IN THE SUPREME COURT OF THE STATE OF NEVADA

Paige Elizabeth Petit,

Appellant,

vs.

Kevin Daniel Adrianzen,

Respondent.

Supreme Court No. **66565**
District Court No. **D-13-489540-N**
(Consolidated with D-13-489542-D)

MOTION TO CORRECT AND SUPPLEMENT RECORD

Respondent **Kevin Daniel Adrianzen**, by and through his attorney, **Bruce I. Shapiro, Esq.**, of the law office of Pecos Law Group, respectfully submits this Motion to Correct and Supplement Record.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

This appeal arises from a final Decree of Divorce in which the district court changed the name of an infant child from the mother's surname to a hyphenated surname containing the namesakes of both the mother and the father. The appellant mother, Paige Elizabeth Petit ("Paige"), has appealed the district court's order

changing the child's name and filed her opening brief on October 12, 2015. Respondent father, Kevin Daniel Adrianzen ("Kevin"), filed his Answering Brief on December 28, 2015. Paige filed her Reply Brief on February 23, 2016. Certain issues have arisen in both the Answering Brief and the Reply Brief which Kevin respectfully requests the opportunity to address by way of the present motion.

Specifically, in the third paragraph at page 15 of Respondent's Answering Brief, it is stated that "Kevin, his mother, stepfather, brother and sister all share the surname Adrianzen." This statement, however, is inaccurate in one respect. Kevin does not have, nor has he ever had, a stepfather. In other words, Kevin lives with his father (***not*** stepfather), mother, brother and sister who all share the surname Adrianzen.

Appellant attempts to capitalize on this inaccuracy in her Reply Brief when she argues "that maintaining the integrity of Kevin's identity, such as it is, with his stepfather's last name, simply does not outweigh Paige's equal protection in having her son bear her last name." Reply Brief at page 5 and 6. To correct this error, Kevin respectfully requests the opportunity to supplement the record on this appeal with an objectively indisputable statement of fact that Kevin's father (***not stepfather***) bears the name Adrianzen.

Additionally, in her reply Page argues that the court should consider that

"Adrianzen" is hard to pronounce and pronunciation should be a factor in the court's determination of Ryder's best interest. In as much as this argument was neither made in the district court nor in Appellant's Opening Brief, Kevin respectfully requests the opportunity to supplement the court record with the fact that the pronunciation of his surname is not difficult at all.

II.
ARGUMENT

A. This Court has the Authority to Permit the Supplementation of the District Court Record.

Nevada Rule of Appellate Procedure, Rule 10(C) provides:

> **(c) Correction or Modification of the Record.** If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the Clerk.

Federal Rule of Appellate Procedure 10(e) is similar to NRAP 10(c) and reads as follows:

> (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.
>
> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation of the parties; (B)

> by the district court before or after the record has been forwarded; or (C) by the court of appeals.
>
> (3) All other questions as to the form and content of the record must be presented to the court of appeals.

Federal courts have interpreted the federal counterpart to NRAP 10(c) to permit parties to grant the court of appeals the authority to permit *supplementation* of the record. Such courts have found that the authority to supplement the record is implicit in Rule 10(e) or is part of the court's inherent equitable powers. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225, ft. nt. 4, (11th Cir. 2003).

Schwartz involved multi-plaintiff litigation arising from an airplane crash. When the trial court granted defendants' motion to dismiss against certain plaintiffs, the remaining victims and their attorneys moved to supplement the record to include exhibits from the case files of their former clients. The Eleventh Circuit decided to permit this new supplemental evidence on appeal stating:

> We rarely supplement the record to include material that was not before the district court, but we have the equitable power to do so if it is in the interests of justice. We decide on a case-by-case basis whether an appellate record should be supplemented. Even when the added material will not conclusively resolve an issue on appeal, we may allow supplementation in the aid of making an informed decision.

Overall, the court concluded the new evidence provided the court "with a better understanding of the information Appellants possessed at the time these cases were

pending." *Id.* at 1225. The court therefore granted the motion to supplement. *Id.* at 1225.

In order to justify its willingness to go beyond the trial court record, the Eleventh Circuit relies primarily on what it characterizes as its "inherent equitable authority" to supplement the record on appeal with material that was not before the district court. *See Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986). In deciding whether to exercise that authority, the circuit considers three factors: (1) whether allowing the evidence would resolve the issue, (2) whether "remanding the case to the district court for consideration of the additional material would . . . be contrary to both the interests of justice and the efficient use of judicial resources, and (3) whether the case is a habeas corpus proceeding. *Id.* at 1475 (*quoting Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982)); *see also Ouachita Watch League v. Jacobs*, 463 F.3d, 1163, 1168, 1170–71 (11th Cir. 2006) (permitting new evidence on appeal regarding the issue of standing). However, these factors are guidelines, meaning they are not always used in each case. *See Ross*, 785 F.2d at 1475.

The Eleventh Circuit is not alone in its occasional willingness to supplement the record with new evidence. The Second Circuit also asserts expansive authority to supplement the record (although it does so by implementing a broader reading of

10(e) rather than by relying on an inherent authority). *See United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980) (relying on a prior version of Rule 10(e)); *see also Ross*, 785 F.2d at 1476 n.16 (recognizing that the Second Circuit relied on Rule 10(e) to supplement the record).

Similarly, the Eighth Circuit allowed new evidence into the record before considering a motion for a preliminary injunction in a trademark infringement suit based on "interests of justice" concerns. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). *See also See More Light Invs. v. Morgan Stanley DW Inc.*, 415 Fed. Appx1, 2, 2011 WL 121641 (9th Cir. 2011) (denying the motion to strike new evidence from excerpts of record since "this is the extraordinary case in which the documents are helpful to the court and are not prejudicial to either party"); *see also Acumed LLC v. Advanced Surgical Servs.*, Inc., 561 F.3d 199 (3rd Cir. 2009) holding that in exceptional circumstances a court of appeals may allow a party to supplement the record on appeal.

Some state appellate courts similarly rely on inherent powers in allowing themselves to consider new evidence on appeal. The Minnesota Supreme Court, for instance, held that "[a]lthough an appellate court is ordinarily limited to a consideration of matters contained in the record before it, we think it has inherent power to look beyond the record where the orderly administration of justice

commends it." *Crystal Beach Bay Ass'n v. Koochiching Cnty.*, 243 N.W.2d 40, 43 (Minn. 1976) *citing Baker v. Aetna Cas. & Sur. Co.*, 193 S.W.2d 363, 366 (Mo. App. 1946).

The foregoing cases provide that supplementation of the record at the appellate level is appropriate as long as considering new evidence on appeal serves the broader goals of ensuring the rapid (but nevertheless fair) resolution of the appeal or addressing impermissible strategic behavior by parties in the courts below.

B. The Record Should Be Supplemented to Reflect that Adrianzen is Kevin's Father's Last Name *Not* His *Step*-father's Last Name.

As noted above, in drafting the Answering Brief, Kevin's counsel misinterpreted the district court record that Kevin shared the surname, Adrianzen, with a stepfather. This interpretation is incorrect. As set forth in his affidavit attached hereto, Kevin has never had a stepfather. Kevin lives with his ***father***, mother, sister and brother who all share his last name. The Certification of Birth from the Florida Office of Vital Statistics, attached hereto as Exhibit A, objectively proves the indisputable fact that Kevin's father bears his last name. Specifically, the certificate shows Kevin's father to be "Oscar Ernesto Adrianzen." Further, Paige knew that her briefs misrepresented the facts.

In order to ensure the rapid and fair resolution of this appeal and prevent

Paige from capitalizing on an obvious and objective factual inaccuracy, Kevin respectfully requests that he be permitted to supplement the record on this appeal with the indisputable fact that Kevin's father is Oscar Ernesto Adrianzen and that Kevin has never had a stepfather.

C. Adrianzen is Easy to Pronounce.

In her Reply Brief, Paige, for the first time during this entire action, argues that Ryder's best interest would be served by having the same last name as his mother without the purportedly "bulky and unpronounceable hyphenation." Reply Brief at page 6. To make this argument now in a reply brief is both unfair and misleading, especially in the appellate courts where all evidence is reviewed, at least preliminarily, in writing. Not only did Kevin not have the opportunity to refute this argument orally in the district court, Kevin did not have the opportunity to address the argument in his Answering Brief for the simple reason that the issue has never before been raised.

Kevin, therefore, respectfully requests that he be permitted to supplement the record with this other simple fact that his last name is quite easy to pronounce: "Adrian - zen." Further, Kevin does not believe those with "foreign sounding names" or which some may consider difficult to pronounce, is a proper consideration when determining whether it is in the best interest of a child to share

the surname of both his parents.

III.
CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court grant him permission to supplement the record with the following two objective facts: (1) Kevin's father (not stepfather) is named Oscar Ernesto Adrianzen and (2) Kevin's last name is pronounced simply as: Adrian - zen.

DATED this 7TH day of March, 2016.

PECOS LAW GROUP

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AFFIDAVIT OF KEVIN DANIEL ADRIANZEN

STATE OF NEVADA)
: ss.
COUNTY OF CLARK)

Kevin Daniel Adrianzen, being first duly sworn, deposes and states:

1. I am the Respondent in the above-entitled action and competent to testify to the matters contained herein.

2. I make this affidavit in support of my foregoing "Motion to Supplement and Correct Record."

3. I have read the "Motion to Supplement and Correct Record" and hereby certify that the facts set forth in the Points and Authorities attached thereto are true of my own knowledge, except for those matters therein contained stated upon information and belief, and as to those matters, I believe them to be true. I incorporate these facts into this affidavit as though fully set forth herein.

4. Attached hereto as Exhibit A is a true and correct copy of my Certification of Birth from the Florida Office of Vital Statistics. This certification shows that my father is "Oscar Ernesto Adrianzen."

5. I have never had a stepfather. I live with my father, mother, sister and brother who all share my last name, "Adrianzen."

5. Paige knew that her briefs misrepresented the fact that I purportedly

lived with a stepfather.

7. Contrary to Paige's assertions, there is no difficulty in the pronunciation of my surname. It is simply pronounced: "Adrian - zen."

KEVIN DANIEL ADRIANZEN

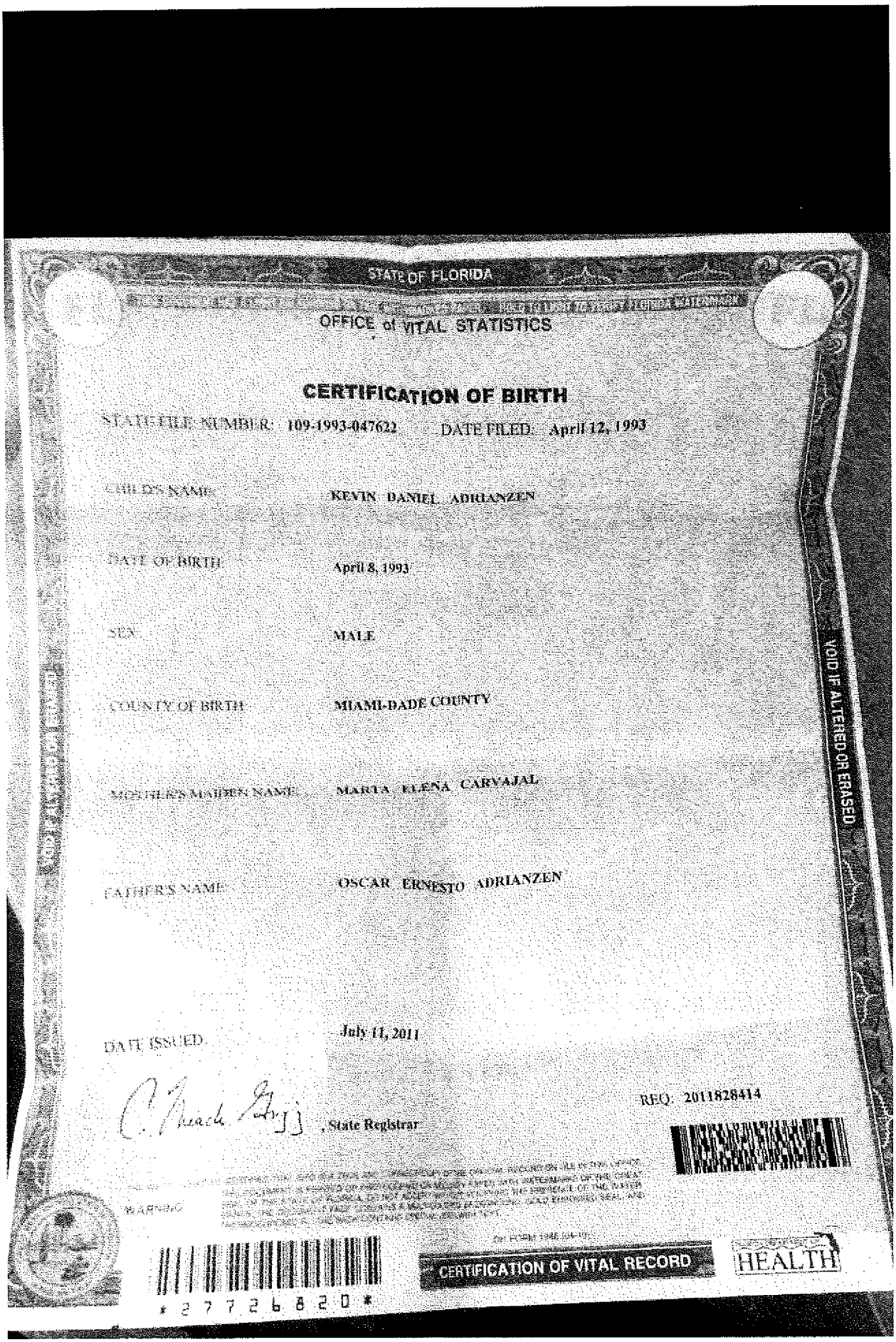
SUBSCRIBED and SWORN to before me this 3rd day of March, 2016.

NOTARY PUBLIC in and for said County and State

County of Clark
State of NV

A. MCKOWN
Notary Public, State of Nevada
Appointment No. 09-11043-1
My Appt. Expires May 6, 2017

Exhibit "A"



STATE OF FLORIDA

OFFICE of VITAL STATISTICS

CERTIFICATION OF BIRTH

STATE FILE NUMBER: 109-1993-047622 DATE FILED: April 12, 1993

CHILD'S NAME: KEVIN DANIEL ADRIANZEN

DATE OF BIRTH: April 8, 1993

SEX: MALE

COUNTY OF BIRTH: MIAMI-DADE COUNTY

MOTHER'S MAIDEN NAME: MARIA ELENA CARVAJAL

FATHER'S NAME: OSCAR ERNESTO ADRIANZEN

DATE ISSUED: July 11, 2011

, State Registrar

REQ: 2011828414

VOID IF ALTERED OR ERASED

WARNING

CERTIFICATION OF VITAL RECORD

HEALTH

27726820