

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

Electronically Filed  
Jan 08 2016 01:43 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**MOTION FOR PERMISSION TO FILE AMENDED REPLY BRIEF**

Appellant/cross-respondent Kirk Harrison (Kirk) hereby moves for permission to file an amended reply brief (which includes his answering brief on the cross-appeal). The proposed amended brief is being submitted with this motion.

The original reply brief was e-filed on January 6, 2016. The purpose of this motion is to provide the court with a brief that corrects a mistake and provides a more accurate discussion of a procedural fact, as set forth in more detail below.

There is no specific rule providing for an amended brief when a party discovers that a brief already filed contains a mistake or a factually incorrect discussion. NRAP 2 allows the court to suspend its rules and to issue any order for proceedings as the court directs. *Cf. Arnold v. Kip*, 123 Nev. 410, 417 n. 20, 168 P.3d 1050, 1054 n. 20 (2007) (appellants filed amended opening brief); *State Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984) (parties ordered to file amended briefs to cure problems with original briefs).

Shortly after filing the reply brief, Kirk and his appellate counsel discovered a mistake, based upon their incorrect understanding of a matter in the appendix. The

mistake and its implications are thoroughly discussed in detail in Kirk's sworn affidavit, which is being submitted with this motion.

In summary, when Kirk and his appellate counsel first read respondent's (Vivian) answering brief, they found statements alleging that Kirk had filed a district court motion to limit Vivian's visitation to supervised visitation; that Kirk's motion caused Vivian to be faced with the loss of her children; and that the motion sought to severely limit Vivian's time with the children. RAB 7, 14, 32. Kirk's recollection was that he had not filed such a motion. His review of appendix documents and his discussion with his trial counsel confirmed his belief. His appellate counsel had also not seen such a motion in the appendix. Based upon their belief that no such relief had been requested in Kirk's district court motion, Kirk and his appellate counsel prepared the reply brief and made arguments that relied on this belief.

The brief was e-filed in the afternoon on January 6, 2016. While putting away materials that night, Kirk noticed a sentence in a motion for primary physical custody that he had not seen in his review during preparation of the reply brief. The sentence requested supervised visitation, but with the supervision limited "to ensure appropriate sleeping arrangements and behaviors of Defendant for the protection and best interests of the minor children; . . ." 1A.App.9.

When Kirk and his appellate counsel prepared the reply brief, they had not seen this sentence in the motion, and they were unaware of it.<sup>1</sup> Therefore, the reply brief was written with the assumption and honest belief that Kirk had not made even an extremely limited request for supervised visitation. When the mistake was

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The answering brief provided an appendix citation, but the citation covered a span of 353 pages. RAB 7. The sentence dealing with limited supervised visitation was within these 353 pages. Kirk and his appellate counsel had simply missed it.

discovered, Kirk immediately notified appellate counsel, and they prepared the amended reply brief that is being submitted with this motion.

The proposed amended brief corrects the mistake and provides accurate discussions of Vivian's contention and Kirk's reply arguments.

Kirk and his appellate counsel sincerely apologize for the mistake and for the need to file an amended reply brief. They respectfully contend that allowing the amended brief will be in the best interests of justice. The changes in the brief are limited to the mistake discussed above. And because the amended brief is being submitted within just two days after the original brief was filed, there will be no prejudice to Vivian if the court grants this motion.

DATED: Jan. 8, 2016

  
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*ATTORNEYS FOR APPELLANT/CROSS-  
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## AFFIDAVIT OF KIRK R. HARRISON

STATE OF NEVADA     }  
COUNTY OF CLARK    }     ss.

KIRK R. HARRISON, declares and says:

1. The matters stated in this Affidavit are based upon my personal knowledge (or upon information and belief if so stated). If called upon to testify, I could and would competently testify to the facts set forth herein.

2. When I first read Respondent's Answering Brief, filed October 6, 2015, I observed the allegations that I had filed a "motion to limit Vivian to *supervised* visitation of Brooke and Rylee. . ." (RAB7; emphasis in original), that "Vivian faced the loss of her children," (RAB14) and that I "[sought] to severely limit her time with the children." (RAB32).

3. My recollection was that we filed a motion for primary physical custody and not a motion to limit Vivian to supervised visitation, Vivian never faced the loss of her children, and I never sought to severely limit her time with the children.

4. As part of my preparation of the Reply Brief, I reviewed numerous parts of the appendix, including the complaint, the motion for primary physical custody (including the table of contents and various sections of the brief), the reply in support of the motion for primary physical custody, and the pleading index to verify all of the foregoing.

5. I confirmed we prayed for primary physical custody in the complaint. (1A.App.4) I confirmed the motion we filed was entitled, "Motion for Joint Legal and Primary Physical Custody and Exclusive Possession of Marital Residence." (1A.App.8) I then checked the request for relief at the end of the motion. This provides, "Based on all of the foregoing, Kirk submits that it is in Brooke and Rylee's best interests for Kirk to be granted primary physical custody of them, and also be granted exclusive possession of the marital residence." (1A.App.8) I then checked

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the relief requested in the reply in support of the motion for primary physical custody, “Kirk is seeking primary custody because it is clearly in Brooke and Rylee’s best interest.” (4A.App.673) I also confirmed the trial court specifically found, “Each party requested primary physical custody of their minor children in their underlying pleadings.” (16A.App.3340)

6. I telephoned my trial counsel, Ed Kainen, who indicated he also had no recollection of ever filing a motion for supervised visitation and did not recall ever making that argument to the court.

7. I worked with Robert Eisenberg to prepare, finalize and file our Reply Brief and Answering Brief on Cross-Appeal, which was filed during the afternoon of January 6, 2016. While putting away all of the binders of materials utilized in the preparation of the Reply Brief later that night, I noticed a sentence on the second page of our motion for primary physical custody that I had not seen in my review. The sentence suggested supervised visitation, with the supervision limited “to ensure appropriate sleeping arrangements and behaviors of Defendant for the protection and best interests of the minor children; . . .” 1A.App.9.

8. Unfortunately, neither Mr. Kainen nor I remembered this limited request for supervised visitation. When Mr. Eisenberg and I prepared the brief, we did not see the sentence in the motion, and we were unaware of it.<sup>1</sup> Therefore, our reply brief was written with the assumption and honest belief that I had not made even an extremely limited request for supervised visitation. When the mistake was discovered, I immediately notified Mr. Eisenberg, and we prepared an amended reply


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<sup>1</sup> The answering brief did contain an appendix citation for the contention that my motion had requested supervised visitation. RAB 7 (last line). But the citation was: “1 A.App. 8-220, 2 A.App. 221-361.” Thus, the citation incorporated 353 pages of the appendix. The sentence dealing with limited supervised visitation was contained within these 353 pages, and we simply missed it.

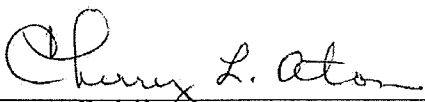
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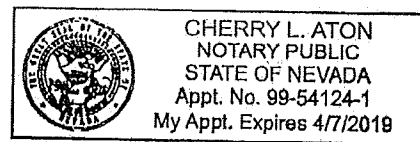
brief, which is intended to correct the mistake and to provide this court with accurate information and arguments on the point.

FURTHER AFFIANT SAYETH NAUGHT.

  
Kirk R. Harrison

Subscribed and sworn before me  
this 7<sup>th</sup> day of January, 2016.

  
Notary Public



CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Gruncy & Eisenberg and that on this date the foregoing Motion for Permission to File Amended Reply Brief 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:

Edward L. Kainen  
Thomas J. Standish  
Radford J. Smith  
Gary R. Silverman  
Mary Anne Decaria

DATED: \_\_\_\_\_

1/8/16

William S. Jones