IN THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE MATTER OF: THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972,	Supreme Court No.: 66231 District Court Case No.: P-09-066425-T Appeal from the Eighth Judicial District Court, The Honorable Gloria Sturman Presiding
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	Consolidated with: Supreme Court No.: 67782
ELEANOR CONNELL HARTMAN AHERN, Appellant, vs. KATHRYN A. BOUVIER; AND JACQUELINE M. MONTOYA, Respondents.	

IN THE MATTER OF THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972, AN INTER VIVOS IRREVOCABLE TRUST	Consolidated with: Supreme Court No.: 68046
ELEANOR CONNELL HARTMAN AHERN, Appellant, vs. JACQUELINE M. MONTOYA; AND KATHRYN A. BOUVIER, Respondents.	

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

First and foremost, this case concerns whether the District Court improperly weighed competing evidence to find that the Respondents/ Daughters[1] were entitled to summary judgment on the merits. In their Answering Brief, the Daughters suggest that the evidence submitted by their mother, Appellant/Eleanor[2], was barred by the parol evidence rule, and therefore the District Court could not have and did not weigh any evidence. Not so. First, the Daughters never raised the parol evidence rule before the District Court, and therefore the argument is waived. Second, even if the argument is not waived, the parol evidence rule only restricts use of extrinsic evidence to interpret the meaning of an unambiguous trust instrument (*e.g.* to determine the intent of the settlors of the Trust[3]); it does not bar evidence going to the performance of that trust.

In this case, the District Court applied the facts and evidence to the Trust language to determine the parties' respective rights to oil income, but in doing so, improperly weighed the competing evidence. The Daughters provided the

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[1] Respondents Jacqueline Montoya and Kathryn Bouvier ("Respondents" or "Daughters").
[2] Appellant Eleanor Ahern ("Appellant" or "Eleanor").
[3] The W.N. Connell and Marjorie T. Connell Living Trust, Dated May 18, 1972, An Intervivos Irrevocable Trust.

District Court with evidence, including a Texas Tax Return[4] and a closing letter from the IRS, to suggest a 35/65 split of the Oil Income[5] between the two sub-trusts, Trust No. 2 (Eleanor's trust) and Trust No. 3 (Marjorie's/the Daughters' trust). Eleanor, meanwhile, provided the District Court with competing evidence, including written oil contracts which show Trust No. 2 as the only recipient of the Oil Income, as well as deeds to the real property were never transferred to Trust No. 3 or the MTC Living Trust. Eleanor's evidence demonstrates that Eleanor, as the beneficiary of Trust No. 2, was and is entitled to 100% of the Oil Income.

Importantly, neither party's evidence was used to interpret the Trust instrument such that the parol evidence rule would apply; rather, it was evidence of how the Trust instrument was performed. Under the Daughters' viewpoint, the Texas Tax Return shows a Federal Tax Marital Deduction equal to approximately 65% of the Oil Income, giving the Daughters rights to 65% of the Oil Assets pursuant to Article Third of the Trust. This evidence, however, is not uncontroverted like the Daughters suggest. (*Cf.* Ans. Brief at 27.) According to Eleanor's evidence, the amount of the Federal Tax Marital Deduction must have

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[4] Terms not otherwise described herein have the meaning ascribed in Appellant's Opening Brief.

[5] The income derived from William Connell's separate property in the Trust—oil, gas and mineral rights in Upton County, Texas (the "Oil Income").

been zero, and therefore the Daughters are entitled to 0% of the Oil Assets, as Eleanor has contended throughout this litigation. The District Court improperly weighed this evidence when it granted summary judgment on the merits.

Secondly, given that summary judgment "on the merits" is improper, the Daughters attempt to prevail on their claims against Eleanor based on the equitable defense of laches, arguing that the status quo for the last thirty-four years must prevail. According to the Daughters, the "status quo" includes their receipt of "distributions" from the Trust. (Ans. Brief at 37.) However, the actual status quo that must be observed is that Eleanor, as the 100% beneficiary, elected to gift Oil Income to Marjorie and the Daughters. The status quo is that Eleanor, as 100% beneficiary, always had control over her income. She had no reason to assert a "claim" for her status as 100% beneficiary when all payments were being directed as gifts to her Daughters in accordance with her wishes. She furthermore had no duty to notify the Daughters that she would no longer share the income, as the Daughters had no rights except as gift recipients. Eleanor owed them no duties, fiduciary or otherwise.

Moreover, the Daughters' theory of laches is flawed because laches—like a statute of limitations—is an affirmative *defense*; it cannot be used to obtain affirmative relief on the Daughters' claims. Most troubling is the Daughters' desire to assess damages against Eleanor personally (*e.g.* attorneys' fees) for an

alleged breach of fiduciary duty without proving anything except the passage of time. Even if laches applies generally (it does not), Eleanor cannot be personally responsible for the Daughters' attorneys' fees or other punitive assessments when the sole underlying basis for the determination of the parties' rights (which undergirds a finding of breach of fiduciary duty[6]) is laches and when the District Court determined that both parties acted in good faith. (16 AA 3452.) Instead, the Daughters would only be entitled to a declaration from the Court regarding the parties' respective rights going forward, and no more.[7]

Finally, if the Court accepts as true the Daughters' argument that they raised laches not as an affirmative claim but as a defense to Eleanor's counterclaims (Ans. Brief at 35-36), and therefore obtained relief as counter-defendants, then NRS 153.031(3) does not permit an award of any attorneys'

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[6] Eleanor is the 100% beneficiary and therefore owes fiduciary duties to no one. (Cf. 16 AA 3457, ¶ 10.)

[7] The Daughters further contend that Eleanor waived all arguments related to her removal as trustee and the appointment of a temporary trustee. However, Eleanor specifically stated as a question presented in this case, "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?" (Opening Brief at 4.) The District Court's ruling that Eleanor should be removed as trustee for breach of fiduciary duty is flawed because it is dependent on the District Court's flawed ruling regarding the percentage ownership interests of the parties. When it is finally decreed that Eleanor is 100% beneficiary of the Trust, this Court and/or the District Court should reinstate Eleanor as trustee as provided in the Trust instrument, in lieu of the current, temporary trustee.

fees (in derogation of common law) because such an award is available only to "petitioners," not counter-defendants, and the statute must be strictly construed.

In accordance with the arguments set forth in Eleanor's Opening Brief, and as discussed further herein, the Court should (i) reverse the district Court's summary judgment on the merits, (ii) reverse the District Court's summary judgment based on laches, but, if the Court determines that the Daughters prevail solely on a theory of laches, prohibit the award of attorneys' fees and/or other punitive assessments of damages.

II. ARGUMENT

A. Adjudication On The Merits At The Summary Judgment Stage Was Improper

1. Given The Conflicting Evidence Set Forth By The Parties, The Court Could Not Grant Summary Judgment.

The District Court erred in granting summary judgment, given that each party offered contradictory evidence. The parties' cross-motions for summary judgment do not equate to consent to the District Court's invalid application of NRCP 56. 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"). (Cf. Ans. Brief at 32, fn. 31.) Therefore, an appeal of the summary adjudication is proper.

2. Respondents Never Raised The Parol Evidence Rule Before The District Court.

Notwithstanding the several hundred pages of briefs and oral argument transcripts in the record before the District Court, the Daughters never raised the parol evidence rule to attempt to suppress Eleanor's evidence regarding her right to 100% of the Oil Income, and the District Court never considered it. (See e.g., 16 AA 3418-3434.) Accordingly, the Daughters waived this issue and the Court may consider all evidence presented by Eleanor. See In re Cay Clubs, 130 Nev. Adv. Op. 92,340 P.3d 563 (2014) ("But when a party does not object to the inadmissibility of evidence below, the issue is waived and otherwise inadmissible evidence can be considered.").

3. The Parol Evidence Rule Does Not Apply To Evidence Of The Performance Of The Instrument.

Even if not waived, the Daughters' arguments regarding the parol evidence rule are inapposite. As stated in M.C. Multi-Family Dev., L.L.C. v. Crestdale Associates, Ltd., "[p]arol evidence is admissible for…ascertaining the true intentions and agreement of the parties when the written instrument is ambiguous." 124 Nev. 901, 914, 193 P.3d 536, 545 (2008) (internal quotations and citations omitted.) While the rule may work to exclude evidence of the intent of the settlor of the Trust where the language is unambiguous, it is

axiomatic that the rule does not exclude evidence of the performance of that intent.[8]

Here, Eleanor offers evidence that, under the terms of Article Third, Trust No. 2 (Eleanor's Trust) is the 100% beneficiary of the Oil Income. This evidence demonstrates that the amount of the marital deduction allocated to Trust No. 3 from the Oil Assets after William's death was *zero dollars*, and therefore that Marjorie/the Daughters have no interest in the Oil Assets and no right to Oil Income.

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.) (Emphasis added.) In making the allocations of property to Trust No. 3, "the determination of the

[8] Take for example a written contract requiring that A pay $100 to B. If the written contract is unambiguous, A cannot offer extrinsic evidence to prove that the contract requires only a $50 payment. However, A may offer evidence that she has already paid $100 to B pursuant to the contract. This is evidence of the execution of the contract, not its meaning.

character and ownership of the said property and the value thereof shall be as finally established for federal estate tax purposes." (*Id.*)

The only incontrovertible evidence of the existence or amount of a marital deduction taken from the Oil Assets (and thus the existence of any amount allocated to the Daughters) is tax Form 706 (defined in Opening Brief, p. 13), which the Daughters were unable to procure. While the Daughters suggest the onus is on Eleanor to produce Form 706 because Eleanor acted as Trustee in the past, that is not correct. Eleanor's mother, Marjorie, was the executrix of William's estate and oversaw the inheritance taxes. (9 AA 1890.) Eleanor never saw nor was privy to the tax forms. (Id.)

Without Form 706 to confirm her position, Eleanor offered other circumstantial evidence that the amount allocated to Marjorie's/the Daughters' Trust No. 3 for the marital deduction was $0, and therefore that the "character and ownership" of the Oil Income was 0% to Marjorie/the Daughters, and 100% to Eleanor (and will remain so until Eleanor's passing). Eleanor provided the following evidence of this outcome: (1) 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); (2) 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); (3) 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[9]) after Marjorie passed away (9 AA 1925-26); (4) 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); (5) Eleanor testified that Marjorie knew that Eleanor held 100% of the rights to the Oil Income (9 AA 1891, 1918); (6) Marjorie's accountant presumably prepared the Texas Tax Return in secret, as Eleanor had never seen it until it was produced in this litigation (9 AA 1889-90); and (7) the Texas Tax Return erroneously claims that Marjorie personally, rather than Trust No. 3, received part of William's separate property (which never happened and could not have happened under the express terms of the Trust), meaning it could contain other errors as well (8 AA 1794-95).

This evidence, taken in the light most favorable to Eleanor, shows that no amount was allocated to Trust No. 3 for the marital deduction, or, alternatively, that any such allocation was "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" until the amount reached zero, as permitted by Article Third. (9

[9] MTC Living Trust is discussed on page 15 of the Opening Brief.

AA 1900.) In either case, the result is that Eleanor enjoys rights to 100% of the Oil Income and the Daughters must wait to obtain rights until their mother, Eleanor, passes away. At minimum, in light of the parties' competing evidence[10], a genuine issue of material fact exists as to the existence of any marital deduction upon William's death in 1979 and the resultant ownership allocation for the Oil Assets. Accordingly, summary judgment on the merits in the Daughters' favor was improper.

[10] The Daughters rely mainly on the Texas Tax Return, and cite to the District Court's Summary Judgment for the notion that, "because the Texas Tax Return used the same calculation as those employed in the Federal Tax Return, the relevant content of the Federal Tax Return is known." (Ans. Brief at 4-5 (citing District Court's Summary Judgment order).) This statement of "fact" relies on circular logic. The parties do not have access to the missing Federal Tax Return, cannot conclusively identify the calculations used in that return, and, therefore, cannot make infallible comparisons between the Federal Tax Return and the Texas Tax Return (which on its face contains errors; *see* 8 AA 1794-95, stating erroneously that Marjorie personally, rather than Trust No. 3, received part of William's separate property (which never occurred)). The District Court engaged in the same logical fallacy when it stated in the Summary Judgment that "the Texas Tax Return basically duplicated the information provided on the Federal Estate Tax Return." (16 AA 3421; Ans. Brief at 5.) This comparison is simply not possible when the Federal Tax Return has been lost.

B. The Defense Of Laches Cannot Form The Basis For The Daughters' Affirmative Relief Granting A 65% Interest In The Trust And, More Glaringly, Cannot Underlie A Finding Of Breach Of Fiduciary Duty Or An Award Of Attorneys' Fees.

1. The Daughters Cannot Prevail On A Defense Of Laches Because the "Status Quo" Involves Ms. Ahern Gifting Funds To The Daughters, Not The Daughters' Entitlement To Such Funds.

The Daughters argue that a finding of laches is proper as follows: "[E]ven if [Eleanor] was originally entitled to 100% of the Trust income…, her 33-year failure to assert this claim—while making 65% distributions to [Marjorie and the Daughters]—bars any recovery." (Ans. Brief at 37.) The Daughters' argument is flawed because it wrongfully presumes that the funds given to Marjorie, and then to the Daughters, were "distributions" to beneficiaries. In fact, such funds were gifts given by Eleanor, the 100% beneficiary, to Marjorie and then to the Daughters. (9 AA 1890, at ¶ 10.) Thus, the "status quo" involves Eleanor dictating where her funds are channeled. Laches cannot require Eleanor to give gifts in the future simply because she has given freely in the past, particularly when the Daughters' own affidavits demonstrates that they knew that Eleanor was gifting such funds at her discretion and of her good will. (Opening Brief at 26-27.) The Daughters theory of laches fails to explain why Eleanor should have been required to assert some "claim" to her 100% rights in the Oil Income when she has always been the 100% beneficiary and when all

payments were being directed in accordance with her wishes as beneficiary and her understanding as trustee.[11] This failure is fatal to the Daughters' claim of laches.

2. Laches Cannot Underlie A Finding Of Breach Of Fiduciary Duty Or An Award Of Attorneys' Fees Against Eleanor Personally.

In order to award attorneys' fees against Eleanor personally (rather than against the Trust), the Daughters had to demonstrate that Eleanor breached her fiduciary duties to the Daughters.[12] *See* NRS 153.031(3)(b). If the Daughters prevail only on the basis of laches (a defense), a finding of such a breach and the resulting award of fees against Eleanor are unavailable.

That is, a finding of laches means that no evidence is taken on the substance of the Daughters' claim. Instead, to succeed based on laches—on claims that the Daughters initiated—the Daughters claim that they need only prove that Eleanor delayed and that the Daughters were prejudiced. (Ans. Brief at 37.) Such a finding has no regard for the reality that Eleanor is in fact the sole beneficiary of the Trust and, therefore, that no fiduciary duties existed when

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[11] This Court should also consider the balance between a rule requiring a beneficiary to act promptly in seeking a court declaration on the terms of the Trust, with a trustee's duties and obligations under the express language of the trust.

[12] NRS 153.031(3)(b) also provides that a finding of negligence may give rise to an award of attorneys' fees assessed directly against the trustee. However, the Sisters did not move for fees based on negligence.

Eleanor opted to stop sharing her benefits with her Daughters without consultation. Why would Eleanor consult with persons she understood to have no interest in the Trust before she stopped sharing income with them?

The edict pronounced in Haley v. Dist. Ct., 128 Nev. Adv. Op. 16, 273 P.3d 855, 860 (2012)—that the discretion to award attorneys' fees "is tempered only by reason and fairness"—is precisely the reason why attorneys' fees or other damages are inappropriate here, should the Court uphold the District Court's finding based solely on the defense of laches in favor the Daughters. It is neither reasonable nor fair to impose attorneys' fees based on a finding of laches, where the Daughters were not required to prove their case on the merits as petitioners. Thus, in the event the Court upholds the District Court's summary judgment *based solely on the defense of laches*, the assessment of attorneys' fees against Eleanor personally should be overturned.

C. If The Daughters Prevail Only On Laches, NRS 153.031(3) Does Not Permit *Any* Recovery Of Attorneys' Fees And Costs In This Case.

The Daughters are not entitled to attorneys' fees (or any other damages) if, as they now assert in their Answering Brief, they prevail ***as counter-defendants*** on a defense of laches. The Daughters suggest in the Answering Brief that they may rely on laches because they use it as a defense to Eleanor's counter-claims.

(Ans. Brief at 34-36.) Taking the Daughters' argument as true, NRS 153.031(3) does not permit them to recover any attorneys' fees and costs.

As the Daughters point out, NRS 153.031(3) permits the District Court to award attorneys' fees "if the court grants any relief ***to the petitioner***." (Ans. Brief at 41.) (Emphasis added.) If the Sisters prevail only on the basis of the defense laches, ***as a counter-defendant***, then they did not obtain relief as "petitioners" and cannot be entitled to attorneys' fees under a strict reading of NRS 153.031(3).[13] See Bergmann v. Boyce, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993) ("[S]tatutes permitting recovery of costs, being in derogation of the common law, must be strictly construed."); Gibellini v. Klindt, 110 Nev. 1201, 1208, 885 P.2d 540, 544-45 (1994) ("Statutes in derogation of the common law should be strictly construed.") Thus, if the Court upholds the District Court's ruling on the basis of laches, the award of attorneys' fees and costs must be reversed.

[13] This coincides with the common law notion that laches cannot be used for affirmative relief. See LaPrade v. Rosinsky, 882 A.2d 192, 197-98 (D.C. 2005) ("Laches may be used as a shield, but not as a sword by one seeking affirmative relief."); 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").

III. CONCLUSION

In light of the arguments set forth above and in the Opening Brief, Appellant, Eleanor, respectfully requests that this Court (1) reverse the District Court's grant of summary judgment on the merits, (2) reverse the District Court's grant of summary judgment based on laches, (3) if the Court finds that only laches applies, reverse the District Court's finding of breach of fiduciary duty and award of attorneys' fees, and (4) grant all other relief requested in the Opening Brief.

Dated this 5th day of April, 2016.

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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, and proportionally spaced. 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 3,515 words, excluding the disclosure statement, table of contents, table of authorities, Certificate of Service and this Certificate of Compliance.

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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 5th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on April 5, 2016 upon the following:

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