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IN THE SUPREME COURT OF THE STATE OF NEVADA

WESLEY ALLEN LEWIS,)
)
Appellant;)
)
vs.)
)
MARIA DANIELA LEWIS.,)
)
Respondent.)
_____)

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Supreme Court No. 66497
District Court No. D-10-427034-D

RESPONDENT'S ANSWERING BRIEF

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4 **STATEMENT OF THE CASE**

5 This is an appeal brought by Appellant (hereafter "WESLEY") from
6 post-divorce orders that, among other things, modified physical custody of
7 the parties' minor child from joint physical custody to an award of primary
8 physical custody to Respondent (hereafter "MARIA"). These orders also
9 found WESLEY in contempt of court based upon his failure to comply with
10 prior orders imposing financial obligations upon him and requiring him to
11 take the minor child to tutoring classes. WESLEY's current child support
12 obligation was increased to \$360.00 per month based upon his previously
13 imputed gross monthly income and the modification of physical custody.

14 **STATEMENT OF THE ISSUES**

- 15 1. Did the District Court abuse its discretion in modifying physical
16 custody of the parties' minor child?
17
18 2. Did the District Court abuse its discretion in finding WESLEY in
19 contempt of court?
20
21 3. Did the District Court abuse its discretion in setting WESLEY's
22 current child support obligation and in entering its orders relating to the
minor child's participation in the Kumon tutoring classes?
4. Did the District Court display sufficient bias so as to taint the fairness

1
2 of the evidentiary hearing before it?

3 **STATEMENT OF THE FACTS**

4 WESLEY and MARIA are the parents of one minor child, to-wit:
5 ISABELLA SARA LEWIS (hereafter "BELLA"), born August 10, 2006.

6 The parties were divorced pursuant to a Decree Of Divorce filed on July 15,
7 2011. (Record On Appeal [ROA] 81-96) The Decree awarded them joint
8 legal and joint physical custody of BELLA, and imposed upon WESLEY a
9 current child support obligation of \$440.00 per month less one-half of his
10 monthly expense in maintaining health insurance to cover BELLA. (ROA
11 82)

12 On May 2, 2013 MARIA filed Plaintiff's Motion To Have Defendant
13 Held In Contempt Of Court, To Enforce Decree Of Divorce, To Reduce
14 Child Support Arrears To Judgment, And For Award Of Attorney Fees.
15 (ROA 120-129) WESLEY, through counsel, responded with Defendant's
16 Response And Countermotion For Attorney's Fees And Related Relief filed
17 on May 28, 2013. (ROA 149-215) MARIA then filed Plaintiff's Reply To
18 Defendant's Response And Countermotion For Attorney's Fee And Related
19 Relief on May 31, 2013. (ROA 230 - 240)

20 At a hearing conducted on June 4, 2013 (ROA 926-927) the District
21 Court scheduled an Evidentiary Hearing for August 29, 2013 on the issues
22 raised by the parties. The Evidentiary Hearing was begun on August 29,

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2 2013 but then continued to October 8, 2013 to a courthouse power outage.
3 (ROA 930-931). The Evidentiary Hearing was concluded on October 8,
4 2013, at which time the District Court took the matter under advisement.
5 (ROA 932-933) On October 14, 2013 the District Court rendered its
6 findings and orders in a detailed Minute Order. (ROA 934 - 939) and
7 provided same to both counsel that day.

8 The findings and orders from the 2013 Evidentiary Hearing (in which
9 WESLEY was represented throughout by counsel) were thereafter set forth
10 in the Findings Of Fact, Conclusions Of Law And Order filed on December
11 27, 2013. (ROA 403-413). No appeal was taken therefrom.

12 The District Court at the conclusion of the 2013 Evidentiary Hearing
13 determined that WESLEY's child support arrears from June 2011 through
14 August 2013, exclusive of interest and penalties, were in the amount of
15 \$9,012.38. (ROA 411) As for WESLEY's failure to obey the existing child
16 support order, the District made the following orders (ROA 412):

17 **IT IS FURTHER ORDERED** that Defendant is held in
18 contempt of court for his non-payment of child support as
19 follows: In 2011, for June, July, August, September; In 2012,
for January, May, June, July, September, October and
November.

20 **IT IS FURTHER ORDERED** that Defendant is sanctioned by
21 the sum of \$500.00 for each of his eleven contempts set forth
22 in the preceding paragraph for a total sanction of \$5,500.00.
Said sum is reduced to judgment in favor of Plaintiff and may
be collected by any and all lawful means. The Court is also

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2 imposing a 10 day jail sentence for each of the eleven
3 contempts for a total sentence of 110 days. Said jail sentence
4 is stayed, but will be imposed in the event that Defendant has
5 any future missed payments to Plaintiff.

6 Based upon the evidence before it, including WESLEY's pay stubs,
7 the District Court determined WESLEY to be wilfully underemployed and
8 determined his imputed gross monthly income to be \$1,998.00 based upon a
9 forty hour work week. (ROA 405) Based upon the joint physical custodial
10 arrangement and MARIA's gross monthly income, WESLEY was ordered
11 to pay \$91.00 per month as and for child support commencing October
12 2013, \$50.00 per month for his one-half of the monthly cost of MARIA
13 maintaining health insurance for BELLA, and \$100.00 per month for child
14 support arrears. (ROA 412)

15 The Findings Of Fact, Conclusions Of Law And Order, after finding
16 that BELLA's continued tutoring with Kumon is in her best interest,
17 ordered the parties to share equally in the cost of that tutoring and
18 WESLEY was further ordered to take BELLA to her tutoring class on
19 Mondays. (ROA 410) The District Court made the following further order
20 regarding the tutoring:

21 ... BELLA shall continue receive tutoring services until she is
22 testing at or above grade level as tested by Kuman (or if
Kuman does [sic] test, by the CRT's administered by the Clark
County School District), or if Plaintiff and Defendant mutually
decide to terminate the tutoring.

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2 On March 19, 2014 MARIA filed her Motion To Modify Custody;
3 To Enforce Order Of December 27, 2013 And An Award Of Attorney Fees.
4 (ROA 532-631) In this motion MARIA sought a modification of custody so
5 that she would be awarded primary physical custody of BELLA. In support
6 of this request, MARIA alleged that WESLEY had failed to support efforts
7 to improve BELLA's education; that WESLEY had failed to participate in
8 BELLA's counseling despite her therapist's desire that he do so; that
9 WESLEY had not properly tended to BELLA's health; and that WESLEY
10 had failed and refused to co-parent with MARIA. (ROA 537-541)

11 MARIA's motion filed on March 19, 2014 also sought to enforce the
12 financial obligations imposed upon WESLEY by the Findings Of Fact,
13 Conclusions Of Law And Order filed December 27, 2013 through the
14 District Court's contempt powers. The motion, and accompanying
15 documentation, pointed out that WESLEY had not paid his one-half share
16 of the cost of BELLA's tutoring, had not made timely child support
17 payments, had not made the health insurance contribution payments, and
18 had not made the mandated monthly payments on previously determined
19 arrears. ROA 541-543)

20 Following the issuance of an Order To Show Cause filed on March
21 27, 2014 (ROA 633-634), WESLEY (although still with counsel of record)
22 filed on April 24, 2014 a document entitled "Opposition To Motion To

1
2 Modify Custody; To Enforce Order Of December 27, 2013 And An Award
3 Of Attorney's Fees And Countermotion For Fees; To Order Therapy For
4 Plaintiff; To Hold Plaintiff In Contempt; And For Related Relief. (ROA
5 654-685)

6 A hearing was conducted on the motion calendar on May 1, 2014
7 with WESLEY represented in an unbundled capacity by his attorney of
8 record who had represented in at during the 2013 proceedings. At that
9 hearing the District Court scheduled an Evidentiary Hearing for July 29,
10 2014 and August 5, 2014 and made temporary custody modifications for the
11 interim period. At the conclusion of the hearing, WESLEY's unbundled
12 attorney of record was permitted to withdraw. (ROA 940-942). The
13 District Court's temporary orders were thereafter set forth in an Order filed
14 on June 16, 2014. (ROA 700-702)

15 The Evidentiary Hearing was in fact conducted on both July 29, 2014
16 and August 5, 2014, at the conclusion of which the District Court awarded
17 MARIA primary physical custody of BELLA, modified the timeshare and
18 entered orders relating thereto, modified WESLEY's current child support
19 obligation based upon the new physical custody award, and found
20 WESLEY in contempt of court. (ROA 943-947)

21 The District Court's orders were set forth in an Order filed on
22 September 2, 2014 (ROA 889-893) and Supplemental Order filed on

1
2 September 4, 2014 (ROA 902-904). Following service of these orders, this
3 appeal was commenced. (ROA 906)

4 **ARGUMENT**

5 **The District Court Did Not Abuse Its Discretion In**
6 **Modifying Physical Custody Of The Parties' Child**

7 In *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), this Court
8 set forth the standard for reviewing custody orders as follows:

9 This court reviews the district court's decisions
10 regarding custody, including visitation schedules,
11 for an abuse of discretion. District courts have
12 broad discretion in child custody matters, but
substantial evidence must support the court's
findings. Substantial evidence "is evidence that a
reasonable person may accept as adequate to
sustain a judgment". (Citations omitted)

13 In the Replacement Opening Brief Of Appellant, WESLEY asserts
14 that the District Court abused its discretion in modifying physical custody
15 of BELLA by failing to apply the correct standard for such a custody
16 modification and correspondingly failing to make the specific findings
17 required by that standard. WESLEY argues on page 18 of his brief that,
18 pursuant to *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), as follows:

19 A District Court may modify an order regarding
20 primary physical custody "only when (1) there has
21 been a substantial change in circumstances
22 affecting the welfare of the child, and (2) the
child's best interest is served by the
modification."

1
2 WESLEY argues that the District Court abused its discretion by
3 failing to address any change in circumstances in support of its modification
4 of physical custody. However, it is WESLEY not the District Court that is
5 in error in terms of the proper standard to apply to a requested modification
6 of physical custody in the case at bar.

7 This Court has distinguished cases in which a modification from a
8 prior primary physical designation is being sought versus a modification
9 from a prior joint physical custody designation is being sought. This was
10 made clear by footnote 4 in *Rivero, supra*, where this Court stated as
11 follows:

12 The court may modify *joint* physical custody if it
13 is in the vest interest of the child. NRS
14 125.510(2); Potter v. Potter, 121 Nev. 613, 618,
15 119 P.3d 1246, 1249 (2005). However, to modify
16 a primary physical custody arrangement, the court
must find that it is in the best interest of the child
and that there has been a substantial change in
circumstances affecting the welfare of the child.
Ellis, 123 Nev. at 150, 161 P.3d at 242.

17 As noted earlier herein, the parties' 2011 Decree Of Divorce awarded
18 them joint physical custody of BELLA. (ROA 82) MARIA's motion filed
19 on March 19, 2014 sought a modification of that joint physical custody
20 designation to an award to MARIA of primary physical custody.
21 Accordingly, the District Court properly applied the "best interests"
22 standard and WESLEY's argument to the contrary is without merit.

1
2 WESLEY also claims that the District Court's modification of
3 physical custody was "based, in large part, upon Mr. Lewis' purported
4 noncompliance with its orders." Had the District Court's award to MARIA
5 of primary physical custody been based solely upon WESLEY's failure to
6 comply with prior orders, clearly that would have been an abuse of
7 discretion. *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993). However, a
8 review of the record discloses that not to be the case.

9 WESLEY attempts to make much of the fact that the District Court's
10 oral statement at the conclusion of the Evidentiary Hearing "twice" included
11 references to WESLEY's disobedience of court orders. This is not
12 surprising, nor does it taint the custody modification.

13 One of the issues before the District Court was the request that
14 WESLEY be held in contempt of court for his failure to obey various
15 provisions of the District Court's orders. Evidence was in fact propounded
16 as to that issue, and WESLEY's failure to comply with those orders was
17 proven. Therefore, in addressing the contempt of court issue it was entirely
18 proper that the District Court make specific factual findings as to those
19 failures.

20 In its oral statement setting forth its findings of fact supporting its
21 modification of physical custody, the District Court addressed a number of
22 instances of WESLEY's conduct that were contrary to BELLA's best

1
2 interest. WESLEY failed to permit or provide for communications
3 between MARIA and BELLA when she was in WESLEY's care. (II. SUPP.
4 APP. 363:9-21) WESLEY failed to consistently take BELLA to her
5 tutoring, and indeed stopped doing so altogether in the Summer of 2014
6 because he did not want to drive so far. (II. SUPP. APP. 365:18 - 366:3)
7 Despite being aware of BELLA's counseling and the therapist's desire that
8 he become involved in same, WESLEY failed to participate in that
9 counseling until he did so for appearance sake after the filing of MARIA's
10 motion in March 2014. (II. SUPP. APP. 366: 21 - 367:5. WESLEY failed
11 to attend to BELLA's medical needs when she was in his care. (II. SUPP.
12 APP. 368:14 - 369:3).

13 The District Summarized the custodial findings (which in some
14 instances also included violations of court orders) at II. SUPP. APP. 373:13
15 - 374:4 as follows:

16 You know, Mr. Lewis, in the space of ten months,
17 you demonstrated to the Court by your own
18 behavior in this – your own conduct, I should say,
19 that it's in the best interest of the minor child that
20 I change the custodial arrangement, from not
21 paying your support to not taking her to Kumon,
22 to ignoring her medical needs, to not making
yourself available with a voicemail, to not
following my Court orders, even so far as making
sure your child's phone stay plugged in an
charged so that Mom can have access to her, and
to the tardies and the absentee record, especially
the tardies and the absentee records. Those are

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2 significant factors the Court looks at.

3 To the fact that you didn't participate in the
4 child's mental health, that's significant to The
5 Court, very, very significant. That you wait until
6 March, and even then your dad is the one who
7 calls and not you.

8 It is clear that WESLEY's argument that the District Court failed to
9 use the proper standard for custody modification is without merit. The
10 District Court's reciting of its factual findings as quoted immediately above
11 similarly demonstrates WESLEY's arguments that the District Court based
12 its change of circumstances on his violation of court orders and that the
13 District failed to make specific findings necessary for a custody
14 modification are similarly without merit. Accordingly, the modification of
15 physical custody should be affirmed.

16
17 **The District Court Did Not Abuse Its Discretion**
18 **In Finding Wesley In Contempt Of Court**

19 In the Replacement Opening Brief Of Appellant, WESLEY argues
20 that the District Court abused its discretion in finding him in contempt of
21 court. This Court's jurisdiction to consider the contempt findings is not
22 contested by MARIA since they are set forth in the custody orders appealed
from by WESLEY. It should be noted, however, that WESLEY incorrectly
adds that "the contempt Orders served as the basis of the attorney fee Order
that is properly on appeal". The District Court did not award MARIA
attorney fees in either of the two orders WESLEY is appealing from.

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2 WESLEY seeks the vacating of the contempt orders on three separate
3 grounds. He first asserts the Evidentiary Hearing was a criminal contempt
4 proceeding rather than a civil contempt proceeding, and therefore his failure
5 to have counsel violated his Sixth Amendment protections. WESLEY next
6 argues that the contempt orders should be vacated because the District
7 Court failed to determine his present ability to pay arrearages. Finally, it is
8 argued that the order finding him in contempt for failing to take BELLA to
9 her Kumon tutoring must be vacated because the order imposing such an
10 obligation upon WESLEY "was too ambiguous". WESLEY's arguments
11 will be addressed in the order in which they are presented.

12 WESLEY takes the position that since the District Court imposed a
13 definite number of days sentence for each contempt (20 days, albeit
14 stayed), each of these constitutes a "criminal contempt". Under that
15 interpretation, WESLEY submits that his failure to have counsel during the
16 Evidentiary Hearing was a violation of his Six Amendment rights.

17 It is respectfully submitted that the fact that a definite period of
18 incarceration is imposed as a sentence for contempt does not necessarily
19 constitute criminal contempt. Instead, it is the purpose of the sentence that
20 is determinative. This was made clear by this Court in a case cited by
21 WESLEY, *Warner v. Second Judicial District Court*, 111 Nev. 1379, 906
22 P.2d 707 (1995) by the following discussion:

1
2 The United States Supreme Court has further clarified the
3 distinction between civil and criminal contempt, explaining
4 that since a civil contempt sanction is designed to coerce the
5 contemnor into complying with a court order, it must be
6 conditional or indeterminate - that is, it must end if the
7 contemnor complies. Hicks v. Fejoek, 485 U.S. 624, 633, 108
8 S. Ct. 1423, 1430, 99 L.Ed.2d 721 (1988) In contrast, a
9 criminal contempt sanction is intended to punish the contemnor
10 for disobeying a court order and, thus, must be determinate or
11 unconditional. Such a sanction is not affected by any future
12 action by the contemnor. *Id.*, at 633-35, 108 S. Ct. at 1430-31.

13 In the case at bar, had each or even any of the 20 days sentences for
14 contempt actually have been imposed and WESLEY incarcerated then this
15 would clear have been a criminal contempt proceeding since the sanction
16 would simply have been to punish him for disobeying a court order.
17 However, in this instance all the sentences were stayed. Instead, the District
18 Court advised WESLEY (II. SUPP. APP. 375:11-18) as follows:

19 For failing to bring the child to tutoring in Kumon – for failing
20 to bring the child to tutoring on Mondays during your custodial
21 time, I’m finding you in contempt and I’m sentencing you to
22 twenty days, which is stayed.

For each of the missed payments, December, January,
February, child support, I’m sentencing you to twenty days for
each of those three missed payments, which are stayed, I’m not
imposing them.

If there’s any Court order in the future which you decide to
ignore, and this comes back to me on an Order to Show Cause,
I will impose jail on you. Do you understand that, Mr. Lewis?

By staying the imposition of the contempt sentences, it is clear that
the District Court did not punish WESLEY. Instead, the stayed sentences

1
2 are intended to motivate or coerce WESLEY into complying with court
3 orders in the future. For that reason, they constitute civil contempt
4 sentences rather than criminal contempt sentences. WESLEY's decision
5 not to have counsel at the Evidentiary Hearing did not violate his Six
6 Amendment rights.

7 As indicated above, WESLEY also seeks to have the child support
8 contempt findings vacated because "the District Court made no findings
9 regarding an ability to pay". WESLEY's current child support obligation
10 for the months that formed the basis of his contempt findings (December
11 2013, January 2014 and February 2014) was \$91.00 per month. (ROA 411).

12 There was no suggestion that WESLEY lacked the ability to pay that child
13 support.

14 Finally, WESLEY seeks to have the contempt finding related to his
15 failure to take BELLA to Kumon tutoring vacated because the underlying
16 order imposing such an obligation upon him was ambiguous since it
17 directed him to "take BELLA to her Kuman [sic] Tutoring class on
18 Mondays immediately after school." (ROA 410) WESLEY argues that he
19 did not realize that the Kumon program was continuing during the summer
20 months when school was not in session.

21 It is respectfully submitted that "immediately after school" simply
22 referred to the time each Monday when BELLA was to be taken to her

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2 tutoring class. This did not make the order ambiguous. Moreover,
3 WESLEY's "summer months excuse" does not apply to the other instances
4 in which he failed to take BELLA to her tutoring despite school being in
5 session. (I. SUPP. APP. 153)

6 None of the three arguments WESLEY advances in an attempt to
7 have one or all of the contempt findings vacated have merit. The
8 uncontroverted evidence was that WESLEY in each instance violated a
9 court order, and stayed sentences were imposed in an attempt to obtain
10 compliance from him in the future.

11 **The District Court Did Not Abuse Its Discretion In Setting Wesley's**
12 **Current Child Support Obligation Nor In Ordering Him To Pay**
13 **On-Half Of Bella's Kumon Tutoring**

14 The Replacement Opening Brief Of Appellant argues that the District
15 Court abused its discretion in setting WESLEY's current child support
16 obligation because ALLEGEDLY "no specific findings were made to
17 justify the deviation from the statutory guidelines". This argument is faulty
18 because the District Court's imposition of a current child support obligation
19 of \$360.00 per month is not a deviation from the statutory guidelines.

20 In the Findings Of Fact, Conclusions Of Law And Order filed on
21 December 27, 2013 following the 2013 Evidentiary Hearing, the District
22 Court made a finding that WESLEY was wilfully underemployed.
Applying his hourly wage and commission percentage to a forty hour work

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2 week, the District Court determined and made a finding that WESLEY's
3 imputed gross monthly income for child support purposes is \$1,998.00.
4 (ROA 403-413). Since there was no appeal from this order, this became the
5 law of the case and no evidence was submitted at the 2014 Evidentiary
6 Hearing to the contrary. With the award of primary physical custody to
7 MARIA, applying the 18% multiple to this imputed income of \$1,998.00
8 yields a current child support obligation of \$360.00.

9 Alternatively, WESLEY argues that it was an abuse of discretion for
10 the District Court to order him to continue to pay one-half of BELLA's
11 Kumon tutoring cost because "the requirement that Mr. Lewis bring Bella to
12 the Kumon programming and pay one half the cost of such programming,
13 had already ended by the terms of the existing order."

14 The instances under which the Kumon tutoring would end are set
15 forth within the Findings Of Fact, Conclusions Of Law And Order filed on
16 December 27, 2013 (ROA 410: 8-14. None of these pre-conditions were
17 were presented in the evidence as existing at the time of the Evidentiary
18 Hearing. Therefore, this argument does not pass muster either.

19 **The District Court Did Not Deprive Wesley Of A Fair Hearing**

20 WESLEY argues that the record relating to this Evidentiary Hearing
21 discloses such bias on the part of the District Court that he was deprived of
22 a fair hearing. Such an argument ignores the fact that the District Court

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2 less than a year earlier had conducted an Evidentiary Hearing as to these
3 parties in which it had found that WESLEY had failed to comply with his
4 court ordered financial obligations, that he was wilfully underemployed,
5 and that he had ignored many of his child's needs. The District Court had
6 further made a finding that WESLEY had testified "on several issues where
7 the Court found his credibility suspect, or that he was motivated to act in a
8 manner that was contrary to the best interest of his minor child". (ROA
9 406)

10 Accordingly, when the 2014 Evidentiary Hearing commenced the
11 District Court had a familiarity with the background facts and the parties.
12 This does not, however, translate to improper bias and a tainting of the
13 hearing. This Court is not unfamiliar with how trying an evidentiary
14 hearing can be when a proper person litigant is involved, particularly one
15 such as in this instance did not properly participate in pre-hearing discovery
16 nor comply with the District Court's other pre-hearing orders.

17 WESLEY has pointed to instances in which the District Court was
18 less than soothing in tone and ruled upon Objections that itself, in effect,
19 had made. However, an examination of the Evidentiary Hearing transcript
20 discloses the District Court at times taking the same approach with
21 MARIA's counsel. Two points are most important. WESLEY is unable to
22 point to any relevant evidence that he was not permitted to present.

1
2 WESLEY is unable to point to any finding that is not supported by
3 evidence.

4 **CONCLUSION**

5 For the reasons set forth above, Respondent respectfully submits that
6 the District Court orders appealed from by Appellant should be affirmed.

7 Respectfully submitted on this 16 day of November, 2015, by:

8 
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14 **CERTIFICATE OF COMPLIANCE**

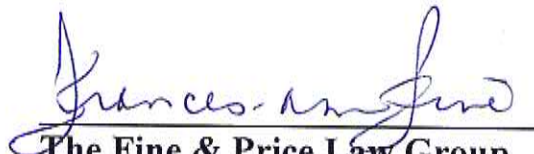
15 Undersigned counsel hereby certifies that this brief complies
16 with the formatting requirements of NRAP 32(a)(4), the typeface
17 requirements of NRAP 32(a)(5) and the type style requirements of
18 NRAP 32(a)(6) because this brief has been prepared in a
19 proportionally spaced typeface using Microsoft Word and a size 14
20 Times Regular font.

21 ///

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2 Undersigned counsel further certifies that this brief complies
3 with the page or type-volume limitations of NRAP 32(a)(7) because,
4 excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is
5 proportionately spaced, has a typeface of 14 points or more, and
6 contains 3,991 words.

7 Finally, undersigned counsel certifies that I have read this
8 appellate brief, and to the best of my knowledge, information and
9 belief, it is not frivolous or interposed for any improper purpose. I
10 further certify that this brief complies with all applicable Nevada
11 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
12 requires every assertion in the brief regarding matters in the record to
13 be supported by a reference to the page and volume number, if any, or
14 the transcript or appendix where the matter relied on is to be found. I
15 understand that I may be subject to sanctions in the event that the
16 accompanying brief is not in conformity.

17 DATED this 16th day of November, 2015.

18
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