IN THE SUPREME COURT OF THE STATE OF NEVADA

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KIRK ROSS HARRISON,

Appellant/Cross-Respondent,

vs.

VIVIAN MARIE LEE HARRISON,

Respondent/Cross-Appellant

/

NO. 66072

APPEAL FROM JUDGMENT
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
BRYCE DUCKWORTH, DISTRICT JUDGE

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

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REPLY ARGUMENT ON KIRK'S APPEAL

A. Vivian's Well-Established History of Parental Misconduct and Neglect

Vivian, incredulously, asserts, "Nothing in the parties' history justified the litigation."[1] RAB2. Vivian then attempts to mislead this court regarding the issue of whether Vivian has a narcissistic personality disorder ("NPD"). The primary issue before the trial court was whether Vivian's history of parental misconduct and neglect justified Kirk obtaining primary custody. Secondarily, Kirk submitted that the causes of this misconduct and neglect were Vivian's prolonged history of abuse of controlled substances and her NPD. Unable to deny or legitimately dispute Vivian's history of misconduct and neglect, and unable to deny the existence of all the medical records confirming Vivian's severe drug abuse for over seven years, Vivian chose to make a disproportionate assault upon the NPD issue. There was no "prevailing" party as the case settled prior to trial. 16A.App.3339-3340. Obviously, since there was no trial, there was no "competent evidence" adduced as to whether Vivian has or does not have NPD.

Less than sixteen months after giving birth to Rylee, and while still nursing Rylee, beginning on June 9, 2004, Vivian started taking Phentermine, Didrex, Bontril, and Diethylpropion, all of which are Schedule III or Schedule IV controlled substances. 4A.App.685-688,758,801-804. Phentermine, Didrex, and Bontril are in the same pharmaceutical family as amphetamines. All of these drugs work on the central nervous system and are so powerful each is only supposed to be taken for a

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[1] Kirk had hoped to avoid addressing Vivian's history of parental misconduct and neglect in any detail, as demonstrated by the few line references on page 22 in the opening brief. However, Vivian's baseless assertion that Kirk made much to do about nothing in the litigation, necessitates such a response.

few weeks. Through discovery, it was confirmed that Vivian took these drugs for over seven years. 4A.App.685-688,758,801-804. Vivian represented in writing to one of her doctor's that she was using Phentermine as a "**recreational drug.**"[2] 4A.App.685,859 (emphasis added).

As a consequence of the long term use of these powerful drugs, Vivian had severe insomnia, significant delusions, and was unstable, volatile, aggressive, assaultive, emotionally abusive, and physically abusive. 8A.App.1571-1572. Vivian was also incoherent at times. 2A.App.356-357. Vivian also complained that she saw "triple" while driving with Rylee and had to pull to the side of the road. 2A.App.360. Also through discovery, it was learned that Vivian told a psychiatrist, Dr. Sean Duffy, on July 19, 2005, that, "She is feeling very tense, irritable, and reactive to her family dynamics manifesting as **frequent arguments and anger on her part.**" (emphasis added). 5A.App.914. This was Vivian's self confessed behavior after taking these drugs for only thirteen months. As Vivian continued to take these drugs during the next six years, her behavior deteriorated more and more each year. 1A.App.87,186,198,200;4A.App.755-756.

Dr. Duffy also noted on July 19, 2005, "there is considerable ambivalence about her relationship with her husband and her older children." By the fall of 2005, Vivian wanted little to do with Brooke (then 6 years old) and Rylee (then 2 years old)

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[2] Incredulously, Vivian asserts, "Kirk's claims of 'drug abuse' were proven false by Vivian voluntarily submitting to weekly blood tests for ten months, all of which were negative for any drugs." RAB10-11. These weekly blood tests were **after** the service of the complaint and motion for primary physical custody and only proved Vivian stopped abusing drugs for that limited period of time. 3A.App.587.

on a day to day basis, other than sleep in the same bed with them. 1A.App.194-195,198,206;5A.App.914. Vivian withdrew from the family, including Brooke and Rylee, more and more each year. 1A.App.198;4A.App.755-756.

With his wife no longer wanting to be a mom on a day to day basis, Kirk decided he had no choice but to walk away from what was a thriving legal practice and resigned from Harrison, Kemp & Jones, Chtd. on January 31, 2006 to take care of their 6 year old and 3 year old daughters on a full-time basis. 1A.App.15;4A.App.755.

For the next almost six years, until about when the complaint for divorce was served on September 14, 2011, Kirk took Brooke and Rylee to school everyday, to and from sports activities, and to and from dance classes. Kirk did all of the grocery shopping, made the vast majority of their meals and ate his meals with them, took them shopping for their clothes, taught them how to do their laundry, helped them with their homework, played board games with them, taught them how to play sports, took fly fishing lessons with Brooke, taught them how to ride their bikes, took them to movies, roller skating, ice skating, to parks, on hikes, to sporting events, to their friends' birthday parties, to plays at Tuachan, trips to Utah on the weekends, etc. 1A.App.18-19,112,141,195;4A.App.706-711.

During this same six year time period, Vivian did very little with Brooke and Rylee on a day to day basis. 8A.App.1573;2A.App.358. Vivian would go to bed not knowing or caring whether Brooke or Rylee had done their homework. 1A.App.112,139-140,150. When Vivian was home, she would sequester herself behind the closed door in the home office away from the rest of the family, including Brooke and Rylee. 1A.App.97,194-195,206. There were many days when Vivian would leave during the day without anyone knowing where she was. 1A.App.131-132;2A.App356. Vivian was oblivious to Brooke's and Rylee's needs most of the

time. 1A.App.83-84,150,206. If Kirk had to be out of town over night, there was a substantial risk Vivian would not make a meal for Brooke and Rylee. 1A.App.79,81,96, 129,137,142,144;2A.App.350;8A.App.1579. Vivian would go months without sitting down in their home and having a meal with Brooke and Rylee. 1A.App.206,112-113. Vivian's lack of involvement with the children was so acute that on September 19, 2010, Brooke, then 11 years old, commented that Rylee "has really never had a mom." 1A.App.131-132.

Vivian did make sporadic public appearances with the girls, such as parent teacher conferences, school functions, sewing classes, parent observation at dance, dance recitals, etc. 1A.App.76-77. However, even the sporadic public appearances became almost non-existent between the fall of 2008 and mid-September of 2011 when the motion for primary custody was served. 1A.App.85,89,90,104,143,151,202. All but a couple of the affidavits submitted by Vivian only attest to these sporadic public appearances before the fall of 2008 and after mid-September of 2011. 15A.App.3100.

The record shows that Vivian became extremely delusional. Vivian believed their oldest daughter wanted to kill her and would suffocate Vivian in her sleep with a pillow. 1A.App.99-100,204. Vivian proudly told their oldest daughter that Vivian was a "master soul" because she had been reincarnated so many times. 1A.App.188. Vivian told several people, including one of their adult daughters, that Jonathan Rhys Meyers, a 32 year old actor she had never met, was her "soul mate" and Vivian spent years in pursuit of this actor. Vivian signed up for "Google Alert" to monitor his every move. 1A.App.187. In 2010 alone, Vivian spent over five months in Arizona and California having one major plastic surgery after another getting herself ready for this actor and then in Asia and Europe in pursuit of this actor. 1 A.App. 25-27, 30.

Vivian openly talked about her pursuit of this actor with their older daughters. 1A.App.185,187-188,201-202.

Over the years, while Vivian was abusing prescription drugs, she was consumed by one obsessive compulsive behavior after another. For example, Vivian became obsessed with plastic surgery and other beauty and age-defying treatments. Vivian had just about every type of plastic surgery procedure available performed on her, including five major plastic surgeries, out of state, in less than a twelve month period. 1A.App.25-26. During February of 2011, for example, Vivian had 11 different appointments with 8 different doctors. 1A.App.156-157. Vivian's increasingly obsessive compulsive behavior, in many instances, was to the total exclusion of Brooke and Rylee and an emotional and physical abandonment of them, including reading Vampire novels behind a closed door for almost a year, pursuing the 32 year old actor, from the home office and then to Asia and Ireland for another year, and then pursuing Sergio Becerra, another young man who lives in Ireland, for another four months. 1A.App.194-195,206;4A.App.692-697,755-756,758. Just during 2010, Vivian chose to be away from Brooke and Rylee and travel to India, California, Arizona, Ireland, Utah, and Nepal for over five (5) months. 8A.App.1573. This pattern continued during 2011. 1A.App.26-27;2A.App.357.

The record also shows that Vivian has a history of physical violence against their children and Kirk. 1A.App.51,66-67,175;4A.App.704,758. Vivian threw their oldest daughter to the floor and kicked her in the stomach over and over again. 4A.App.674,758. On another occasion, Vivian struck their second oldest daughter in the head when she was trying to get Brooke and Rylee out of harm's way when Vivian was attacking their oldest daughter. 1A.App.181-182,199. Vivian struck Kirk in the face with her fist. 1A.App.43,175. Years later, Vivian struck Kirk in the eye

with her fist, which was confirmed by the Boulder City Police Department. 4A.App.704,758,851-854.

Additional horrors came to light or occurred after the filing of the complaint: (1) Despite large bold print FDA warnings not to take while nursing, Vivian took Phentermine, Didrex, and Diethylpropion for at least eighteen (18) months while she was nursing Rylee; (2) Despite large bold print FDA warnings not to take while nursing, Vivian took an SSRI, Citalopram, for at least sixteen (16) months while nursing Rylee; (3) Vivian infected Rylee with testosterone, exposing Rylee to the risk that devices would be surgically implanted in her arm that would secrete a man-made hormone into her body for two to four years; 2A.App.359-360; (4) despite the knowledge of what she had done to Rylee, Vivian continued to sleep with Brooke and Rylee in the same bed and Rylee was harmed yet again when she fell out of bed and onto a glass chandelier. This fall resulted in Rylee being soaked in her own blood, necessitated an emergency room visit for Rylee and Kirk, seven stitches in Rylee's arm, permanent scaring for Rylee, and finding Vivian sound asleep upon their return. 1A.App.25; 4A.App.685-688,758,801-806,808-810; 2A.App.350-351

B. Both Parties Requested Primary Physical Custody and Vivian was Never Faced with the Loss of Her Children

Vivian disingenuously attempts to justify the outrageous conduct of Vivian's attorneys by falsely claiming Kirk filed a "motion to limit Vivian to ***supervised*** visitation of Brooke and Rylee. . ." RAB7. In furtherance of this ruse, Vivian represents to this court, "Vivian faced the loss of her children." RAB14. Vivian further attempts to mislead this court by representing, "the Court did not grant Kirk's

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motion to limit Vivian's contact to supervised limitation. . ." RAB15. This is absolutely false, as Kirk never made a motion to limit Vivian's contact to supervised limitation.[3] 1A.App.8.

Each party sought primary physical custody and the court ordered Kirk to have temporary physical custody four days each week and Vivian three days each week. 7A.App.1405.

The trial court specifically found, "Each party requested primary physical custody of their minor children in their underlying pleadings." 16A.App.3340. Kirk only prayed for primary physical custody in the Complaint. 1A.App.4. The referenced motion was entitled, "Motion for Joint Legal and **Primary Physical Custody** and Exclusive Possession of Marital Residence." 1A.App.8(emphasis added). Although Dr. Roitman recommended supervised visitation, Kirk only requested primary physical custody in the motion. 1A.App.55. Kirk reiterated in his reply that he was only seeking primary physical custody, "Kirk is seeking primary custody because it is clearly in Brooke and Rylee's best interest." 4A. App.673.

C. After Filing a Voluminous Opposition to Kirk's Motion for Primary Custody and Countermotion for Primary Custody, Vivian Argued that Kirk Should Not be Allowed to File a Reply in Support of His Motion and Should Not be Allowed to File an Opposition to Vivian's Countermotion for Primary Custody

Kirk filed a 48 page motion for primary physical custody on September 14, 2011. 1A.App.8. On October 31, 2011, Vivian filed a 56 page opposition and countermotion for primary physical custody. 2A.App.362.

During a hearing before the court on December 3, 2011, Vivian argued to the court that Kirk should be denied the right to file an opposition to Vivian's countermotion for primary physical custody and should be denied the right to file a

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[3]This false narrative is repeated throughout the RAB as a justification for the outrageous conduct of Vivian's attorneys in this action.

reply to Vivian's opposition to Kirk's motion for primary physical custody. 13A.App.2796.

It was not that Vivian's attorneys truly wanted to "stop the voluminous motion practice" as they now try to mislead this court into believing. RAB15. Vivian's attorneys had no problem taking 47 days to file an opposition and countermotion, which was significantly longer than Kirk's motion. Vivian's attorneys simply wanted to deny Kirk the ability to respond to what they had filed. 15A.App.3084. Under these circumstances, it is disingenuous, at best, to represent to this court that, "Kirk instead demanded that he be allowed additional briefing, and the hearing then set for December 19, 2011, be delayed for months." RAB15-16. Kirk did not demand any "additional briefing." Kirk simply wanted to file an opposition to Vivian's countermotion and a reply to Vivian's opposition in accordance with the rules. EDCR2.20. The hearing had to be postponed because Vivian took **47 days** to file the opposition and countermotion. 1A.App.8; 2A.App.362.

Vivian's efforts to unduly delay the proceedings continued. For example, Kirk's opposition and countermotions regarding attorney's fees were filed and provided to Vivian's attorneys on May 28, 2013. 15A.App.3084. Despite persistent efforts by Kirk's counsel to get Vivian's attorneys to take a reasonable amount of time to respond, Vivian's attorneys failed to file Vivian's reply and opposition to Kirk's countermotions until September 12, 2013 (**107 days later**). 15A.App.3084. Similar to when they tried to deprive Kirk of an opportunity to file an opposition and reply in connection with briefing the primary physical custody issues, Vivian's attorneys, after taking 107 days, attempted to limit Kirk to just 8 calendar days to respond to their 77 page points and authorities. 15A.App.3084-3085.

Another example of Vivian's attorneys delay was in connection with the preparation of the Marital Settlement Agreement ("MSA"). Kirk provided the draft

of the MSA to Vivian's counsel on February 19, 2013. Despite a representation that a revised MSA would be provided sometime during the week of March 18, 2013, Vivian's attorneys failed to provide the promised response until September 27, 2013 – **220 days** – almost seven and one-half months after the draft was provided. 15A.App.3085. Vivian's attorneys failed to respond to Kirk's proposed decree of divorce for **136 days**. 15A.App.3085.

Vivian's attorneys delayed this case month after month. Vivian's attorneys employed reprehensible tactics to gain an unfair advantage in the briefing process throughout the case. 15A.App.3086.

D. Kirk Never Prepared a Draft of Dr. Roitman's Report, Nor Did Kirk Originate or Draft the Analysis and Opinions Contained in that Report; and it was Not Improper for Dr. Roitman to Express Opinions Without Interviewing Vivian.

Vivian asserts: "Discovery revealed that Kirk had prepared a 43 page draft of Roitman's report." RAB 9. Vivian makes this assertion for the purpose of leading this court to believe that Kirk actually originated and drafted the analysis and opinions contained in Dr. Roitman's report. The truth is that Dr. Roitman originated and drafted 100% of the analysis and opinions in that report. Kirk did not draft Dr. Roitman's report. 8A.App.1643-1644;9A.App.1873-1875. Dr. Roitman's report is dated June 9, 2011. 2A.App.222. Kirk had first sought Dr. Roitman's advice in January of 2010, when he was dedicated to the marriage, in an effort to help Vivian and his children. 4A.App.756;15A.App.3092.

Vivian's parental misconduct and misbehavior began in the summer of 2005 when she suddenly and without explanation took Brooke and Rylee away from Kirk for about six weeks and secreted them away in hotels. 1A.App.53. Kirk did not know where they were or when they would return. 4A.App.756.

Vivian's aberrant behavior was worsening and her condition had noticeably been deteriorating each year since the summer of 2005. 1A.App.87,186,198,200; 4A.App.755-756. However, Vivian refused to get any help. 4A.App.756; 15A.App.3092. Kirk wanted to do whatever he could to help Vivian and their children. Desperate to determine the cause of Vivian's misconduct and misbehavior, Kirk prepared an exhaustive 38 page single spaced summary of everything he knew about Vivian, with the intention of seeking the advice of a psychiatrist who specialized in dealing with children and family matters. Kirk wanted to learn what he could do to help Vivian and their children. 4A.App.756,760-797;15A.App.3092. Kirk had completed this summary sometime in December of 2009. 4A.App.756.

Two different people, including Gard Jameson, a leader in the child advocacy effort in Southern Nevada, referred Kirk to Dr. Roitman as the best psychiatrist in Southern Nevada. 4A.App.756-757;15A.App.3092. Kirk had never met Dr. Roitman prior to this matter. 15A.App.3097. Kirk delivered the exhaustive summary to Dr. Roitman's office on January 4, 2010. 15A.App.3092.

Kirk met Dr. Roitman on January 15, 2010, after Dr. Roitman had a chance to review the exhaustive summary. 4A.App.757. At that time Kirk was dedicated to the marriage and wanted to have a good relationship back with Vivian. 15A.App.3092;3164. Although Kirk was seeking advice because he did not know the cause of Vivian's aberrant behavior, as indicated in the summary, Kirk believed Vivian was probably bi-polar. 15A.App.3088-3089. However, after reading the summary, Dr. Roitman advised Kirk that he believed Vivian was pathologically narcissistic. 4A.App.797;15A.App.3092. Dr. Roitman advised Kirk to read various treatises. 15A.App.3092. Kirk followed Dr. Roitman's advice and read those treatises and many more, and called Dr. Roitman asking questions about the treatises

he was reading in an effort to educate himself so he could help Vivian and their children. 4A.App.682;15A.App.3092-3093.

Unfortunately, Vivian continued to deteriorate during the next 15 months, becoming more confrontational, argumentative, delusional, manipulative, abusive, and exhibiting much of this behavior in front of both the adult and minor children. 1A.App.131-132,139-140,156-157,161-162,168-169,191-195,200-206.

Beginning in November of 2010, Vivian, temporarily, started spending time with Brooke and Rylee, and in late 2010 and January of 2011, Vivian made it very clear she was soon filing for divorce. 1A.App.149-150.

On March 13, 2011, Vivian told Brooke (then 11 years old) and Rylee (then 8 years old), that she was filing for divorce, and the girls would need to choose the parent with whom they wanted to live. Vivian also indicated, in front of Brooke and Rylee, that she wanted to physically fight Kirk. 1A.App.161-162. Having no other realistic choice, Kirk filed for divorce five days later. 1A.App.1.

Kirk was advised that in the event he was unable to settle custody, it was important to be the moving party for temporary primary physical custody. 15A.App.3093. Kirk became concerned that Vivian's attorney was not genuinely interested in settling the case, and was possibly preparing a motion for Vivian to obtain temporary primary physical custody. 15A.App.3093.

Kirk hand delivered copies of the affidavits of the 26 and 24 year old daughters, and the most current draft of Kirk's affidavit to Dr. Roitman. 15A.App.3093. After Dr. Roitman had an opportunity to review the affidavits, Dr. Roitman and Kirk had a lengthy discussion, wherein Kirk asked Dr. Roitman his opinion of the cause of Vivian's behavior. *Id.* Dr. Roitman reconfirmed his opinion that Vivian was suffering from a narcissistic personality disorder. *Id.* A review of Kirk's exhaustive summary letter to Dr. Roitman, dated January 4, 2010, and Kirk's

affidavit indicates Kirk was memorializing events as they occurred. 15A.App.3091; 4A.App.760-797;1A.App.58-175.

When Kirk asked Dr. Roitman when he could provide an expert report, Dr. Roitman was pessimistic in light of his existing commitments. 15A.App.3093. Kirk asked Dr. Roitman if there was anything he could do to assist Dr. Roitman to facilitate Dr. Roitman's preparation of the report. 15A.App.3093. Dr. Roitman replied that since Kirk already had the affidavits, if Kirk could make the initial pass to simply resort the paragraphs under the DSM-IV nine criteria, that would save considerable time for Dr. Roitman, who would then review and revise the data. 15A.App.3093.

Under the guidance of Dr. Roitman, Kirk performed the clerical function of **resorting** the paragraphs in his affidavit and the affidavits of the parties' then 26 and 24 year old daughters. 9A.App.1873-1875;15A.App.3093. Dr. Roitman then reviewed and revised each of the paragraphs and noted Kirk was only about 70% accurate in his effort. 9A.App.1874;15A.App.3094. Kirk performed the clerical function of **typing** excerpts from treatises written by experts in Narcissistic Personality Disorder, most of whom were referred to Kirk by Dr. Roitman and discussed between Kirk and Dr. Roitman, for Dr. Roitman's consideration. 9A.App.1874;15A.App.3093-3094,3099. Based upon the opinions Dr. Roitman had provided to Kirk, beginning when Kirk first sat down with Dr. Roitman on January 15, 2010 and continuing through May of 2011, and using a format construction and engineering experts had used, Kirk prepared a proposed outline for Dr. Roitman's independent consideration. Dr. Roitman rejected the proposed outline in total. 9A.App.3094-3096. Thus, Dr. Roitman was certainly not just a puppet for Kirk, as Vivian's answering brief seems to suggest.

Vivian's assertion that Kirk originated any of Dr. Roitman's psychiatric opinions is not only wrong, it is also illogical. Dr. Roitman, one of the most respected psychiatrists in this State, certainly would not let anyone, including a lay person, who he met for the first time in connection with this case, who he had no contact with except in connection with this matter, tell him what his professional opinions were going to be in this case, and then abandon his professional independence to adopt opinions from the lay person he just met. 15A.App.3097.

Kirk did not originate, write, draft, or prepare any of Dr. Roitman's opinions in this matter. Kirk, also, did not originate, write, draft, or prepare any of Dr. Roitman's analyses in this matter. 9A.App.1873-1875. Accordingly, the court should reject the arguments in Vivian's brief unjustifiably attacking Dr. Roitman and Kirk on this point.

Vivian's brief also attacks Dr. Roitman for rendering a preliminary and qualified opinion without having personally interviewed Vivian. RAB8. The brief contends that Dr. Roitman "grossly violated his standard of care as a psychiatrist" and that it was a "sham" diagnosis. RAB7-8. The record belies Vivian's contention, as established by one of Vivian's own experts, Dr. Thienhaus. He referred to ethical guidelines, which expressly allow a psychiatrist to issue opinions regarding a person's mental status without conducting a personal examination; such an opinion may be "rendered on the basis of other information." 4A.App.733-734.

E. Dr. Roitman's Report was Based Upon Significantly More Reliable and Extensive Information than the Expert Reports Offered by Vivian's Experts.

In addition to Vivian's false argument that Kirk drafted Dr. Roitman's report, Vivian's brief also contends that Dr. Roitman was unethical–or that his methodology was a violation of his standard of care as a psychiatrist, because Kirk was the doctor's only source of information. RAB9. This additional argument is also baseless.

1. Dr. Roitman's Opinion Was Based Upon Important, Extensive, Detailed, and Reliable Collateral Source Information

In his report, Dr. Roitman noted that collateral sources of information are critical to know the subject's behaviors and thought processes over time. 2A.App.222. Dr. Roitman emphasized the importance of collateral source information during his deposition:

> In the case of a personality disorder the collateral history is critical, because the person with the personality disorder has a certain blindness to themselves. They can't appreciate the context in which they're operating. Personality disorders have to be gauged based on long-term patterns of functioning first manifested at an early age. And so **collateral history** is one of the essential ingredients in a valid examination.

15A.App.3096(emphasis added).

Dr. Roitman received the extensive affidavits of the parties' adult daughters, who were eye witnesses to Vivian's behavior and were justifiably concerned about the negative impacts upon their younger sisters. 1A.App.181-207. This collateral history was, therefore, very reliable. The facts set forth in Kirk's exhaustive summary, which Dr. Roitman received about eighteen months earlier, when Kirk was still dedicated to the marriage, were also reliable. Kirk's affidavit contained essentially the same detailed information that was in the 38-page exhaustive summary, plus detailed information concerning Vivian's behavior after the date of the submission of the summary. 4A.App.733. Most of the additional information corroborated the information contained in the adult daughters' affidavits. Therefore, this affidavit was also highly reliable collateral history.

Dr. Roitman appropriately noted in his report: "The opinions rendered are preliminary and subject to change based upon a psychiatric examination of Vivian L. Harrison." 2A.App.222. The credibility of Dr. Roitman's report can best be judged by comparison to the three expert reports upon which Vivian relied.

2. The Report of Each of Vivian's Three Experts was Based Only Upon What Vivian Told Them In Very Brief Interviews.

It is apparent that Vivian did not go to Doctors Applebaum, Ronningstam and Thienhaus to seek therapy, but rather, for opinions to be used in court. Vivian was not motivated to get relief from suffering, but rather, to win a case. As a consequence, there are significant differences as to what is portrayed in these doctors' reports and what was confirmed by Vivian to her treating physicians, reflected in the physicians' notes, when she was being truthful. 8A.App.1646.

In sharp contrast to Dr. Roitman's report–which was based upon the affidavits of the adult daughters and Kirk's affidavit, which corroborated the daughters' affidavits– the evaluation of Vivian by each of her own three experts was based **only** upon what Vivian told each of them during their separate interviews with Vivian when Vivian was motivated to lie to prevail in the litigation. 8A.App.1645.

Dr. Applebaum interviewed Vivian, but he qualified his opinion by stating he is not in a position to determine who is telling the truth, and if it turns out Vivian's account is inaccurate–which it was–he would have to modify his opinion. 8A.App.1647. Dr. Ronningstam also met with Vivian, but this doctor made it very clear that her diagnosis was limited only to her evaluation: "This evaluation was done without the prior knowledge of other diagnostic and psychiatric evaluations." 8A.App.1646-1647. Dr. Thienhaus also met with Vivian. He, similarly, made it very clear that his DSM-IV evaluation was based upon "Ms. Harrison's description of her symptoms." 4A.App.733. Each of these three experts chose to ignore all of the collateral source information, including the eye witness detailed accounts of the parties' adult daughters. It is respectfully submitted that these three experts had do so in order to render the negative preliminary opinions they each provided.

Accordingly, based upon Vivian's own experts' methodologies, her brief's harsh criticisms of Dr. Roitman are entirely unjustified. As previously noted, since there was no trial, there was no "competent evidence" adduced as to whether Vivian has or does not have NPD. However, in light of the extensive collateral history and medical documentation they each chose to ignore, it is a fair assumption that none of them could have withstood cross-examination at trial.

In light of this history, especially after being provided a copy of Kirk's 38 page exhaustive summary, Vivian's continued assertion in her brief that Kirk "manufactured" the claim that Vivian has NPD is truly appalling. RAB3. 15A.App.3086-3091.

F. The Medical Records Which Were Obtained After Dr. Roitman's Preliminary Opinion, But Before Vivian's Experts Rendered Their Preliminary Opinions, Confirm Vivian Has a Disorder.

Dr. Roitman's preliminary opinion was provided prior to the discovery from Vivian's treating psychologist and psychiatrist, as well as from all of the multiple diet mills, prescribing physicians, and pharmacies. However, the diagnosis and notes of those treating physicians clearly indicate their belief that Vivian has a disorder. Dr. Squitieri, Vivian's treating psychologist, diagnosed Vivian as having a "depressive disorder." 5A.App.902. Dr. Duffy, Vivian's treating psychiatrist, diagnosed Vivian, among other things, as having a "major depression disorder" as well as a "generalized anxiety disorder." 5A.App.915.

Dr. Margolis was retained by Vivian's attorneys to administer an MMPI to Vivian. Dr. Margolis's opinions of Vivian are consistent with someone with NPD and Dr. Roitman's opinion:

> This clinical profile has marginal validity because the client attempted to place herself in an overly positive light by minimizing faults and denying psychological problems. This defensive stance is characteristic of individuals who are trying to maintain the appearance of adequacy and self-control. This client tends to deny problems and is not very

> introspective or insightful about her own behavior. The clinical profile may be an underestimate of the individual's psychological problems. The individual is likely to have little awareness of her difficulties. She is likely to be rigid and inflexible in her approach to problems and may not be open to psychological self-evaluation. She is likely to project an excessively positive self-image and be somewhat arrogant and intolerant of others' failings. She is unlikely to seek psychological treatment or to cooperate fully with treatment if it is implemented.

5A.App.1105.

Drs. Applebaum and Ronningstam chose to ignore the affidavits of the adult daughters and Kirk's affidavit. They chose to ignore all of this information as well. Drs. Applebaum and Ronningstam also chose to ignore the medical records obtained from the multiple diet mills, physicians, and pharmacies, which confirmed Vivian's prolonged drug abuse. Instead, they each based their opinions only upon what Vivian told them during an interview. 8A.App.1647;8A.App.1646-1647.

Dr. Thienhaus rendered his opinions prior to the production of all of Vivian's medical records. 4A.App.730. Although, inexplicably, unwilling to rely upon the adult daughters affidavits, Dr. Thienhaus relied upon what Vivian told him during his interview. 4A.App.730. This reliance was sorely misplaced. For example, Dr. Thienhaus thought it was significant that Vivian told him she did not suffer from insomnia. 4A.App.730. In contrast, Vivian's medical records confirmed Vivian had been complaining of severe insomnia for years. 4A.App.730;8A.App.1572. Based upon what Vivian told him, Dr. Thienhaus concluded that Vivian, "does not experience sustained times of depressed mood. . ." 4A.App.730. Vivian's description of her historical drug abuse to Dr. Thienhaus was a small fraction of her actual documented drug abuse. 4A.App.731-732. As a consequence, Dr. Theinhaus erroneously concluded there were "extended intervals between episodes of [Phentermine and related] use." 4A.App.732.

To his credit, Dr. Thienhaus was highly critical of Vivian's use of the stimulants Phentermine and Bontril, "Vivian received poor advice and used poor judgment in following the desultory regimen without obtaining a second opinion from a qualified practitioner." 3A.App.576.

G. Kirk's Persistent Good Faith Efforts to Amicably Resolve the Entire Case Were Thwarted By Vivian's Attorneys

Kirk made sure before the commencement of the first mediation that Vivian knew he wanted primary custody.[4] 1A.App.173-174;8A.App.1581,1704-1705.

Vivian's then attorney, Mr. Dickerson, was able to thwart Kirk's good faith efforts to reach an amicable settlement during that mediation. As evidenced by Vivian's emails on July 15, 2011, Vivian also had enough of Dickerson's strategy of delay, "We've thus far gone over the same items over three sessions and nothing has been formally drawn up and agreed upon." 8A.App.1585. Vivian made it clear in an email that she was terminating Dickerson because of his overt refusal to settle anything, "Now we are going into session #4 talking about dame (sic) 50/50 assets that there is no disagreement on. Talks (sic) about inefficiency and waste!!!!" Vivian ended this email writing, "It's time to make adjustments and find competent people who know what their (sic) doing and can work together efficiently and professionally!!!!" 8A.App.1585.

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[4] Although Vivian would later falsely claim she was unaware Kirk wanted primary physical custody until the service of the complaint and motion for primary physical custody on September 14, 2011, Vivian's attorneys sent an email a month prior to that date revealing their knowledge that Kirk wanted primary physical custody. 15A.App.3073-3074. Standish also submitted an affidavit detailing his discussion with Dickerson in June of 2011 wherein it was evident that Dickerson was aware Kirk wanted primary physical custody. 8A.App.1582-1583.

Vivian's representation to this court that, "Kirk insisted that the mediation be composed of only the distribution of assets" is absolutely false. RAB3. Vivian's citation of "7A.App.1464" does not support this false assertion. Kirk requested and the mediator simply ordered the parties to address the financial issues first. 8A.App.1580-1581.

Contrary to Vivian's representation to this court, Kirk's offers to resolve custody during the second mediation were not conditioned upon the use of cameras, nannies or anything else. RAB17-18;9A.App.1841-1842.

As previously noted, Vivian opposed Kirk's motion to appoint a neutral medical expert to perform an evaluation. Kirk unilaterally agreed to be bound by that determination. Vivian did not. 9A.App.1949-1950,1961-1962. Kirk requested a stay during the pendency of that evaluation. Vivian opposed that request. 9A.App.1950, 1985-86. The court denied Kirk's request for a stay. 7A.App.1405;9A.App.1986.

Vivian asserts the custody case settled through a stipulation for joint legal and physical custody "only when Kirk abandoned [the NPD claim.]" RAB3. Both parties sought primary physical custody. Obviously, both parties "abandoned" their respective claims, when they settled for joint physical custody.

H. Vivian Failed To Meet Her Burdens Regarding the Fees and Costs She Incurred.

1. The Presumption in Nevada is that Each Party Should Bear His or Her Own Fees.

Vivian erroneously contends there is no presumption under Nevada law that each party should bear their own fees. RAB19. However, the trial court noted, "It is well established in Nevada that attorney's fees are not recoverable unless allowed by express or implied agreement or when authorized by statute or rule." 16A.App.3338 (citations omitted). Consistently, "Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing

such award." *Thomas v. The City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) See also, *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1356, 971 P.2d 383, 388 (1998); *Consumers League v. Southwest Gas*, 94 Nev. 153, 156, 576 P.2d 737, 738 (1978). "[A]s a general principle, the American [R]ule reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case." *House v. Estate of Edmondson*, 245 S.W.3d 372, 377 (Tenn. 2008).

The court in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 941 (9th Cir. 2011), which involved a class action, set forth the importance of the American Rule in considering an award of fees, "The reasonableness of any fee award must be considered against the backdrop of the "American Rule," which provides that courts generally are without discretion to award attorneys' fees to a prevailing plaintiff unless (1) fee-shifting is expressly authorized by the governing statute; (2) the opponents acted in bad faith or willfully violated a court order; or (3) "the successful litigants have created a common fund for recovery or extended a substantial benefit to ta class." *Id.* (citations omitted).

Vivian wants this Court to find an exception to the general rule that each party should bear their own fees. NRS 125.150(3) permits such a motion to be filed. However, neither NRS 125.150(3) provides, nor does *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) stand for the proposition that fees should be shifted without justification and without a legally recognized basis to do so.

Under the American Rule, settlement is encouraged because each party is motivated to stop the financial burden of continuing the battle. Therefore, as a matter of policy, any exception to the American Rule should be narrowly construed.

2. *Brunzell* is Not a Legal Basis for the Award of Fees.

Brunzell only provides the criteria to determine the reasonableness of fees, **if** the Court first determines there is a legal basis for an award of fees. *Brunzell* is not itself a legal basis for the award of fees. Vivian's apparent argument that *Brunzell* is a legal basis for an award of fees is simply wrong. RAB20-22.

3. The Trial Court Did Make Findings Relating to Custody Under EDCR 7.60.

Contrary to Vivian's erroneous assertion, the trial court did make findings relating to custody under EDCR 7.60. RAB20. 16A.App.3340-3341.

4. The Trial Court's Order Unreasonably Expands *Sargeant* and is Contrary to *Applebaum.*

The trial court's order unreasonably expands *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972). It is noteworthy that Vivian failed to reference or address *Applebaum v. Applebaum*, 93 Nev. 382, 566 P.2d 85 (1977), which was discussed in Kirk's opening brief at AOB 15-16, and which highlights the extent to which the trial court's ruling unreasonably expands *Sargeant*. The trial court's ruling is directly contrary to the holding in *Applebaum*, where it was clear the husband was financially secure and well able to pay his own fees, and this court noted, under such circumstances, the husband's contention he was entitled to fees under NRS 125.150(2) was "absurd." *Applebaum*, 93 Nev. at 387, 566 P.2d at 89. In this context, Vivian assertion that, "The wealth of either party is irrelevant" is also absurd. RAB 21.

If this court interprets *Sargeant* so broadly that under almost any scenario fees can be granted, as Vivian urges, then motions for attorney's fees will be filed as a matter of course in family court, which, as in this case, will unnecessarily prolong the financial and emotional burden upon the parties and unduly increase their financial risk. It will also enable divorce attorneys to continue to encourage their clients to

unnecessarily continue the divorce and post-divorce battles, to the emotional detriment of the children and the financial and emotional detriment of the parents, based upon the expectation there will be a later fee award against the other parent.

5. Vivian Prepared Her Affidavit, a Friend's Affidavit, and the First Draft of Her Opposition

Vivian makes much to do about Kirk's preparation of his own affidavit. RAB22. Yet, as noted in the opening brief, Vivian drafted her own affidavit and the affidavit of one of her friends. AOB13;9A.App.1845. Vivian was also intimately involved in preparing her own opposition to Kirk's custody motion, as evidenced by the many hours Vivian's multiple attorneys spent just to read it. AOB13-14;8A.App.1661-1662. Moreover, the record before the court is that it would have been more efficient and less costly to Kirk, who had no experience in family court whatsoever, if he had not participated in the briefing process. AOB16;8A.App.1706;8A.App.1721-1722.

6. Vivian's Attorneys Overbilling Was Rampant

Equally important, Vivian's attorneys have the burden to establish the reasonableness of the hours they billed. *Sabatini v. Corning-Painted Post Area School District*, 190 F.Supp.2d 509,521 (W.D. New York 2001)(citations omitted). There is no presumption of reasonableness on the hours presented. *Young v. Midwest Family Mut. Ins. Co.*, 753 N.W.2d 778, 783 (Neb. 2008). The court "is not required to accept an attorney's valuation of his own time." *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 767 (7th Cir. 1982).

Vivian's attorneys' overbilling in this case was rampant and cannot be denied with a straight face. For example, Vivian's attorneys charged $85,050.00 to prepare Vivian's 56 page opposition and countermotion for primary custody. 9A.App.1844-1846. Assuming it should take an attorney about one hour per page to prepare points

and authorities, and Vivian's attorneys billed $450.00 per hour, the bill to prepare this opposition and countermotion should have only been about $25,200.00. 9A.App.1844-1846. If both parties would have adhered to the page limitation of EDCR 2.20(a) of 30 pages, then the bill to prepare this opposition and countermotion would have only been about $13,500.00. Vivian can argue that Kirk's "voluminous" 48 page moving papers caused her to incur an additional $11,700.00[$25,200.00 less $13,500.00]. Vivian cannot argue, at least in good faith, that it caused her to incur an additional $71,550.00 [$85,050.00 less $13,500.00]. Importantly, the trial court noted that "both parties routinely filed papers in excess of the page limitations in EDCR 2.20(a)" and the trial court had previously "indicated that it did not 'have a problem' with the lengthy filings. . ." 16A.App.3335. As noted in the AOB, Vivian initiated four of the five motions of any significance, which were filed prior to the hearing on the motion and counter motion for attorney's fees. AOB1; 8A.App.1565;9A.App.1836. Therefore, Vivian's "voluminous" briefs also caused Kirk to incur more in fees as well.

7. Team Approach

Vivian's attorneys have the burden to establish their fees are reasonable. It is unreasonable to use a team approach. *Ackermann v. Carlson Industries, LLC*, 2004 WL 3708670 (C.D. Cal. 2004). Vivian does not meet her burden in this regard by claiming that Kirk's attorneys also used a team approach.

8. Duplicate Billing

Vivian's brief falsely asserts that Vivian only had one attorney at the hearing on October 24, 2011. RAB24. Vivian had two attorneys at that hearing. This misrepresentation is knowingly made because Vivian made the same misrepresentation to the trial court and Kirk previously established Vivian had two attorneys at that hearing – Smith and Peel. RAB24;15A.App.3080.

9. Block Billing and Vague Billing

Again, Vivian has the burden to show the fees were reasonable. Alleging that Kirk's attorneys also block billed does not meet her burden. In addition, *Sunstone Behavioral Health, Inc. v. Alameda County Medical Center,* 646 F. Supp. 2d 1206, 1217 (E.D. Cal. 2009), on which Vivian relies (RAB25) is readily distinguishable. As noted in the opening brief, both Silverman's and Smith's invoices are replete with block billings that do not identify how much time was spent on each task performed that day. AOB30;10A.App.2051-2098;2100-2148. Therefore, these invoices do not provide, under *Sunstone*, sufficient detail to enable the court to evaluate what the lawyers were actually doing and the reasonableness of the number of hours spent on those tasks.

10. Subpoenaing Irrelevant "Medical Records"

Vivian loses all credibility in suggesting (at RAB25) there was any justifiable basis whatsoever for Vivian's attorneys to spend their time obtaining records from the Costco Optical Department (where Kirk gets his glasses), Dr. Earl (Kirk's dentist), Dr. Grace Shin (Kirk's ophthalmologist), Dr. Schroeder (Kirk's ear, nose & throat physician), etc. 8A.App.1619;9A.App.1836.

11. Subpoenaing Unnecessary and Duplicate Financial Records

Again, Vivian's attorneys conduct regarding this unnecessary and duplicate discovery is indefensible. All assets had been fully disclosed prior to the mediation in November 2011. 9A.App.1794-1795. Vivian has a degree in accounting, a master's degree in taxation, and worked as an auditor. 9A.App.1848. Vivian–not Kirk–prepared their joint tax return each year for over 20 years. 9A.App.1847. Vivian was aware of every financial account. 8A.App.1619 ;9A.App.1836,1847.

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12. Vivian's Attorney Costs Were Excessive

It is noteworthy that Vivian's brief contains no response whatsoever to the opening brief's argument regarding the excessive attorney costs Vivian paid in the amount of $57,107.75, which included airfare charges to and from Reno and stays at the Four Seasons Hotel and Green Valley Ranch Hotel & Spa. AOB31.

13. Designating Six Custody Experts, Two of Whom Were Designated *After* The Court Appointed an Independent Expert with the Expectation the "Battle of the Experts" was Avoided

Vivian does not deny that Theinhaus, Applebaum, and Ronningstam were all retained to opine regarding NPD and were therefore cumulative. RAB31-32. Vivian also does not deny her attorneys retained her fourth and fifth custody experts while Dr. Paglini's evaluation was pending when the court had hoped the "battle of the experts" was avoided. *Id.*

Vivian attorneys retained Dr. Hendricks, who owns a diet mill in Sacramento, California, to provide a letter opinion on June 1, 2012, while Dr. Paglini's evaluation was pending, providing that Vivian taking Phentermine, Bontril, Deidrex, and Diethylpropion for over seven years was somehow acceptable, despite explicit FDA warning labels that such drugs can only be taken for a few weeks. 2A.App.330-333; 8A.App.1591. This was despite the fact that Vivian was experiencing the very adverse effects the FDA warning labels warned would occur from abuse. 2A.App.330-333,356-357,360;8A.App.1571-1572.

It is also noteworthy that Dr. Roitman expressed concern about Vivian using Phentermine and also taking Citalopram, which is a serotonin reuptake inhibitor ("SRRI"). 2A.App.228. The FDA warning labels for Phentermine also caution against using Phentermine with an SSRI. 2A.App.331. Unfortunately, Vivian took Citalopram for six of the seven years she was abusing Phentermine, Bontril, Deidrex,

and Diethylopropion. 4A.App.801-810. The opinion of Dr. Hendricks, who makes a living prescribing these drugs, is contrary to the explicit FDA warning labels, as well as the opinion of Dr. Thienhaus, as noted above. 7A.App.1525-1531.

Kirk's motion for primary physical custody and reply focused upon the adverse consequences of Vivian's prolonged abuse of these controlled substances, including the fact she was taking them while nursing Rylee – not whether she was addicted to the drug. Phentermine, Didrex, and Bontril are in the same pharmaceutical family as amphetamines. The FDA warning label for Phentermine specifically provides, "Phentermine hydrochloride is related chemically and pharmacologically to the amphetamines." 2A.App.331. All of these drugs work on the central nervous system and are so powerful each is only supposed to be taken for a "few weeks." 2A.App.330,359. Through discovery, it was confirmed that Vivian took these drugs for over seven years. 4A.App.685-688,758,801-804. By her own written admission, Vivian was using Phentermine as a "**recreational drug.**" 4A.App.685,859 (emphasis added). As noted previously, the weekly blood tests were **after** the service of the complaint and motion for temporary custody and only proved Vivian stopped abusing drugs for that limited period of time. 3A.App.587.

Contrary to Vivian's representation to this court, Kirk was not "proceeding forward with his NPD claim." RAB28. Kirk had moved for the appointment of Dr. Paglini to make a neutral third party evaluation and Kirk had unilaterally agreed to be bound by his determination. 9A.App.1949-1950,1961-1962.

Vivian insisted Brooke and Rylee sleep in the same bed with her. Vivian suffered from severe insomnia and would get out of bed and go downstairs to the home office in the middle of the night. When Vivian would leave the bedroom, she would intentionally leave the door open and a light on at the bottom of the stairs. When Rylee was just 6, 7, and 8 years old, Rylee would wake up **frightened** at 3:00

a.m. to 4:00 a.m., probably four or five nights each week, and looking for Vivian, would follow the light Vivian had left on, and negotiate the stairs while half asleep in a frantic search for Vivian. 1A.App.68,91,99,109-110,112,136,139-140,145,146,152-153,348-351,355-359. Despite knowing Vivian's history of instilling insecurities and fear in Rylee and Brooke each night, Vivian's attorneys retained Dr. McKenna, who opined that Vivian should continue sleeping in the same bed with her then 13 and 9 year old daughters. Dr. McKenna is not a psychiatrist, nor a psychologist. He is an anthropologist. 8A.App.1622-1623.

14. Vivian's Personal Property Valuation Expert Overbilled

There is a reason Vivian failed to respond to this issue. It is simply indefensible for Vivian to pay $14,176.87, when Kirk paid $2,000.00, when both experts had the same scope of work and both experts made the same number of trips and generated the same work product. 8A.App.1624; 9A.App.1804,1836.

15. Vivian's Financial and Forensic Accounting Experts Overbilled

The opening brief established that Kirk's one accounting expert was involved with the same case with the same issues as Vivian's two accounting experts, and although Kirk's expert billed only $17,800.00, Vivian's two financial experts billed a total of $64,591.35. AOB32. Vivian's brief provides no justification for this huge discrepancy. RAB28-29.

16. Vivian's Real Estate Appraisers Overbilled

Vivian's attorneys, after assuring both the district court and Kirk's attorneys it would be provided to Kirk's attorneys, hid the appraisal of the Harrison family ranch, and unreasonably caused Kirk's attorneys to take the deposition of their appraiser in St. George, Utah, who they terminated, via email, the day of the deposition, then made material misrepresentations to Kirk's attorneys during the

deposition that they never received a written opinion from the appraiser, when, in fact, they did and they had it in their briefcase at the deposition. 8A.App.1594-1600,1652,1686;9A.App.1836.

Vivian's attorneys misled Kirk with an appraisal of the marital residence which they knew was fraudulent based upon another appraisal the appraiser performed that was in their possession, which was later provided to Kirk in error. 8A.App.1678-1686. This misrepresentation cost Kirk One Hundred Ten Thousand Dollars ($110,000.00). 8A.App.1685-1686.

I. It is Critical that This Court Confirms that Motions for Partial Summary Judgment Can Be Filed Prior To Custody Being Resolved and that Such Motions Are Strongly Favored

Kirk is not seeking an advisory opinion. The district court expressly confirmed it would have ruled that motions for partial summary judgment regarding the division of financial assets, filed while custody is pending, are precluded in Family Court cases, under *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979). 8A.App.1569-1570,1707;16A.App.3346. The district court also made it crystal clear that not only would it have been a futile act for Kirk to file a motion for partial summary judgment, but Kirk would have incurred the ire of the court for doing so, while the court was still in the process of determining the custody of his children. 16A.App.3346. When the district judge made it clear to Kirk that the judge believed motions for partial summary judgment cannot be filed in divorce cases, it would have been completely futile for Kirk to file such a motion. "The law does not require the doing of a futile act." *Hernandez v. State*, 124 Nev. 60, 188 P.3d 1126, 1135 (2008). Kirk is not seeking an advisory opinion from this court; he is seeking a reversal of the judge's ruling and, consequently, a resolution of the impact that the erroneous ruling had on the district court's award of attorneys' fees against Kirk.

NRCP 56 is a critical rule that applies in all civil cases and enables parties to have expeditious resolutions of disputes. Had Kirk been allowed to file such a motion, then Vivian would have known that every fee invoice received from her attorneys was ultimately going to be paid from her own pocket, not Kirk's. Vivian's attorneys' ability to be paid by the "community" would be gone. Importantly, Vivian's attorneys' motivation to prolong the dispute would have substantially diminished and their ability to incite Vivian to continue the battle would also have been diminished. The focus would have then been where it should have been all along – an expeditious and amicable resolution of custody in the best interests of the children. 8A.App.1569-1570. Under such a scenario, Kirk's offers for a good faith resolution of custody in the second mediation would likely have been accepted.

Unfortunately, however, this court will probably never see a formal appeal from a denial of a motion for partial summary judgment for the division of financial assets filed in family court prior to custody being resolved. Assuming other members of the Nevada family court bar share the district court's opinion and also believe that *Gojack* nullifies Rule 56 and prevents the filing of a Rule 56 motion, then they have no affirmative obligation to advise their clients to avail themselves of Rule 56. A party, such as Kirk, is one of the few who is already familiar with Rule 56. However, just like Kirk, such a party would be foolish to "risk the ire" of the judge by filing such a motion, particularly while the welfare of his children and the determination of custody by the same judge is hanging in the balance. This is especially true when knowing that filing such a motion would be a futile act.

J. This Court Should Reverse The Trial Court's Denial Of Kirk's Motion for Equitable Relief

The relief requested on this issue is clearly set forth in Appellant's Opening Brief. AOB33-35. Kirk, respectfully, requests the court to reverse the trial court's

denial of Kirk's Motion for Equitable Relief which sought an order requiring Vivian's attorneys to pay Vivian the sum of $505,000.00 which are the fees and costs billed to Vivian by her attorneys after the November 2011 mediation through January of 2013 [$875,000 - $370,000]. 8A.App.1696-97; 9A.App.1794. This request appears to be unopposed.

K. The Court's Denial Of Kirk's Motion for Attorney's Fees and Sanctions Should Be Reversed

Again, the relief requested on this issue is also clearly set forth in Appellant's Opening Brief. AOB35. Kirk respectfully requests the court to reverse the trial court's denial of Kirk's Motion for Fees and Sanctions. Vivian should pay Kirk for all fees and costs incurred by Kirk in this litigation from the preparation for the mediation with Jimmerson forward through January of 2013. The court is respectfully requested to order Vivian to pay Kirk the sum of $370,000.00. 9A.App.1794. This request appears to be unopposed.

ANSWERING BRIEF ON VIVIAN'S CROSS-APPEAL

In addition to the huge award of attorneys' fees already erroneously awarded to Vivian, her cross-appeal brief seeks even more. As noted previously, Vivian disingenuously attempts to justify the outrageous conduct of her own attorneys by falsely claiming Kirk filed a "motion to limit Vivian to ***supervised*** visitation of Brooke and Rylee. . ." RAB7. In furtherance of this ruse, Vivian represents to this court, "Vivian faced the loss of her children." RAB14. Vivian further attempts to mislead this court by representing, "the Court did not grant Kirk's motion to limit Vivian's contact to supervised limitation. . ." RAB15. This is false, as Kirk never made a motion to limit Vivian's contact to supervised limitation. 1A.App.8. Each party sought primary physical custody and the court ordered Kirk to have temporary

physical custody four days each week and Vivian three days each week. 7A.App.1405. Vivian never faced the loss of her children.

As also noted previously, Vivian placed an inordinate focus on the NPD issue because she had no defense to the detailed documented history of parental misconduct and neglect. Vivian also had no defense to the seven years of documented drug abuse. Vivian's retention of multiple cumulative experts was unjustified. Vivian's retention of two additional experts while Dr. Paglini's evaluation was pending was also not justified. All of the discovery conducted by Vivian's attorneys while the evaluation was pending was also not justified.

Under the undeniable facts of this case, Vivian cannot claim, in good faith, that "Kirk massively increased attorney's fees by his claim of NPD," as her cross-appeal brief contends. RAB31. However it is very evident that Vivian is not going to let the truth and the facts get in the way of this argument.

Kirk tried desperately to settle the entire dispute without ever filing a motion for primary physical custody. Dickerson refused to settle anything and Vivian fired him as a consequence. 8A.App.1585. Vivian's present attorneys refused to mediate the case before the filing of a motion for temporary primary physical custody. 8A.App.1705-1706;8A.App.1718-1719. Kirk filed his motion for primary physical custody on September 14, 2011. 1A.App.8. In an effort to avoid a costly and highly adversarial custody battle, on October 3, 2011, Kirk's counsel, Ed Kainen, requested Vivian's attorneys to stipulate to Dr. John Paglini doing an independent custody evaluation. This request was denied. 8A.App.1720.

The second mediation finally took place on November 28 & 29, 2011. 8A.App.1720. Vivian's attorneys sabotaged that mediation. 9A.App.1841,1843.

During the mediation, Kirk proposed the parties mutually retain a neutral medical expert to make a determination, but neither party would be bound by the

neutral medical expert's determination, but the parties would simply agree, in good faith, to utilize that determination to jointly craft a custody arrangement which would both safeguard the minor children, Brooke and Rylee, and insure Vivian got the professional help she needed, if any. 9A.App.1841-1842. Kirk assumed that merely asking for an agreement where the parties agreed to negotiate a custody arrangement in good faith for the best interests of Brooke and Rylee would be readily accepted. However, Silverman summarily rejected that proposal without discussion. 9A.App.1841-1842.

As noted previously, the hearing had to be postponed because Vivian's attorneys had taken **47 days** to file an opposition and countermotion and then, unbelievably, argued Kirk should be deprived of his right to file a reply and opposition to the **56** page memorandum they just filed. 13A.App.2796.

As noted numerous times, Kirk then moved the court for the appointment of a neutral medical expert on February 1, 2012, unilaterally agreed to be bound by the determination, and requested a stay–all of which would have reduced attorneys' fees and costs for both parties. 9A.App.1949-1950,1961-1962. Vivian opposed both the appointment and the stay. 9A.App.1954,1960;9A.App.1950,1985-86. The court denied the stay, but noted that hopefully the battle of the experts has been avoided. 7A.App.1405;9A.App.1986;9A.App.1953.

The record establishes that Kirk did everything he possibly could to amicably and expeditiously resolve every aspect of this case, especially custody. Kirk wanted to stop the conflict as soon as possible for the benefit of their minor children, their older children, Vivian and himself. Kirk wanted to protect their children from future harm. Kirk wanted Vivian to get the help she obviously needed. Kirk wanted Vivian to be a good, attentive and caring mother for their children. However, Vivian's attorneys opposed each and every one of these efforts. There was no justification for

Vivian's attorneys' despicable behavior at either of the mediations. There was no justification to oppose Kirk's request for a stay during the pendency of Dr. Paglini's evaluation. There was no justification for Vivian's attorneys to run up the bill during the pendency of that evaluation.

Vivian erroneously represents to this court that all she ever wanted was joint physical custody. More specifically, Vivian's cross-appeal brief alleges, "Throughout the action she continued to seek joint physical custody." RAB31. Vivian filed a countermotion seeking primary physical custody. 2A.App.362-363. The trial court specifically found, "Each party requested primary physical custody of their minor children in their underlying pleadings." 16A.App.3340. Vivian never "abandoned" her claim for primary physical custody until the parties settled for joint physical custody on July 11, 2012. 7A.App.1408.

Vivian's argument again misses the mark in her argument on cross-appeal. Kirk's concern regarding Vivian was her established history of parental misconduct and neglect. It was what she was doing to the children that mattered to Kirk. He wanted her misconduct and neglect to stop. Consistently, from the very beginning until when custody was finally resolved, Kirk only wanted primary physical custody and whatever safeguards were necessary to protect their children. The most obvious way to protect the children and what was clearly not only in their best interests, but Vivian's as well, was to identify the causes of Vivian's misconduct and neglect and to get Vivian help. Vivian's attorneys opposed and thwarted Kirk's multiple and consistent efforts in this regard, thereby substantially increasing the attorneys' fees Vivian was incurring–the additional fees she now seeks in her cross-appeal.

Vivian's attorneys characterization of Kirk's efforts as attempting to severely limit Vivian's time with the children is simply not true and contrary to the record before the court. Vivian relies on a letter from Vivian's counsel, which falsely

alleges, "your client seems intent on proving that my client suffers from a personality disorder, and thereby seeks to severely limit her time with the children." RAB32. Incredibly, this letter was sent just two weeks after Vivian's attorneys summarily rejected Kirk's proposal that the parties simply agree, in good faith, to utilize an independent medical determination to jointly craft a custody arrangement which would both safeguard the minor children, Brooke and Rylee, and insure Vivian got the professional help she needed, if any. 9A.App.1841-1842.

Vivian's attorneys continue to assert facts which are not true. In Kirk's Reply in support of his motion for primary physical custody, Kirk did take the position that Dr. Thienhaus's diagnosis was flawed for the same reasons as set forth herein. 4A.App.729-734. Most notably, he ignored the collateral history set forth in the adult daughters' affidavits, without any justifiable reason, and he accepted as true, Vivian's critical misrepresentations regarding her severe insomnia and the extent of her drug abuse.

However, at no point did Kirk ever assert that the bulk of her witnesses were "perjurers." RAB13. Again, what Kirk asserted then is what he is asserting before this court, namely, that the bulk of the witness statements are only relevant for the time period before the fall of 2008 and after mid-September of 2011, when Vivian made more frequent sporadic public appearances. None of these statements accurately addressed what was going on in the Harrison home, nor could they. Kirk did assert that two of Vivian's friends did perjure themselves. 4A.App.737-747. Vivian gave the first one $10,000.00 for her daughter's first year of college, a check for $11,927.48 for a Mediterranean cruise, $4,232.50 for round trip airfare to Europe, and clothes. 4A.App.735. Vivian bought the second friend a new house for $382,000.00. 4A.App.736. This friend was going to be the sole legal owner of the house without putting up a dime of the purchase price, until Kirk complained to the

trial court. 4A.App.739. These two individuals did perjure themselves as Kirk described in detail before the trial court. 4A.App.739-747.

Vivian's cross-appeal brief baselessly asserts, "He continued to press to limit Vivian to supervised visitation for months after competent and world class physicians found no basis for Kirk's claim of personality disorder." RAB33. The court should note there is no appendix citation in Vivian's brief for this baseless claim. The reason is because it is false. Dr. Applebaum met with Vivian on December 28, 2011. 8A.App.1647. Dr. Ronningstam met with Vivian on January 6, 2012. 8A.App.1647. The letter opinions were not furnished until sometime thereafter. Kirk made the motion for an independent medical evaluation during the hearing on February 1, 2012. 9A.App.1949-1950,1961-1962. The court later ordered the independent medical evaluation. Therefore, Vivian's assertion that Kirk "continued to press to limit Vivian to supervised visitation for months after competent and world class physicians found no basis . . ." is absolutely false.

As claimed justification for more fees in the cross-appeal, Vivian's attorneys falsely claim they "staved off a salvo designed to prevent her from ever having more than unsupervised visitation with her children." RAB33. Again, Kirk asked for primary physical custody, Kirk filed a motion for primary physical custody, and the relief he sought was primary physical custody. Vivian asked for, filed a motion for and also sought primary physical custody. They both settled for physical joint custody.

Vivian asserts that it "appeared" the trial court's refusal to entertain Vivian's request for additional fees centered on the trial court's review of the "result of the case," a specific criteria under *Brunzell*; and Vivian contends that the district court erred by considering this factor as neutral. RAB31, 34. Actually, the district court carefully considered this *Brunzell* factor, noting that each of the parties prevailed or

did not prevail on different issues. 16A.App.3444. This was within the district court's discretion, and the cross-appeal brief does not establish error in the district court's evaluation of this factor.

Vivian's attorneys then, again, misrepresent to this court that the district court made no finding under NRCP 7.60. RAB34. The trial court did make a specific finding on that issue. 16A.App.3340-3341. The trial court found NRCP 7.60 was applicable to Vivian's motion for the appointment of a parenting coordinator and that NRCP 7.60 was applicable to Kirk's motion to enter the decree of divorce. 16A.App.3340. The trial court found that "the attorneys' fees attributable to the foregoing motions should be offsetting, and no fees are awarded to either party." 16A.App.3341.

Vivian falsely asserts, "Instead, Kirk filed his motion seeking to limit Vivian to supervised visitation, and after receiving Vivian's response in late October, requested another two months to file a Reply, belying any argument he was worried about Vivian remaining in the home with the children." RAB35. First, as stated many times before, Kirk never filed a motion seeking to limit Vivian to supervised visitation. Second, as previously addressed, after taking 47 days to file an opposition and countermotion for primary physical custody, Vivian's attorneys argued Kirk should not have the opportunity to respond at all and then argued his time to respond should be severely limited. In light of the intervening holidays, including Thanksgiving and Christmas, Kirk's attorneys were given far less time than Vivian's attorneys took. Third, Kirk was still living in the house with the children during this briefing process. 7A.App.1405 (see para. 11).

The trial court did not find that Kirk unnecessarily multiplied the proceedings except in connection with Vivian's motion for the appointment of a parenting coordinator. This was not clearly erroneous error.

The trial court did not find that Vivian unnecessarily multiplied the proceedings except in connection with Kirk's motion to enter the decree of divorce. This was clear error.

Vivian's Argument of More Funds for "an Equalization of Community Funds" Under *Sargent* Is Not Supported By the Record or the Law

For the same reasons Vivian's unreasonably expansive interpretation of *Sargent* does not support the trial court's actual award, Vivian's same unreasonably expansive interpretation of *Sargent* (at RAB 36) does not justify requiring the district court to make some type of "equalization" award, as Vivian suggests at RAB 36.

CONCLUSION

The primary reason Vivian claims she was compelled to pay the outrageous attorney's fees she paid in this case is because Kirk filed a "motion to limit Vivian to ***supervised*** visitation of Brooke and Rylee" and, as a consequence, "Vivian faced the loss of her children." This false narrative is repeated throughout the RAB as the purported justification for the outrageous conduct of Vivian's attorneys in this action. Vivian even goes so far as to also affirmatively represent to this court that "the Court did not grant Kirk's motion to limit Vivian's contact to supervised limitation. . ." RAB15. All of this is truly outrageous, as Kirk never made a motion to limit Vivian's contact to supervised limitation. 1A.App.8. Vivian also claims she was forced to incur unnecessary attorney's fees based upon Dr. Roitman's preliminary and qualified finding that Vivian has a narcissistic personality disorder. But the true facts fail to support her argument. Kirk did everything he reasonably could to resolve this matter as amicably and expeditiously as possible throughout this case. Vivian's attorneys opposed and obstructed those efforts each and every time.

Kirk initiated the first mediation. As discussed in more detail above, this mediation failed because of the obstructive and uncooperative conduct of Vivian's

attorney. Vivian's attorneys then strenuously opposed each of Kirk's repeated efforts to resolve custody issues by expeditious and inexpensive methods. Again, Vivian's attorneys opposed and obstructed those efforts.

Vivian has the burden of proofing that her attorneys fees were reasonable. She failed to meet this burden. On the other hand, Kirk has established the overbilling and improper billing by Vivian's attorneys. The indisputable causes of Vivian's excessive fees in this case, as well as Kirk's excessive fees in this case, were Vivian's attorneys' unwillingness to negotiate in good faith, bad faith participation in the both mediations, opposition to every effort Kirk made to resolve this case expeditiously and amicably, rampant overbilling, retention of an army of unnecessary and duplicative experts, and the expenditure of excessive costs.

Moreover, it is of the utmost importance for the families and children that avail themselves of the family courts of this State, that this court hold that Rule 56 was not nullified by *Gojack* and that parties can and should avail themselves of Rule 56, to file motions for partial summary judgment and thereby expeditiously and inexpensively divide financial assets while custody is pending in family court. Divorce attorneys ability to "spend down the community" will thereby be significantly curtailed. AOB24;8A.App.1730.

It is also of utmost importance for those families and children of this State, that any exceptions to the American Rule regarding attorneys' fees are narrowly construed. An award of fees under NRS 125.150(3) can only be made if there is a narrowly defined legally recognized basis to do so, rather than just the arbitrary and capricious whim of the trial judge. This will stop the filing of motions for attorney's fees at the end of divorce cases as a matter of course. *Cracker Barrel Old Country Store v. Epperson*, 284 S.W. 3d 303,308 (Tenn. 2009) ("requiring each party to be responsible for their own fees promotes settlement."); *Litton Industries, Inc. v. IMO*

Industries, Inc., 982 A.2d 420, 427 (N.J. 2009) (the shifting of attorney's fees is disfavored by the courts). 16A.App.3474-3475.

Further, under no circumstances should this court's holdings in *Sargent* and *Applebaum* be expanded. Based upon Vivian's overly broad interpretation of *Sargent*, this court is respectfully urged to confirm the very narrow circumstances under which attorneys fees may be sought under NRS 125.150(3), *Sargent,* and *Applebaum.*

This court should reverse the $91,240 award of attorneys' fees against Kirk and in favor of Vivian. Additionally, this court should reverse the trial court's denial of Kirk's Motion for Equitable Relief which sought an order requiring Vivian's attorneys to pay Vivian the sum of $505,000.00, which are the fees and costs billed to Vivian by her attorneys after the November 2011 mediation through January of 2013.

This court should also reverse the trial court's denial of Kirk's Motion for Fees and Sanctions, which sought an order requiring Vivian to pay Kirk for all fees and costs incurred by Kirk in this litigation, from the preparation for the second mediation on November 28 & 29, 2011 forward through January of 2013, in the sum of $370,000.00.

Finally, the relief sought by Vivian in her cross-appeal should be rejected. Vivian's continuing false narrative that the outrageous fees and costs she incurred was because of a motion Kirk filed to limit Vivian to supervised visitation and that Vivian was facing the loss of her children is absolutely false. There was no such motion. Vivian never faced the loss of her children. Her false narrative is especially egregious in light of the multiple and continuing efforts Kirk made to resolve this entire matter, especially custody, as expeditiously and amicably as possible, which efforts were thwarted by Vivian's attorneys again and again.

For the foregoing reasons, the district court's judgment should be reversed; the district court should be ordered to vacate the award of attorneys' fees against Kirk, and to award appropriate fees in Kirk's favor; and Vivian's arguments on the cross-appeal should be rejected.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version X5 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 28.1(e)(2)(A), applicable to combined reply/answering briefs in cross-appeal cases, because it contains 11,925 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this 6th day of January, 2016 Appellant/Cross-Respondent's Reply Brief and Answering Brief on Cross-Appeal was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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