

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

IN THE MATTER OF: THE W.N.
CONNELL AND MARJORIE T.
CONNELL LIVING TRUST, DATED
MAY 18, 1972,

ELEANOR C. AHERN A/K/A
ELEANOR CONNELL HARTMAN
AHERN,

Appellant,

vs.

JACQUELINE M. MONTOYA; AND
KATHRYN A. BOUVIER,

Respondents.

IN THE MATTER OF THE W.N.
CONNELL AND MARJORIE T.
CONNELL LIVING TRUST, DATED
MAY 18, 1972, AN INTER VIVOS
IRREVOCABLE TRUST

ELEANOR CONNELL HARTMAN
AHERN,

Appellant,

vs.

KATHRYN A. BOUVIER; AND
JACQUELINE M. MONTOYA,

Respondents.

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ELEANOR CONNELL HARTMAN
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Respondents.

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. There are no corporations or entities subject to disclosure; and
2. The following law firms have represented Appellant in her capacity as trustee and/or beneficiary of the trust relevant to this case:

- (a) Brownstein Hyatt Farber Schreck, LLP;
- (b) Marquis Aurbach Coffing;
- (c) Jeffrey Burr, LTD; and,
- (d) Solomon Dwiggin & Freer, LTD.

Dated this 20th day of November, 2015.

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I. JURISDICTIONAL STATEMENT

This is a consolidated appeal from three related orders of the District Court. On July 7, 2014, the District Court issued a preliminary injunction ordering Appellant as trustee and previous sole income beneficiary to distribute trust income to Respondents Jacqueline Bouvier and Kathryn Montoya (“Respondents” or “Daughters”). The District Court’s preliminary injunction was immediately appealable pursuant to NRAP 3A(b)(3), and Appellant Eleanor Ahern (“Appellant” or “Eleanor”) filed her first Notice of Appeal on July 31, 2014.

On April 6, 2015, the District Court entered an order appointing a temporary trustee (in place of Appellant) to oversee the trust administration during the pendency of this dispute. Appellant filed a second Notice of Appeal of the District Court’s order on April 7, 2015, pursuant to NRS 164.005 and NRS 155.190 (permitting appeal of order appointing trustee).

Finally, on April 17, 2015, the District Court entered Summary Judgment in favor of Respondents and, on April 20, 2015, entered a related summary judgment Order Regarding The Accounting, Breach of Fiduciary Duty Claims and Award of Attorneys’ Fees. Appellant filed a third Notice of Appeal of these orders on May 18, 2015, pursuant to NRAP 3A(b)(1), and filed an Amended Notice of Appeal on July 31, 2015, following the District Court’s Judgment and

Order Approving Award of Attorneys' Fees, which clarified the amount of fees and costs awarded pursuant to the District Court's April 20, 2015 order. On August 31, 2015, this Court granted Eleanor's Motion to Consolidate Related Appeals.

II. ROUTING STATEMENT

This case involves trust and estate matters in which the corpus, upon information and belief, has a value in excess of \$5,430,000. NRAP 17(b)(9). Therefore, this case is presumptively assigned to the Supreme Court. Id.

Moreover, even if this case were presumptively before the Court of Appeals, it should be retained by the Supreme Court because (1) this case involves as a principal issue a question of first impression involving common law in Nevada (*e.g.* whether the defense of laches may be used for affirmative relief) (11 AA 2387-88; 16 AA 3452), and (2) this case raises principal issues of statewide public importance (*e.g.* whether a trustee acting in good faith is required to seek court approval before taking action pursuant to the express intent of the trust documents) (16 AA 3432, 3458). NRAP 17(a)(13)-(14).

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The following issues arise from the District Court's Summary Judgment regarding Respondents' claim to 65% of the trust income:

- a. Did the District Court err in finding no genuine issue of material fact, despite (i) trust language that specifically identifies Appellant as the recipient of the income, (ii) the existence of conflicting evidence regarding rights to income, and (iii) presentation of a sworn affidavit by Appellant disputing Respondents' position?
 - b. Did the District Court err further when it found, in the alternative, that Respondents are entitled to 65% of the trust income based on laches, despite the fact that Respondents never pled laches in their original petition and despite the fact that laches is a defense that cannot be used to obtain affirmative relief?
2. Did the District Court, which found that Appellant was acting in good faith as trustee (and sole income beneficiary during her lifetime), err when it found that Appellant breached a fiduciary duty owed to Respondents (as contingent beneficiaries) by stopping gifts of trust income to Respondents without first seeking court approval?
3. Did the District Court err when it granted a preliminary injunction permitting the Respondents to receive trust payments during the course of this litigation (a) despite the District Court's initial finding that no irreparable harm existed and (b) despite no changed circumstances or showing of irreparable harm upon Respondents' second request for injunctive relief?

4. Did the District Court err when it removed Appellant from her position as trustee, given that Appellant is the sole income beneficiary of the trust during her lifetime?

IV. STATEMENT OF THE CASE

This is an appeal from the District Court's summary judgment (and related orders) concerning Respondents' claim to an interest in the W.N. Connell and Marjorie T. Connell Living Trust, Dated May 18, 1972, an inter vivos irrevocable trust (the "Trust"). Appellant, Eleanor, was both the trustee and sole income beneficiary of the Trust. Respondents are Eleanor's daughters.

Eleanor has always known and believed that her father left to her his sole and separate property and, in particular, the income derived from oil, gas and mineral rights in Upton County, Texas (the "Oil Income"), pursuant to the terms of the Trust. (9 AA 1890, at ¶ 10.) Since her father's death, however, Eleanor has willingly gifted part of the Oil Income, first to her stepmother, Marjorie, and then later to Eleanor's Daughters following Marjorie's death. (*Id.*) Eleanor and Marjorie (or Marjorie's representative) oversaw the distribution of these gifts in their capacities as co-trustees for several decades, and neither law nor logic suggested that Eleanor should or was required to challenge her own generosity in her capacity as beneficiary of the Trust. (*Id.* at ¶¶ 22-25.) Marjorie, for her

part, always understood that Eleanor held the rights to the Oil Income pursuant to the Trust. (Id. at ¶¶ 10, 22.)

In 2009, after Marjorie's death, Eleanor, as sole trustee, sought to reform the Trust to guarantee that her Daughters received Eleanor's benefits under the Trust upon Eleanor's death. (1 AA 1-61; 8 AA 1620-21.) The Daughters approved the reformation in August 2009 and signed written consents affirming they were merely "contingent income beneficiar[ies] of the [Trust]" until Eleanor's death. (8 AA 1622-23.) These consents were filed with the District Court. (8 AA 1697-1701.)

In mid-2013, Eleanor made the decision to cease gifting Oil Income to her Daughters. Thereafter, on September 27, 2013, the Daughters petitioned the District Court for a declaration that they are entitled to 65% of the Oil Income (the "Petition") (1 AA 0080), and moved the District Court for a mandatory injunction requiring Eleanor to restart the gifts of Oil Income to the Daughters (the District Court denied the request for injunction based on the absence of irreparable harm) (2 AA 277). Eleanor, in turn, has defended this action as both trustee and sole income beneficiary of the Trust during her lifetime.

Since the beginning of this action, as early as January 2014, the District Court has stated repeatedly that an evidentiary hearing would be necessary to sort through the merits of this case. (3 AA 0604 ("it's going to require taking

testimony”)). The District Court held a Pretrial Conference on February 14, 2014, for a bench trial set for February 18, 2014, but ultimately postponed the trial for discovery on Eleanor’s counterclaims for intentional interference with contract.¹ (3 AA 0672.)

On March 6, 2014, after the trial was postponed, the Daughters moved again for a mandatory injunction requiring Eleanor to resume gifts of Oil Income to the Daughters on the basis that the prolonged litigation schedule was causing them harm. (4 AA 736.) On July 7, 2014, District Court issued the preliminary injunction, ordering Eleanor to distribute 65% of the Oil Income to the Daughters each month (during the pendency of the litigation), but required the Daughters to post a security bond in order to receive the funds.² (7 AA 1597.) Eleanor appealed the District Court’s injunction order (the First Appeal) arguing that the elements of a preliminary injunction had not been established (*e.g.* no irreparable harm), and that a delay in the trial date did not constitute “changed circumstances” justifying reconsideration of a prior denial of the same request for injunctive relief. (7 AA 1615.)

¹ Eleanor’s counterclaim asserted that the Daughters intentionally interfered with Eleanor’s right to receive the Oil Income when they threatened Texas oil companies to cutoff the monthly income flowing to the Trust that belonged to Eleanor. The District Court dismissed Eleanor’s Counterclaims without prejudice upon granting summary judgment. (16 AA 3432.)

² At that time, Respondents elected to not post a bond.

Several months later, on October 9, 2014, Eleanor filed a motion to dismiss the Petition, which initiated the parties' filings of a series of cross-motions for summary judgment relating to their interests in the Trust and rights to Oil Income, culminating in a hearing on January 30, 2015. (8 AA 1617; 8 AA 1757; 9 AA 1850; 11 AA 22362; 12 AA 2541; 12 AA 2589.) Following an oral decision at the hearing, the District Court entered Summary Judgment on April 16, 2015 in favor of the Daughters and, after further briefing, issued an Order Regarding The Accounting, Breach of Fiduciary Duty Claims and Award of Attorneys' Fees on April 20, 2015. (16 AA 3418, 3433, 3455.) The District Court erred when it decided this case on summary judgment.

Although the Daughters did not plead laches in their original Petition, they moved for summary judgment on the basis of "their defenses...[including] laches." (8 AA 1775; 1 AA 64.) Despite the Daughters' failure to originally plead laches (1 AA 64), and despite the fact that laches is a defense that cannot be used to obtain affirmative relief, the District Court granted summary judgment (improperly) against Eleanor on the basis of laches. (16 AA 3432.)

Furthermore, the District Court improperly weighed evidence and made credibility determinations in granting summary judgment "on the merits" against Eleanor, despite the fact there existed numerous "material factual issues in

dispute,” as the Daughters put it³. (12 AA 2549). The Daughters then used the District Court’s improper summary judgment as a basis to obtain attorneys’ fees pursuant to NRS 153.031(3)(b) for an alleged breach of fiduciary duty by Eleanor in her capacity as trustee, despite Eleanor’s good faith belief that she was the sole beneficiary of the Trust and therefore owed fiduciary duties only to herself. (16 AA 3432-33, 3458.)

The core issue in this appeal is the District Court’s error in granting summary judgment in the Daughters’ favor on the basis of laches and on the merits regarding the parties respective rights to Oil Income. In addition to the error in granting summary judgment, the District Court further erred in finding concomitantly that (i) in spite of a finding of good faith, Eleanor breached a fiduciary duty as trustee by stopping Oil Income gifts to the Daughters, (ii) that the Daughters are therefore entitled to attorneys’ fees in this action, and (iii) that Eleanor should be removed as trustee over the Trust for which she is the sole income beneficiary during her lifetime. Finally, the District Court erred, prior to the grant of summary judgment, by issuing a preliminary injunction regarding Trust payments despite no finding of irreparable harm.

³ In opposing Eleanor’s motion for summary judgment, the Daughters admitted that issues of fact precluded summary judgment.

V. STATEMENT OF THE FACTS

A. The Trust And Legacy Planning For Eleanor's Benefit During Her Lifetime.

On May 13, 1938, Eleanor was born to William and Marguerite Lavina Connell ("William" and "Marguerite", respectively) in Las Vegas, Nevada. (9 AA 1889, Decl. of Eleanor Ahern ["Ahern Decl."].) In 1942, William married his second wife, Marjorie Connell ("Marjorie"), who stopped working in or around 1955. (Id.) Eleanor is William's only child, as he did not want any more children, even with his new wife, Marjorie. (Id.)

In May 1972, Eleanor's father and Marjorie formed the W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972 (the "Trust," as previously defined). (9 AA 1898-1915.) Within Article First of the Trust, William and Marjorie specified that the Trust was created to benefit the grantors as well as Eleanor, who is defined as the only "Residual Beneficiary". (9 AA 1899.)

At the time the Trust was formed, Eleanor's Daughters, Jacqueline and Kathryn, were both alive.⁴ There was no provision in the Trust that provided Jacqueline or Kathryn any beneficial rights while their mother, Eleanor, was alive. (9 AA 1898-1915.)

⁴ Jacqueline was born on July 19, 1965. Kathryn was born on January 29, 1970. (9 AA 1855.)

B. William's Separate Property Was Intended For Eleanor.

Eleanor's father, William, owned oil, gas and mineral rights (the "Oil Rights") and real property ("Real Property") (collectively, the "Oil Assets") located in Upton County, Texas. (9 AA 1970, Second Decl. of Eleanor Ahern ["2nd Ahern Decl."].) The Oil Rights generated consistent monthly income (the "Oil Income," as previously defined). (Id.) On or about June 13, 1972, William transferred his right and title in and to all of the Oil Rights and the Real Property to the Trust by two Quitclaim Deeds. (9 AA 1925-26.) Despite this transfer, the Trust specifically instructed that the Oil Rights and Real Property shall remain as William's sole and separate property as follows:

The property comprising the original trust estate during the joint lives of the Grantors shall retain its character as their community property or separate property, as designated on the attached Schedule "A".

(9 AA 1899.) As reflected on Schedule A, Marjorie did not transfer any separate property to the Trust, only William. (9 AA 1913-15.) The Trust was therefore funded with the following assets: (1) real property interests characterized as community property; (2) real property in Nevada and Texas characterized as William's separate property; and (3) 100% title and ownership to the Oil Rights and flowing Oil Income characterized as William's separate property. (Id.)

1. **Trust No. 3 (Marjorie's "Survivor's Trust").**

Upon William's death, the assets to be allocated to Trust No. 3 (also known as the "Survivor's Trust") were: (1) Marjorie's separate property interest in the trust estate (non-existent); (2) Marjorie's one-half interest in the community property of the trust estate, less a proportionate part of all amounts properly chargeable against all community property; and (3) Marjorie's community property interest in any life insurance policy of William's made payable to Trust No. 1. (9 AA 1900.) Nothing contained in Article Fifth (which contains the controlling language for Trust No. 3) mentioned the Real Property, Oil Rights, or Oil Income. (9 AA 1903.)

2. **Trust No. 2 (Eleanor's "Decedent's Trust").**

Article Fourth of the Trust governed Trust No. 2 and the terms were far more detailed than those of Trust No. 3. Indeed, Trust No. 2, unlike Trust No. 3, contained specific instructions as to the sale of the Real Property and distribution of the Oil Income. (9 AA 1901-03.) By identifying the Oil Rights/Income and Real Property under Trust No. 2, William desired to preserve these particular assets for Eleanor and her family and protect against the impact of a future re-marriage and/or divorce by Marjorie. (9 AA 1858.) In other words, the terms of Article Fourth would be William's control from the grave on the ownership and distribution of this heirloom asset. (Id.) From the plain terms

of the Trust Agreement, William therefore made his intent clear that Trust No. 2 would receive 100% of the Oil Income, with all income being distributed to Eleanor and later her blood lines. (Id.)

Pursuant to Article Fourth, Section B, William directed that Eleanor, as the Residual Beneficiary, shall receive all income from any of his separate property received by Trust No. 2 as follows:

All income received by this Trust from the separate property of the Decedent shall be paid to the Residual Beneficiary [Eleanor].

(9 AA 1901.) To allow Eleanor to protect her interest in this Income, the Trust made Eleanor “Co-trustee of [William’s] separate property,” which resided in Trust No. 2. (9 AA 1900.) In other words, Eleanor was co-trustee of Trust No. 2.

C. Conflicting Evidence Regarding The “Marital Deduction.”

Respondents’ case—and the District Court’s Summary Judgment Order (16 AA 3421, 3431-32)—in large part relies on Article Third of the Trust. Pursuant to Article Third, the Trustee was directed to allocate to Marjorie’s Trust No. 3 from “the Decedent’s separate property the fractional share of the said assets which is equal to the maximum marital deduction allowed for federal estate tax purposes, reduced by the total of any other amounts allowed under the Internal Revenue Code as a Marital Deduction which are not a part of this trust

estate.” (9 AA 1900.) In making the allocations of property to Trust No. 3, “the determination of the character and ownership of the said property and the value thereof shall be as finally established for federal estate tax purposes.” (Id.)

To support their theory that some portion of William’s separate property was actually allocated to Marjorie’s Trust No. 3, in conjunction with a federal estate tax marital deduction, the Daughters were unable to produce the federal estate tax return (“Form 706”). (16 AA 3421.) Instead, the Daughters rely on a patchwork of evidence, including a questionable Texas inheritance tax return (the “Texas Tax Return”) prepared in secret by Marjorie’s accountant (8 AA 1790; 9 AA 1890-91) and a similarly questionable IRS closing letter (8 AA 1798).

In opposition, Eleanor provided the following evidence demonstrating that no transfer of the Oil Assets to Marjorie’s Trust No. 3 was ever made or intended: (1) Marjorie’s accountant presumably prepared the Texas inheritance tax return in secret, as Eleanor had never seen it until it was produced in this litigation (9 AA 1889-90); (2) The Texas tax return erroneously claims that Marjorie personally, rather than Trust No. 3, received part of William’s separate property (which never happened), meaning it could contain other errors as well (8 AA 1794-95); (3) From 1989 until 2006, Marjorie and Eleanor always identified Eleanor’s Trust No. 2 as the owner of the Real Property and Oil

Rights when they conducted business with oil companies, and they used exclusively the federal Tax ID for Trust No. 2 (9 AA 1863-69); (4) Marjorie's hand-written records as co-trustee use the Tax ID for Eleanor's Trust No. 2 to account for Oil Income (9 AA 1868); (5) The deeds to the Real Property and Oil Rights are still in the name of the Trust (*e.g.* the deeds were never transferred to the Daughters' trust (MTC Living Trust, discussed below) after Marjorie passed away) (9 AA 1925-26); (6) Jacqueline, one of the Daughters, testified that she relied on Eleanor's oral promises—not the Trust itself—to form her belief that she would continue to receive Oil Income after Marjorie passed away (8 AA 1801); (7) Eleanor testified that Marjorie knew that Eleanor held 100% of the rights to the Oil Income (9 AA 1891, 1918); and (8) To this day, the federal estate tax return, Form 706, has not been produced (9 AA 1863). Thus, all interests in William's separate property (the Real Property, Oil Rights, and Oil Income) reside in the Trust and belong to Trust No. 2, and thus to Eleanor, pursuant to William's intent.

D. Respondents, Eleanor's Daughters, Acknowledge that Trust No. 2 Maintained Ownership of All Real Property And Oil Rights After Marjorie's Death.

1. The Daughters Sign Consents Acknowledging They Are Contingent Income Beneficiaries Until Eleanor's Death.

Article Fifth of the Trust provided Marjorie with the power to appoint her rights under the Trust to herself or someone else during her lifetime or upon her death. (9 AA 1903.) To effectuate this power, Marjorie created the MTC Living Trust dated December 6, 1995 (the "MTC Living Trust") and ordered that all assets from her Trust No. 3 should pass out of the Trust to the MTC Living Trust upon her death. (9 AA 1892.) Marjorie named the Daughters as beneficiaries of the MTC Living Trust.

Despite creating this separate trust to receive all her benefits under Trust No. 3 at her death, Marjorie never took court action to partition the Real Property or Oil Rights, as would be required for such rights to transfer upon her death. Nor did the Daughters attempt to partition. To this day, title remains vested in the Trust, for which Eleanor is now the sole beneficiary until she passes away. (9 AA 1925-26.)

In fact, after Marjorie's death in 2009 and continuing for almost four years, Jacqueline and Kathryn confirmed that only Trust No. 2 in the Trust owned all of the Oil Assets by signing and filing with the Court Consents

acknowledging they were only “contingent income beneficiar[ies]” of William’s Trust. (1 AA 0004-5.)

On August 17, 2009, Eleanor petitioned the Probate Court to assume jurisdiction over the Trust, confirm her as trustee and construe and reform the Trust. (1 AA 1-61.) Within the Petition, Eleanor set forth specific facts confirming the sole ownership of the Oil Rights in Trust No. 2 and her as the 100% current income beneficiary as follows:

As of the death of MARJORIE, **Trust No. 2** owned land and oil and gas shares in reserves and income located in Upton County, Texas (the “Oil Assets”).

...

Pursuant to Article Fourth, which Article governs the administration of **Trust No. 2**, **all income from the Oil Assets is to be paid to the Petitioner as the “Residual Beneficiary” during her lifetime.**⁵

(1 AA 0004-5.) On August 8, 2009, Jacqueline signed a Consent “in its entirety” stating that she is only a “contingent income beneficiary” of the Trust and all facts contained in the Petition are “true and correct to the best of [her] knowledge.” (10 AA 2239-44.) On August 9, 2009, Kathryn signed an identical Consent. (10 AA 2245-50.) Both Consents were filed with the District Court. (10 AA 2239-50.)

⁵ Id. at pp. 4-5, ¶19.

E. The Texas Probate And Eleanor's Decision to Stop Gifting Oil Income To Her Daughters.

Sometime in the summer of 2013, Eleanor learned that Jacqueline, without any notice to Eleanor, had filed in July 2012 an application in Upton County, Texas, to probate Marjorie's will as a foreign will. (9 AA 1893.) The application contained false statements, including that Marjorie had no children, when Marjorie had adopted Eleanor decades earlier. (*Id.*) Due to the Texas probate coupled with her daughters' lack of involvement in her life, Eleanor felt completely abandoned and taken advantage of. (*Id.*) As a result, Eleanor had a falling out with her daughters and decided to stop the gifts of Oil Income to Jacqueline and Kathryn. (*Id.*) On September 27, 2013, the Daughters filed their Petition claiming 65% ownership of the Real Property and Oil Rights, and resultant Oil Income. (1 AA 0064.)

VI. SUMMARY OF THE ARGUMENT

The District Court erred in granting summary judgment in this case. First, genuine issues of material fact made summary judgment improper on the question of ownership rights in the Trust. In turn, Eleanor cannot be held liable for breach of fiduciary duty to the Daughters if there is no finding that the Daughters have an interest in the Trust. Furthermore, a finding of breach of fiduciary duty is improper because the District Court found that Eleanor acted in

good faith in administering a duties as trustee (e.g. she believed in good faith that she was the only beneficiary of the Trust). Finally, the District Court erred by granting a preliminary injunction mandating distributions of Trust Income on the basis that trial had been postponed several months, despite no finding of irreparable harm.

VII. ARGUMENT

A. Standards Of Review

1. The Court Reviews Summary Judgment De Novo.

The Court reviews an order granting summary judgment de novo. See Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). That is, on appeal, this Court is “required to determine whether the trial court erred in concluding that an absence of genuine issues of material fact justified its granting of summary judgment.” Bird v. Casa Royale West, 97 Nev. 67, 68, 624 P.2d 17, 18 (1981).

NRCP 56(c) establishes two basic substantive requirements for the entry of summary judgment: (1) there must be no genuine issues as to any material fact; and (2) the moving party must be entitled to judgment as a matter of law. In other words, summary judgment “is appropriate only where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving

party.” Alberter v. McDonald’s Corp., 70 F. Supp. 2d 1138, 1141 (D. Nev. 1999); Borgerson v. Scanlon, 117 Nev. 216, 220 (2001).

The District Court granted summary judgment on the merits regarding the parties’ respective interest in the Trust, and later granted summary judgment on the Daughters’ claim of breach of fiduciary duty against Eleanor. Accordingly, the Court reviews both of these issues de novo.

2. ***As A Mixed Question Of Law And Fact, The Court Reviews Laches De Novo And For Substantial Evidence.***

The Court reviews de novo the District Court’s determination of (1) the existence of factual disputes on summary judgment and (2) the applicability of laches to the claims at issue. See Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 833-34 (9th Cir. 2002). Meanwhile, the Court reviews for substantial evidence the District Court’s application of the undisputed facts to the laches factors. Id.; see also Modjeski v. Fed. Bakery of Winona, Inc., 307 Minn. 432, 240 N.W.2d 542, 546 (Minn. 1976) (explaining that laches is primarily a factual, not legal, determination). In this case, Eleanor appeals the District Court’s improper application of laches as an affirmative claim (a sword), which calls for de novo review. See Jarrow Formulas, Inc., 304 F.3d at 833-34.

3. **The Court Reviews The Grant Of A Preliminary Injunction For An Abuse Of Discretion.**

This court reviews a district court's issuance of a preliminary injunction for an abuse of discretion. See Guerin v. Guerin, 114 Nev. 127, 134, 953 P.2d 716, 721 (1998), abrogated on other grounds by Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 648–49, 5 P.3d 569, 570–71 (2000). “A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion.” Stratosphere Gaming Corp. v. Las Vegas, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (quotation omitted). “Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion.” McClanahan v. Raley's, Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (quotations omitted).

B. **The District Court Erred When It Ruled On Summary Judgment That Respondents Are Entitled To 65% Of The Trust Income.**

1. **The District Court Judge Erred By Granting Summary Judgment On The Merits.**

The District Court’s Summary Judgment on the merits improperly weighed evidence, made credibility determinations, and relied on unauthenticated and inadmissible documents.⁶ In other words, genuine issues

⁶ Furthermore, when Respondents moved for summary judgment on December 23, 2014, they did so based only on laches and other equitable defenses. (8 AA

of material fact precluded the District Court's summary judgment in favor of Respondents.

a. *Genuine Disputes As To The Material Facts Preclude Judgment In Favor Of Respondents.*

In determining whether there exists a genuine dispute as to any material fact, the nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Conversely, the court is *not* entitled to view the evidence in favor of the party moving for summary judgment. See Charles v. J. Steven Lemons & Assocs., 104 Nev. 388, 760 P.2d 118 (1988). When the evidence for and against summary judgment yields conflicting inferences, summary judgment is improper. See Easter v. Am. W. Fin., 381 F.3d 948 (9th Cir. 2004); O'Connor v. Boeing N. Am., Inc., 311 F.3d 1139 (9th Cir. 2002). The court may not weigh the merit of the inferences on summary judgment. See Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1117-18 (9th Cir. 2009). Finally, even if the weight or believability of the evidence is clearly in favor of one party, the other party is entitled to a trial to determine the facts. See Cardinal v. C.H. Masland & Sons, 87 Nev. 224, 484 P.2d 1075 (1971)

1775.) It was not until Respondents' reply brief in support of their motion that Respondents improperly requested judgment on the merits. (12 AA 2542.)

Even if this Court were to permit the District Court to rule on the merits of the case, despite the fact that such relief was not requested until Respondents' reply brief (see fn. 6), this Court should nonetheless determine in its de novo review that summary judgment on the merits was improper based on the existence of genuine issues of material fact.

**(1) The District Court Judge Was Required To
Make A Determination Regarding The
Existence Of Disputed Facts.**

Although this Court has noted that when both parties file motions for summary judgment, the “parties are normally precluded from arguing on appeal that the lower court erred in granting a summary judgment because a genuine issue of material fact exists,” see Collins v. Union Fed. Sav. & Loan Ass’n, 99 Nev. 284, 662 P.2d 610, fn. 2 (1983), countermotions for summary judgment do not necessarily mean that there are no disputed issues of material fact, and do not necessarily permit the judge to render judgment in favor of one side or the other. See id.; see also Starsky v. Williams, 512 F.2d 109, 112 (9th Cir.1975). In fact, the trial court is required to rule separately on each party’s motion and, if a fact issue exists, both motions must be denied and a trial had—even though both sides allege in their cross-motions that there is no genuine issue as to any material fact. See Ardmore Leasing Corp. v. State Farm Mut. Auto. Ins. Co., 106 Nev. 513, 515, 796 P.2d 232, 233 (1990) (holding that “the district court is

not relieved of its responsibility to ascertain if genuine issues of fact remain even though both parties move for summary judgment”). Here, the District Court had a responsibility to ascertain the existence of factual disputes, and failed to do so.

**(2) The District Court Judge Improperly Weighed
Conflicting Evidence, Thwarting The Plain
Language Of The Trust And Eleanor’s Right To
The Oil Income.**

The District Court improperly weighed evidence and made credibility determinations to decide the ownership rights in the Real Property and Oil Rights under the Trust.

The District Court determined that Marjorie’s Trust No. 3 was funded with a “portion of William’s separate property [as] determined by the provisions in Article Third of the Trust.” (16 AA 3441.) Article Third states as follows:

THIRD: MARITAL DEDUCTION. The Trustee shall allocate to Trust No. 3 from the Decedent's separate property the fractional share of the said assets which is equal to the maximum marital deduction allowed for federal estate tax purposes ... In making the computations and allocations of the said property to Trust No. 3 as herein required, the determination of the character and ownership of the said property and the value thereof shall be as finally established for federal estate tax purposes.

(Id.) Specifically, the District Court found that the ownership allocation of the Real Property and Oil Rights was determined by the amount of the marital deduction for federal estate tax purposes. (16 AA 3441-42.)

To determine the amount allocated to Trust No. 3 (there was none), the Court relied on circumstantial evidence provided by the Daughters and disregarded contradictory evidence provided by Eleanor, as follows:

First, the District Court noted that the only conclusive evidence of the federal tax deduction—the Federal Estate Tax Return, Form 706—“could not be located.”⁷ (16 AA 3441.) Thus, the Court pieced together a puzzle of evidence consisting of an (unstamped) Texas Tax Return and a purported Closing Letter for William’s Form 706. (*Id.*) Despite not having Form 706, the District Court determined that the “Texas Estate Tax Return basically duplicated the information provided in the Federal Estate Tax Return.” (*Id.*) The District Court was further persuaded by the Daughters’ tax expert, Daniel C. Gerety, who purportedly “verified in his Report that the Texas Estate Tax Return used the property allocations made on the Federal Estate Tax Return, and that the two Returns were consistent.”⁸ (*Id.*) The nature of and confidence expressed in

⁷ Nevada law presumes “[t]hat evidence willfully suppressed would be adverse if produced.” NRS 47.250(3). Nevada courts have consistently enforced an adverse presumption and, at the very least, an adverse inference from evidence that was requested and willfully suppressed by a party. *See, e.g., Douglas Spencer & Assoc. v. Las Vegas Sun Inc.*, 84 Nev. 279, 439 P.2d 473 (1968). At the very least, if evidence is inadvertently lost or destroyed, the court draws an inference that the evidence would be adverse if produced. *See, e.g., Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d, 103 (2006).

⁸ Mr. Gerety’s report contains several additional problems. First, Mr. Gerety’s report suggests that William had separate property outside the trust that went to

these findings are incredible, and therefore disputed, given the District Court's prior admission that "the Federal Estate Tax Return could not be located." (Id.) If the return could not be located, the "consistency" could not be verified. (Id.) The District Court thus had to have made an improper credibility determination. Moreover, the Texas Tax Return suggests that the separate property was transferred to Marjorie personally (not the Trust No. 3), which never happened. Therefore the missing Form 706 that purports to mirror the Texas Tax Return—even if found—may just be as inaccurate on its face as the Texas tax return reflecting a personal transfer to Marjorie that never occurred. Nevertheless, on this basis, the District Court established a 35%/65% allocation of William's separate property between Eleanor and Marjorie. (16 AA 3441-42.)

The evidence provided by the Daughters, which was relied on by the District Court, is further called into question by evidence provided by Eleanor. First, in the decades following William's death, all business conducted with respect to the Real Property and Oil Rights was conducted in the name of Eleanor's trust, Trust No. 2, not in the name of Marjorie's trust, Trust No. 3. (9 AA 1863-69.) Second, Eleanor testified that she had knowingly permitted

fund the alleged marital deduction. (8 AA 1814.) Second, the report is inadmissible hearsay and was not provided by way of affidavit in accordance with NRCP 56(c) and (e), and is therefore inadmissible. See also NRS 51.035.

Marjorie to receive some of the Oil income, but that she never transferred or deeded any ownership rights. (9 AA 1890.) Third, the deeds for Real Property and Oil Rights are still in the name of the main Trust. (9 AA 1925-26.) If Marjorie had believed that she had rights to the Oil Income that could be passed by her power of appointment over Trust No. 3, she should have and would have transferred deeds to her purported 65% ownership interest to Trust No. 3 so that they would be passed to her separate trust (the MTC Living Trust) upon her death. She did not. Indeed, even after Marjorie passed away, the Daughters, who are beneficiaries under Marjorie's MTC Living Trust, never transferred the deed into the name of MTC Living Trust. (9 AA 1925-26.) All of this evidence is in direct dispute with the evidence provided by the Daughters.

As additional evidence contradicting the District Court's findings, Jacqueline, one of the Daughters, testified that she relied on *oral promises* from Eleanor with regard to continuing receipt of the Oil Income, rather than on some purported right bestowed by the Trust instrument. (8 AA 1801.) In an affidavit, Jaqueline testifies that, "[i]n reliance upon [her] mother's assurances regarding the Trust income,"⁹ Jacqueline elected "to resign [her] employment

⁹ If Jacqueline has claims for fraudulent inducement or misrepresentation based on these purported statements, Jacqueline's remedies would be the result of such a claim, not a reinterpretation of the Trust or reallocation of William's separate property.

and be able to spend more time with [her] children.” (Id.) This statement confirms that the Daughters had no expectation (or legal right) under the terms of the Trust to receive the benefits of the Real Property or Oil Income which rightfully belong to Eleanor. Rather, they relied on an oral promise allegedly made by Eleanor to continue gifting the Oil Income. By finding in favor of the Daughters, the District Court improperly disregarded this evidence.

Other specific findings by the District Court are also called into question by the evidence presented by Eleanor: First, in Paragraph 15 of the Summary Judgment, the District Court improperly weighed evidence as to Marjorie’s knowledge or belief regarding her ownership interest in the Real Property and Oil Income. (16 AA 3424.) The District Court found that “Marjorie’s communications and conduct supported her belief that [Marjorie] owned rights to 65%” of the Oil Income. (Id.) By making this finding, the Court disregarded the evidence demonstrating that all business related to the Oil Income was conducted in the name of Trust No. 2—as evidenced by Marjorie and Eleanor’s use of the Tax ID for Trust No. 2 in transactions with oil companies. The District Court improperly diminished Eleanor’s evidence on this point, stating simply that “the Court was not provided with any dates on when the sub-trust 2 and sub-trust 3 were first assigned tax identification numbers.” (16 AA 3425.) If there was no evidence regarding the dates, to the extent they are even relevant,

the District Court should have inferred such evidence in Eleanor's favor. NRCP 56(c).

Second, in Paragraph 13 of the Summary Judgment, the District Court discusses allegedly conflicting testimony regarding the reasons that Eleanor allowed Marjorie to receive a portion of the Oil Income. In doing so, the Court drew credibility inferences. (16 AA 3425.) The District Court even relied on statements in Eleanor's "pleadings and documents" previously filed with the District Court, and weighed those statements against the actual testimony attached to the Summary Judgment briefs in Eleanor's declaration. (16 AA 3424; 9 AA 1890-91.) Statements by counsel in "pleadings and documents" are not evidence. Trust v. Tyfield Importers, Inc., 289 F.3d 589, 593 n. 4 (9th Cir. 2002) ("arguments and statements of counsel are not evidence"). The District Court was limited to the sworn testimony attached to Eleanor's summary judgment papers. By considering the unsworn statements allegedly made in other "pleadings and documents," the District Court erred and clearly made a credibility determination regarding Eleanor's testimony.

Finally, in Paragraph 20 of the Summary Judgment, the District Court overtly interpreted proffered evidence in favor of the Daughters. (16 AA 3426.) In 2009, the Daughters signed consents to the reformation of the Trust acknowledging that they were "contingent income beneficiar[ies]." (1 AA 0004-

5.) The District Court acknowledged this, but construed this acknowledgment in the Daughters' favor, stating that the underlying "Petition's language can also be read as asserting that Eleanor's right to income from the Texas oil property refers [only] to her 35% interest." (16 AA 3426.) The Court should have construed this evidence in the light most favorable to Eleanor.

Despite the foregoing examples of disputed evidence, starting at Paragraphs 6 and 7 of the Summary Judgment order, the District Court proceeded improperly as though Trust No. 3 had received some portion of William's separate property. (16 AA 3422 (referring to the "Texas oil property which had been allocated between subtrust 2 and subtrust 3").) The Court made this determination early in the summary judgment order based on the Texas Tax Return, and disregarded the evidence provided by Eleanor that no such allocation had occurred.

In sum, the record contains conflicting evidence regarding the nature of the marital deduction presumably funded by William's separate property pursuant to Article Third, and conflicting evidence as to how the Oil Assets were treated in the decades following William's death. Specifically, the District Court disregards Eleanor's sworn testimony, disregards the fact that all business related to the Real Property and Oil Rights were conducted in the name of Trust

No. 2, and weighed evidence and made credibility determinations to find in favor of the Daughters.

(3) Evidence Relied Upon By The District Court Is Hearsay And Was Not Properly Authenticated, And Was Therefore Inadmissible.

In Paragraph 15 of the Summary Judgment, the District Court referred to Marjorie’s “taxable estate,” which purportedly included 65% of the Real Property and Oil Rights, as proof that Marjorie believed she owned said 65%. (16 AA 3424.) The Daughters submitted as evidence of Marjorie’s estate a handwritten record purporting to be an intake sheet related to estate planning for Marjorie. (12 AA 2571.) That document was inadmissible because (1) the document is hearsay (NRS 51.035) and (2) the document had not been authenticated and no foundation had been laid (NRS 52.015). The District Court’s consideration of that document and the inferences in the Summary Judgment drawn therefrom were improper. (11 AA 2380.)

(4) The Statute of Frauds Precludes Judgment In Favor Of the Daughters.

Upon her death, Marjorie’s rights under Trust No. 3 were transferred to Marjorie’s separate trust—the MTC Living Trust—pursuant to Marjorie’s power of appointment under the Trust. (9 AA 1903.) As discussed above, the Daughters are beneficiaries of the MTC Living Trust.

As evidence that Marjorie's Trust No. 3 did not own the Real Property or Oil Rights, Eleanor raised the fact that no deed was ever executed transferring any of the Real Property or Oil Rights to the MTC Living Trust, as required by the Statute of Frauds. See In re Shailer's Estate, 266 P.2d 613, 616 (Okla. 1954). (stating that royalties from "oil and gas and other minerals in the ground, [are] usually treated as real property"). Nevada's statute of frauds requires that all interests in land must be in writing, signed by the party creating or granting the interest, "unless by act or operation of law." NRS 111.205(1). This does not "prevent any trust from arising or being extinguished by implication or operation of law." NRS 111.205(2). "An oral agreement regarding real property is void and not final until put in writing." Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503, 506 (9th Cir. 1978).

In this case, the transfer could not be effectuated within the Trust. NRS 163.385 authorizes a trustee to "[a]cquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division becomes necessary in order to make distributions." Here, the MTC Living Trust was not created by the same "single instrument" as Trust No. 2. The MTC Living Trust is a separate Trust created by Marjorie. Additionally, a trust created in relation to real property is not valid unless created by operation of law or by a written instrument signed by the trustee. NRS 163.008. Here, there can be no transfer

of any of the Oil Assets from the Trust to the MTC Living Trust by operation of law without a written instrument because a written instrument is required by the statute of frauds. Therefore, without a written deed, the MTC Trust cannot, as a matter of law, own any of the Oil Assets.

The Daughters dispute the fact that the deeds were never transferred to the MTC Living Trust by including an affidavit of counsel stating that Eleanor and the Daughters collectively decided to postpone transference of the deeds to avoid the financial costs of dividing the property. (12 AA 2576-78.) While the affidavit of counsel may defeat Eleanor's motion for summary judgment, it cannot support summary judgment in the Daughters' favor. It merely disputes the evidence/fact proffered by Eleanor that the deeds were never transferred.

2. Appellant's Position Is Not Barred By The Equitable Principle Of Laches.

The doctrine of laches is inapplicable because (1) Respondents did not plead laches as required by NRCP 8 and (2) laches is a defense and therefore cannot form the basis for the Daughters' affirmative claims in this case.

a. Respondents Did Not Plead Laches.

In their Countermotion for Summary Judgment, the Daughters argued the statute of limitations, laches, waiver, claim preclusion, and right to an accounting. Yet, the only relief sought by Jacqueline and Kathryn in their

original Petition was for a declaration stating they are entitled to 65% of the Oil Income as beneficiaries of the MTC Trust. (1 AA 0064.) Jacqueline and Kathryn's Countermotion, however, argued that laches, entitles them to that affirmative relief. Like other defenses, laches, must all be pled as affirmative defenses pursuant to NRCP 8.¹⁰ Because the Daughters did not plead laches and did not move to amend the Petition until after briefing on summary judgment, the District Court should have disregarded the arguments in the countermotion regarding laches.

b. *Laches Is A Defense And Therefore Cannot Form The Basis For the Daughters' Affirmative Claims In This Case.*

Jacqueline and Kathryn misconstrue Eleanor's defense of ownership as a claim. A plaintiff may not use laches to bar a right asserted merely by way of defense. Northern Pac. R.R. Co. v. United States, 277 F.2d 615, 624 (10th Cir.1960) (plaintiff could not successfully plead laches on part of defendant where, after dismissal of their counterclaim, defendants did not seek affirmative relief by cross complaint, cross action, or other like pleading); Howorka v.

¹⁰ The only claims Eleanor pled in this case were her counterclaims for intentional interference with contractual relations and enforcement of the Trust's no contest clause, as asserted in her Answer and Counterclaim. The Daughters do not assert that this claims by Eleanor is barred by laches. Indeed, the improper conduct alleged in Eleanor's counterclaim occurred only in 2013, when the Daughters interfered with Eleanor's right to obtain Oil Income, and therefore laches would not possibly apply to that claim.

Harbor Island Owners' Ass'n, Inc., 292 S.C. 381, 356 S.E.2d 433, 436 (Ct.App.1987) (plaintiff cannot urge laches to bar right asserted as defense); see generally 30A C.J.S. Equity § 128. “Laches may be used as a shield, but not as a sword by one seeking affirmative relief.” LaPrade v. Rosinsky, 882 A.2d 192, 197-98 (D.C. 2005) (citing 118 East 60th Owners, Inc. v. Bonner Properties, Inc., 677 F.2d 200, 204 (2d Cir.1982)) (as party seeking declaratory relief is “aggressor” in litigation, equity precludes use of laches as sword).

Jacqueline and Kathryn initiated this litigation with Jacqueline's Petition for Declaratory Relief filed in September 2013. (1 AA 0064.) The Petition for Declaratory Relief asks this Court to determine that Eleanor is only entitled to 35% of the Oil Income, and Jacqueline and Kathryn, as beneficiaries of the MTC Living Trust (Marjorie's separate trust) are entitled to 65% of the Oil Income. As a defense to these claims, Eleanor asserts Trust No. 2's 100% ownership of the Oil Assets and her entitlement to 100% of the Oil Income during her life. Therefore, Eleanor has not raised a *claim* regarding ownership; rather, she has asserted her ownership as a defense against the declaratory relief claim by the Daughters, as well as their claims for breach of fiduciary duty. Eleanor had no ability or duty to raise the defense of ownership until Jacqueline filed the Petition for Declaratory Relief, and Eleanor appropriately raised the defense in her answer and counterclaim. (3 AA 609.) On summary judgment,

the Daughters bear the burden of proving their claim of entitlement to 65% of the Oil Assets, as this is their primary claim in this litigation.

C. The District Court Erred In Finding On Summary Judgment That Eleanor Is Liable For Breach Of Fiduciary Duty To The Daughters.

Should this Court determine that the District Court erred in granting summary judgment regarding ownership interests on the merits and on the basis of laches, the question of Eleanor's alleged breach of fiduciary duty will be moot. Eleanor cannot be liable for a breach of fiduciary duty if the Court overturns the District Court finding on summary judgment that the Daughters are 65% current beneficiaries of the Trust and were therefore even owed fiduciary duties by Eleanor when she acted as trustee.

Moreover, even under the facts of this case, the District Court erred in finding Eleanor in breach of a fiduciary duty in light of the finding that Eleanor held her position in good faith. The District Court found that Eleanor breached her fiduciary duty by failing obtain court approval prior to stopping her gifts of income from the Trust in 2013. (16 AA 3458.) Notwithstanding Eleanor's actions, the District Court found—regarding the dispute itself—that “the position of both parties, seeking the correct interpretation of the Trust provisions as to entitlement to the Texas oil property, were not asserted in bad faith.” (16 AA 3452.) The District Court also granted Eleanor leave to refile her

counterclaims in another action. (Id.) In other words, the District Court found that the beneficiaries of the Trust had a good faith, positional disagreement over the interpretation of the Trust.

Upon motion by the Daughters, the District Court was asked to order an award of attorneys' fees against Eleanor personally in the amount of \$417,855.56, "if the court determine[d] that such additional relief is appropriate to redress or avoid an injustice." NRS 153.031(3)(b). Here, stopping the gifts to the Daughters was not the *cause* of the dispute between the beneficiaries or the attorneys' fees incurred herein. The District Court had already determined that the purpose of this declaratory action is resolution of a good faith dispute between beneficiaries over the "correct interpretation of the Trust provisions." (16 AA 3452.) Thus, even if Eleanor, as trustee, had implemented different procedures initially (*e.g.* asked for court permission prior to discontinuing the gifts—which is illogical given her good faith belief that she was the only beneficiary), the parties would likely have found themselves in court incurring the very same litigation fees. Because prosecuting and/or defending good faith claims is not a breach of a fiduciary duty, nor is it an "injustice" that must be "redressed," an award of attorneys' fees against Eleanor personally under NRS 153.031(3)(b) in this case is improper.

D. The District Court Erred in Granting A Preliminary Injunction Requiring The Trustee To Resume Gifts of Oil Income To The Daughters.

On December 3, 2013, the Daughters petitioned the District Court for a preliminary injunction requiring Eleanor to distribute 65% of the Trust income to them. (2 AA 277.) The Court denied the petition, finding that there was no irreparable harm if payments were delayed (assuming the Daughters were entitled to payments at all). At the time, the trial in this matter was scheduled for February of 2014.

When the trial date was later pushed back, the Daughters again petitioned the District Court for a preliminary injunction requiring Eleanor to distribute 65% of the Trust Income. (4 AA 0713.) Without identifying any irreparable harm, the District Court altered course and granted the preliminary injunction based on “changed circumstances.” (7 AA 1569, 1576, 1546-47.) In doing so, the District Court abused its discretion. A delay in the trial date is not a “changed circumstance” justifying the grant of a preliminary injunction, and no irreparable harm had been identified. That is, the continuance of the trial had no legal effect on whether the Daughters had met their burden of proof in satisfying the mandatory requirements for the injunctive relief, which burden of proof the District Court had previously found was not met by the Daughters.

Generally speaking, in Nevada, as in most states, there are three minimum requirements to be satisfied by the Petitioner before an injunction is issued by a Court. “A preliminary injunction is available [only] upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy.” Sobel v. Capital Management Consultants, Inc., 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) (citing Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 780, 587 P.2d 1329, 1330). Thus, this test is conjunctive, and the failure of the Daughters to meet even one of the requirements necessitates the denial of the request for the issuance of an injunction.

Nowhere in the Nevada Revised Statutes or Nevada Rules of Civil Procedure does there appear to be an exception to the requirements for a preliminary injunction when a trial date is continued. Nonetheless, after finding previously that the Daughters had failed to demonstrate irreparable harm, the District Court granted the request for a preliminary injunction in that exact basis. In the event this case is remanded to the District Court for further proceedings, the preliminary injunction should be overturned, as they have not demonstrated irreparable harm necessary for such an injunction.

VIII. CONCLUSION

In light of the foregoing, Appellant, Eleanor, respectfully requests that this Court (1) overturn the District Court's grant of summary judgment regarding ownership rights and breach of fiduciary duty, (2) find that a change in the trial date does not constitute changed circumstances warranting a preliminary injunction, and (3) remand this case to the District Court for further proceedings.

Dated this 20th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. Additionally, as required under NRAP 32(a)(8), I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6), including the type face and type style requirements, and is Times New Roman, 14 point font. I further certify that, in compliance with NRAP 32(a)(7)(A)(ii), (a)(7)(C), and (a)(7)(D)(ii), the brief complies with the type-volume limitation and contains 8,835 words, excluding the disclosure statement, table of contents, table of authorities, Certificate of Service and this Certificate of Compliance. 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 or if this certificate is incomplete or inaccurate.

Dated this 20th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing **APPELLANT'S OPENING BRIEF ON APPEAL** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on November 20, 2015., upon the following:

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I hereby certify that on November 20, 2015., I served a copy of this document by mailing a true and correct copy, postage prepaid, via U.S. Mail, addressed to the following:

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