and the  
25 fact that Mia may have been impacted by negative statements made by Christina.  
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1           **(f)     *The District Court's Failure to Award an Equal Timeshare Arrangement Requires***  
2           ***Remand for Further Findings.***

3           The Appealed Order confirmed the parties as joint physical custodians of their children and  
4 granted Mitchell additional time equal to nine hours on the third Friday of each month. App., Vol. VIII,  
5 pgs. 1512-1513. However, Mitchell requested an equal timeshare arrangement in his October 29, 2009  
6 motion and May 3, 2010 supplement. App., Vol. IV, pgs. 720-790 (specifically pg. 746); R.App., pgs.  
7 142-198 (specifically pg. 164). While the district court has broad discretion in child custody matters,  
8 substantial evidence must support the district court's findings. *Rivero II*, 216 P.3d at 226 (citing *Ellis v.*  
9 *Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007)). Although the district court made specific  
10 factual findings that a substantial change in circumstances affecting the welfare of the children had  
11 occurred and that joint physical custody was in the best interests of the children, the district court failed  
12 to award Mitchell an equal timeshare arrangement and did not provide in the Appealed Order any  
13 explanation for not doing so. The record in this case supports an equal timeshare arrangement. App.,  
14 Vol. IV, pgs. 734-745; R.App., pgs. 156-164. This Court, however, cannot determine whether the  
15 district court abused its discretion without such findings, and should consequently order a remand.  
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18           **(g)     *The District Court's Failure to Appoint a Parenting Coordinator was within its Sound***  
19           ***Discretion.***

20           Christina did not request in her pleadings that the district court appoint a parenting coordinator.  
21 App., Vol. V, pgs. 791-912; App., Vol. VI, pgs. 1102-1131. Therefore, she is not an aggrieved party,  
22 and the Court lacks jurisdiction to consider her appeal on this issue. *Valley Bank of NV v. Ginsburg*,  
23 110 Nev. 440, 874 P.2d 729 (1994). Christina seems to rely on the statement made by Judge Sullivan at  
24 the end of the hearing on May 6, 2010 that he thought a parenting coordinator was a good idea. App.,  
25 Vol. 1, pg. 171. However, before the district court reduces its decision to writing, signs it and files it  
26 with the clerk, the nature of the judicial decision is impermanent, and Judge Sullivan remained free to  
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1 reconsider the decision and issue a different written judgment. *See Rust v. Clark Cty. School Dist.*, 103  
2 Nev. at 688. Accordingly, the district court did not err when it decided not to appoint a parenting  
3 coordinator. In fact, the district court specifically found that the parties were better served by resolving  
4 their issues without therapeutic intervention. App., Vol. VIII, pg. 1513.

5 (h) ***The District Court Properly Denied Christina's Request for Attorney's Fees and Costs;***  
6 ***however, the District Court Erred by Failing to Award Mitchell his Attorneys' Fees, Costs and***  
7 ***Expenses.***

8 (1) Christina's Right to Attorney's Fees and Costs.

9 Attorney's fees are not recoverable absent a statute, rule or contractual provision to the contrary.  
10 *See Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983). Christina asks this Court to  
11 instruct the district court to award her attorney's fees and costs incurred by Christina since Mitchell filed  
12 his October 29, 2009 motion through the completion of the case on appeal. Appellant's Fast Track  
13 Statement, pg. 12-13. Christina's November 30, 2009 countermotion asked the district court to award  
14 her attorney's fees pursuant to the parties' MSA, which she incurred from December 2008 until the time  
15 of filing her countermotion. App., Vol. V, pg. 833 (Article III, paragraph 5). The parties' MSA  
16 provides for an award of attorney's fees only to the prevailing party in litigation arising under the MSA.  
17 App., Vol. II, pg. 254 (Section 4.7). Christina filed her November 30, 2009 countermotion in proper  
18 person. App., Vol. V, pg. 791. Although Christina is an attorney, this Court has held that all proper  
19 person litigants, whether attorney or non-attorney, must be obligated to pay attorney's fees as a  
20 prerequisite for an award of prevailing party attorney's fees. *See Sellers v. 4<sup>th</sup> Judicial Dist. Ct.*, 119  
21 Nev. 256, 71 P.3d 495 (2003). Moreover, Christina has not been the prevailing party in any matter that  
22 was before the district court and her prior requests for such attorney's fees and costs were denied. App.,  
23 Vol. IV, pgs. 640-644. Notwithstanding the foregoing, the district court specifically denied Christina's  
24 request for attorney's fees at the hearing on December 8, 2009. App., Vol. V, pg. 985 (paragraph 6).  
25 Christina has not appealed from any of these orders by the district court, and the time period for doing so  
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1 has long ago expired. *See* NRAP 4(a)(1). Therefore, Christina is not an aggrieved party, and the Court  
2 lacks jurisdiction to consider Christina's appeal on this matter. *Ginsburg*, 110 Nev. at 446.

3 On February 15, 2010, Christina filed a motion for reconsideration/clarification of the district  
4 court's order from the hearing on December 8, 2009. App., Vol. VI, pgs. 1032-1050. At this time, she  
5 was represented by Donn Prokopius, Esq. The district court held a hearing on April 13, 2010 and denied  
6 Christina's motion but agreed to review each party's request for attorney's fees and costs association  
7 with the pleadings before the district court at the hearing on April 13, 2010. *Id.* at 1138-1140. Citing to  
8 the parties' MSA and NRS 18.010 and NRS 125.150(3), Christina requested that the district court award  
9 her \$3,500 in attorney's fees and costs for filing her motion for reconsideration/clarification. *Id.* at  
10 1043-1044. Although Mitchell acknowledges that the district court failed to address Christina's request  
11 for \$3,500 in attorney's fess and costs in the Appealed Order, the absence of a ruling awarding the  
12 requested relief constitutes a denial of the claim. *See Bd. of Gallery of History v. Datecs Corp.*, 116  
13 Nev. 286, 994 P.2d 1149 (2000) (citing *McClure v. Moore*, 565 So.2d 8, 11 (Ala. 1990)). Furthermore,  
14 Christina is not entitled to an award of attorney's fees and costs under the parties' MSA and NRS 18.010  
15 because she was not the prevailing party. The district court denied her motion for  
16 reconsideration/clarification and her November 30, 2009 countermotion to set aside the SAO. App.,  
17 Vol. VI, pgs. 1138-1140; App., Vol. VIII, pg. 1514. In addition, NRS 125.150(3) is not applicable as it  
18 applies to divorce proceedings.

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22 (2) Mitchell's Right to Attorney's Fees, Costs and Expenses.

23 At the hearing in the district court held on December 8, 2009, the district court deferred ruling on  
24 Mitchell's October 29, 2009 motion and ordered a child custody evaluation to be performed based on  
25 the allegations set forth in the pleadings. App., Vol. V, pg. 981 (paragraph 1). The district court  
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1 concluded that Mitchell should pay for the evaluation, but if the report came back negative toward  
2 Christina, she was required to reimburse Mitchell the amount paid. *Id.*

3 Mitchell moved for sanctions under EDCR 7.60 (which include an award of attorney's fees and  
4 costs) in his pleadings before the district court at the hearing on April 13, 2010. R.App. pg. 51.  
5 Mitchell's May 3, 2010 supplement also requested that the district court order Christina to reimburse  
6 him for the costs of the child custody evaluation and for his attorney's fees and costs of opposing  
7 Christina's motion for reconsideration, which was heard and denied by the district court on April 13,  
8 2010. R.App., pgs. 163-164; App., Vol. VI, pgs. 1138-1140. At the May 6, 2010 hearing, the district  
9 court ruled that it would review the supplement and file a written decision. App., Vol. I, pgs. 147-171.  
10 In the Appealed Order, the district court failed to address Mitchell's requests to be reimbursed for the  
11 expense of the child custody evaluation and for his attorney's fees and costs. However, as stated above,  
12 the absence of a ruling awarding the requested relief constitutes a denial of the claim. *See Datecs Corp.*,  
13 116 Nev. 286 (citing *McClure v. Moore*, 565 So.2d 8, 11 (Ala. 1990)).  
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16 The district court erred by failing to award Mitchell the costs of the child custody evaluation  
17 pursuant to the order from the hearing on December 8, 2009. Based on the factual findings of the  
18 district court as set forth in the Appealed Order, the child custody report was clearly negative toward  
19 Christina. App., Vol. VIII, pgs. 1507-1510; 1512. Therefore, the district court should have awarded  
20 Mitchell \$16,250 as set forth in his supplement filed on May 3, 2010. R.App. pgs. 163-164.  
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22 Mitchell is also the prevailing party. The district court denied Christina's motion for  
23 reconsideration/clarification and granted his October 29, 2009 motion. App., Vol. VI, pgs. 1138-1140;  
24 App., Vol. VIII, pg. 1514. Therefore, the district court erred by failing to award Mitchell \$5,000 in  
25 attorney's fees and costs as requested in his supplement filed on May 3, 2010. Such an award of  
26 attorney's fees and costs is required by the parties' MSA. App., Vol. II, pg. 254 (Section 4.7).  
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1 18. Issues of first impression or of public interest. Does this appeal present a substantial legal  
2 issue of first impression in this jurisdiction or one affecting an important public interest: No.

3 VERIFICATION

4 I recognize that under NRAP 3E I am responsible for timely filing a fast track statement and  
5 response and that the Nevada Supreme Court of Nevada may impose sanctions for failing to timely file a  
6 fast track statement and response. I therefore certify that the information provided in this fast track  
7 statement and response is true and complete to the best of my knowledge, information, and belief.  
8

9  
10 Dated this 9 day of May, 2011.

11 RADFORD J. SMITH, CHARTERED

12  
13   
14 RADFORD J. SMITH, ESQ.

15 Nevada Bar No. 002791

16 64 N. Pecos Road, Suite 700

17 Henderson, Nevada 89074

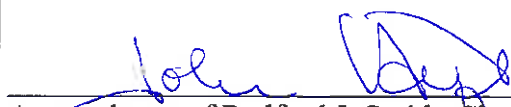
18 (702) 990-6448

19 Attorneys for Respondent/Cross-Appellant Mitchell D. Stipp  
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1  
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I served the foregoing document described as "FAST TRACK  
4 STATEMENT AND RESPONSE" and "RESPONDENT/CROSS-APPELLANT'S APPENDIX TO  
5 FAST TRACK STATEMENT AND RESPONSE" by mail pursuant to NRAP 25 on this 7 day of  
6 May, 2011, to all interested parties as follows:  
7

8 Patricia L. Vaccarino, Esq.  
9 Vaccarino Law Office  
10 8861 W. Sahara Avenue., Suite 210  
Las Vegas, Nevada 89117

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13 An employee of Radford J. Smith, Chartered  
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