

**SUPREME COURT OF THE STATE OF NEVADA**

IN THE MATTER OF THE FREI  
IRREVOCABLE TRUST DATED  
OCTOBER 29, 1996

**Supreme Court No. 68029**

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District Court No. P09-06527-T  
Clerk of Supreme Court

**STEPHEN BROCK**

Appellant,

v.

**PREMIER TRUST, INC.;  
LAWRENCE HOWE; AND  
ELIZABETH MARY FREI,**

Respondents.

**RESPONDENT PREMIER TRUST, INC.'S AMENDED  
ANSWERING BRIEF**

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

HONORABLE GLORIA STURMAN

DEPT. 26

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**SUPREME COURT  
STATE OF NEVADA**

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LAWRENCE HOWE; AND  
ELIZABETH MARY FREI,

Respondents.

**DISCLOSURE STATEMENT PURSUANT TO N.R.A.P. 26.1**

The undersigned counsel of record certifies that the following are persons and entities as described in N.R.A.P. 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.

Premier Trust, Inc. ("**PT**") is a wholly owned subsidiary of Ladenburg Thalmann Financial Services, Inc. ("**LTFS**"). LTFS is a publicly traded company on the New York Stock Exchange (trading under the symbol "LTS").

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1 Douglas D. Gerrard, Esq. and Richard D. Chatwin, Esq., of the law firm  
2 Gerrard Cox Larsen, have represented PT in the District Court proceedings of this  
3 case and during all aspects of this appeal to the Nevada Supreme Court.

4 Dated this 24<sup>th</sup> day of February, 2016. **GERRARD COX LARSEN**

5  
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I.

**STATEMENT OF JURISDICTION**

This Court has jurisdiction to hear this appeal pursuant to N.R.A.P. 3A(b)(1). The District Court's order entered on April 14, 2015 ruled in favor of Premier Trust, Inc. ("**Premier Trust**"), Lawrence Howe and Elizabeth Mary Frei, who are collectively the Respondents to this action. The District Court held that a valid amendment was made to the Frei Irrevocable Trust dated October 29, 1996 ("**Trust**") when Stephen Brock, a Trust beneficiary, entered into a litigation settlement agreement with Dr. Emil Frei, III, a Settlor of the Trust, in 2010 that properly amended relevant terms to the Trust to facilitate the settlement. (*Appellant's Appendix FIT00704-00713*).

The District Court's April 14, 2015 Order is a final and appealable order pursuant to N.R.C.P. 54(b) and Stephen filed his Notice of Appeal on May 14, 2015.

II.

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether an irrevocable trust containing a spendthrift clause can be amended when (i) the amendment is done following the death of one of the two settlors of the trust; (ii) the amendment affects only one beneficiary of the trust; and (iii) the surviving settlor and the affected beneficiary requested and/or consented to the amendment.

2. Whether the terms of a settlement agreement between a settlor of an irrevocable trust and one of the trust's beneficiaries, which settlement by its terms effects a modification of the irrevocable trust, can be treated as an amendment of the trust.

3. Whether the doctrine of judicial estoppel operates to prohibit Steven Brock from contending in this legal proceeding that the irrevocable trust at issue cannot be amended after the death of one of the two settlors, when Steven Brock

1 in an earlier legal proceeding took the exact opposite position and successfully  
2 petitioned a court to amend the same irrevocable trust after the death of one of the  
3 two settlors.

4 4. Whether the doctrine of judicial estoppel operates to prohibit Steven  
5 Brock from taking the position that the irrevocable trust could be modified after  
6 the death of one of the two settlors in order to settle, during the trial, an earlier  
7 lawsuit in which Steven Brock was being sued by the surviving settlor of the  
8 irrevocable trust for money fraudulently converted by Brock, (which settlement  
9 was confirmed by the court and placed on the record), and then after breaching the  
10 settlement agreement taking the opposite position in this legal proceeding to avoid  
11 his obligations under the settlement agreement.

12 5. Whether a trustee violates its fiduciary duties towards a beneficiary  
13 by following a modification to the trust consented to by the only affected  
14 beneficiary and the surviving settlor of the trust.

### 15 III.

### 16 STATEMENT OF THE CASE

17 This is an appeal from the Eighth Judicial District Court's order finding, on  
18 all counts, in favor of the Respondents, Premier Trust, Lawrence Howe and  
19 Elizabeth Mary Frei.

20 On October 29, 1996, Dr. Emil Frei, III ("**Dr. Frei**") and Adoria B. Frei  
21 ("**Mrs. Frei**"), as husband and wife (jointly the "**Settlors**"), created the FREI  
22 IRREVOCABLE TRUST (the "**Trust**"). (*Respondent's Appendix PT 00001-*  
23 *00110* ). The Trust was irrevocable from its inception and named all five of Dr.  
24 Frei's children, who were from a previous relationship, and all five of Mrs. Frei's  
25 children, who were from a previous relationship, as equal beneficiaries.  
26 (*Respondent's Appendix PT 00021-00067*). The Trust showed an intent by Dr.  
27 Frei and Mrs. Frei to be fair and equal with all ten children in their estate  
28 planning. (*Respondent's Appendix PT 00021-00067*). Stephen Brock

1 (“**Stephen**”) is a son of Mrs. Frei and, therefore, a named beneficiary of the Trust.  
2 The Trust contained a spendthrift clause at Article 13, § 3. (*Respondent’s*  
3 *Appendix PT 00104*).

4 Mrs. Frei died on January 28, 2009. (*Appellant’s Appendix FIT 00705*).

5 Stephen and Dr. Frei became engaged in multiple lawsuits in 2009 whereby  
6 Dr. Frei accused Stephen of conversion, taking advantage of an elderly person,  
7 and other allegations due to Dr. Frei losing more than \$500,000.00 at Stephen’s  
8 hands., the first lawsuit being filed on April 24, 2009 (*Respondent’s Appendix PT*  
9 *00111-00125*). In 2010, during the trial of a lawsuit between Dr. Frei and Stephen  
10 before the Honorable Judge Kenneth Cory of the Eighth Judicial District Court  
11 (case no. A-09-588750-C), Stephen and Dr. Frei settled these lawsuits in a  
12 settlement agreement which was placed on the record before Judge Cory and  
13 consented to by both Dr. Frei and Steven (hereinafter the “**Settlement**”). Through  
14 the Settlement, Stephen promised to repay the funds he had taken from Dr. Frei  
15 and secured his repayment obligation with his beneficial interest in the Trust  
16 (irrevocable life insurance trust), which would hold approximately \$750,000.00  
17 for Stephen once Dr. Frei died. Both parties understood that this Settlement  
18 necessarily effected an amendment to the Trust, as Stephen was pledging his  
19 beneficial interest in the Trust. Under the Settlement, Stephen was required to pay  
20 Dr. Frei \$415,000.00. Stephen only made \$5,000.00 in payments to Dr. Frei  
21 under the Settlement by the time Dr. Frei passed away in 2013.

22 At the time of the Settlement, Stephen was already aware that the Trust  
23 could be amended even though one of the settlors, Mrs. Frei, had already passed  
24 away. This is because on March 11, 2009, Stephen had filed a “Petition to  
25 Confirm Trustees of the Frei Joint Irrevocable Trust dated October 29, 1996, for  
26 Order Assuming Jurisdiction Over the Trust, and for an Order Reforming Terms  
27 of the Trust” (the “**2009 Petition**”) through which Stephen requested an  
28 amendment to the Trust. (*Respondent’s Appendix PT 00126-00260*). This

1 Petition was approved by the Probate Commissioner, Wesley Yamashita, on May  
2 20, 2009, and became an order of Judge Sturman on June 12, 2009.  
3 (*Respondent's Appendix PT 00261-270, 00271-274*). As a result, Stephen  
4 obtained an order from the very Court he is now appealing from, holding that the  
5 Trust could be amended. This amendment was sought and approved *after* Mrs.  
6 Frei had passed away, and was not opposed by any Trust beneficiaries or by Dr.  
7 Frei.

8 Stephen brought the instant litigation, claiming that the terms of the  
9 Settlement were unenforceable under Nevada law because the Trust is irrevocable,  
10 has a spendthrift clause, and the terms of the Trust cannot be modified because  
11 one of the two settlors was dead at the time of the Settlement. This is exactly the  
12 opposite of the position Stephen took in the 2009 Petition. This is also directly  
13 contrary to the position Stephen took in order to get the Settlement approved by  
14 Judge Cory.

15 Premier Trust seeks for this Court to uphold, in all respects, the findings of  
16 fact, conclusions of law and order of the Eighth Judicial District Court entered on  
17 April 14, 2015 in this matter.

#### 18 IV.

#### 19 **PROCEDURAL HISTORY**

20 Stephen filed a Petition to Construe Terms of Trust, to Compel Compliance  
21 With Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of  
22 Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust on November  
23 19, 2014. (*Appellant's Appendix FIT00001-00072*) (*Appellant's Appendix* is  
24 hereinafter known as "AA").

25 Premier Trust filed an Opposition to Stephen's November 19, 2014 Petition  
26 on December 29, 2014 and Lawrence Howe and Elizabeth Mary Frei, through  
27 their respective attorneys at the law firm Hutchison & Steffen, filed a joinder to  
28

1 Premier Trust's Opposition on January 9, 2015. (AA *FIT00078-00150, 00151-*  
2 *00153*).

3 A District Court evidentiary hearing on Stephen's November 19, 2014  
4 Petition was held on January 14, 2015. After hearing oral argument by all sides  
5 and sworn testimony by Stephen Brock, the District Court asked for additional  
6 briefing on a few specific points of law and set an additional evidentiary hearing  
7 for March 11, 2015.

8 In preparation for the March 11, 2015 hearing, Premier Trust filed a  
9 Supplement to Opposition to Petition to Construe Terms of Trust, to Compel  
10 Compliance with Terms of Trust, to Confirm Removal of Trustee, to Compel  
11 Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust on  
12 February 9, 2015. (AA *FIT00467-00543*). Similarly, Lawrence Howe and  
13 Elizabeth Mary Frei also filed both a supplement with the District Court in  
14 opposition to Stephen on February 13, 2015 and an Errata to their supplemental  
15 filing on February 20, 2015. (AA *FIT00544-00577* - supplemental filing) and (AA  
16 *FIT00578-00583* - Errata).

17 Stephen filed a Supplemental Reply to Supplemental Oppositions of  
18 Premier Trust and Lawrence Howe and Elizabeth Mary Frei to the Petition to  
19 Construe Terms of Trust, to Compel Compliance with Terms of Trust, to Confirm  
20 Removal of Trustee, to Compel Redress of Breach of Fiduciary Duties, and to  
21 Release Jurisdiction of the Trust on February 27, 2015. (AA *FIT00584-00598*).

22 After hearing additional oral argument by counsel and some testimony on  
23 March 11, 2015, the District Court issued the Findings of Fact, Conclusions of  
24 Law and Order Denying Stephen Brock's Petition to Construe Terms of Trust, to  
25 Compel Compliance with Terms of Trust, to Confirm Removal of Trustee, to  
26 Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the  
27 Trust, which was entered on April 14, 2015 (hereinafter the "**April 2015 Order**"),  
28 finding in favor, on all claims, for the three Respondents in this case. (AA

1 *FIT00704-00713*). A Notice of Entry of Order on the April 14, 2015 Order was  
2 entered on April 14, 2015. (AA *FIT00714-00726*).

3 Stephen filed a Notice of Appeal from the District Court's April 14, 2015  
4 Findings of Fact, Conclusions of Law and Order on May 14, 2015. (AA  
5 *FIT00727-00729*).

6 **V.**

7 **STATEMENT OF FACTS**

8 **A. CREATION OF THE TRUST**

9 On October 29, 1996, Dr. Emil Frei, III ("***Dr. Frei***") and Adoria B. Frei  
10 ("***Mrs. Frei***"), as husband and wife, jointly created the Trust. (*Respondent's*  
11 *Appendix PT PT 00001-00110*) (full copy of the Trust) (Respondent's Appendix  
12 is hereinafter known as "***RA***"). Dr. and Mrs. Frei named all of their children<sup>1</sup>,  
13 including Stephen (who is Adoria's son and Dr. Frei's step-son) as equal  
14 beneficiaries of the Trust. (*RA PT PT 00021-00067*) (naming of Trust  
15 beneficiaries). The Trust was established as an irrevocable life insurance trust and  
16 held a survivor's life insurance policy on the lives of Dr. and Mrs. Frei.<sup>2</sup>

17 The Trust has a spendthrift clause at Article 13, § 3 that states:

18 To the fullest extent permitted by law, the interests of all of the  
19 beneficiaries in the various trusts and trust property subject to this  
20 agreement shall not be alienated, pledged, anticipated, assigned, or  
21 encumbered unless specifically authorized by the terms of this  
22 agreement.

Such interests shall not be subject to legal process or to the claims of  
any creditors while such interests remain trust property.

(*RA PT 00104*).

---

23 <sup>1</sup> Dr. Frei had five children from a previous relationship and Mrs. Frei also had five  
24 five children from a prior relationship. Dr. Frei and Mrs. Frei never had any  
25 children together.

26 <sup>2</sup> For the general information of this Court, Dr. Emil Frei, III was a world renowned  
27 oncologist who made significant contributions towards the curability of certain  
28 cancers. A New York Times article celebrating his achievements following his  
death can be read at:  
<http://www.nytimes.com/2013/05/05/science/emil-frei-iii-who-put-cancer-cure-s-in-reach-dies-at-89.html> (last accessed January 13, 2016).



Adoria B. Frei died on January 28, 2009.

**B. FIRST AMENDMENT TO THE TRUST**

On April 17, 2009, Stephen, by and through his counsel, Daniel V. Goodsell, Esq., filed his Petition to Confirm Trustees of the Frei Joint Irrevocable Trust dated October 29, 1996, for Order Assuming Jurisdiction Over the Trust, and for an Order Reforming Terms of the Trust in case no. P-09-065257 in the Eighth Judicial District Court of Nevada (the “**2009 Petition**”). (RA PT 00126-00260).

Through the 2009 Petition, Stephen sought to amend a portion of the Trust to allow all of the Trust’s beneficiaries (including Stephen) to have the right to withdraw all of their beneficial interest in the Trust at any time, following Dr. Frei’s death, by simply making a written request to the Trustee. (RA PT 00134-00135). Probate Commissioner Wesley Yamashita issued a Report and Recommendation approving the 2009 Petition on May 20, 2009. (RA PT 00261-00270). Neither the 2009 Petition nor the Report and Recommendation were objected to by any of the beneficiaries or by the surviving settlor, Dr. Frei, and an Order approving the Report and Recommendation was entered on June 12, 2009 (the “**First Amendment**” or the “**June 2009 Order**”). (RA PT 00271-00274).

The June 2009 Order modified the terms of the Trust Agreement, in relevant part, to say the following:

Upon an election in writing by any child of ours delivered to our Trustee, the trust share set aside for such child shall forthwith terminate and our Trustee shall distribute all undistributed net income and principal to such child outright and free of the trust.

(RA PT 00264).

Under Stephen’s legal theory being argued in this appeal, this First Amendment of the Trust would not have been possible because Mrs. Frei had already died.

1 On September 14, 2009, Premier Trust executed a written Acceptance of  
2 Trustee to become a Co-Trustee of the Trust. (*RA PT 00275-00279*).

3 **C. SECOND AMENDMENT TO THE TRUST**

4 On April 24, 2009, Dr. Frei filed a Complaint against Stephen and a  
5 corporation under Stephen's control, Public Company Management Corporation,  
6 in the Eighth Judicial District Court of Nevada (case no. A-09-588750-C)  
7 (hereinafter the "**2009 Lawsuit**"). Dr. Frei alleged that Stephen stole at least  
8 \$500,000.00 from him through a series of misrepresentations and calculated  
9 efforts. Dr. Frei's causes of action against Stephen in his Complaint included  
10 intentional misrepresentation, negligent misrepresentation, breach of fiduciary  
11 duty, conversion, gross negligence, and exploitation of an elderly person. (*RA PT*  
12 *00403-00409*) (Dr. Frei's Complaint in case no. A-09-5888750-C). Shortly  
13 thereafter, additional lawsuits were filed between Dr. Frei and Stephen or between  
14 Dr. Frei's children and Stephen in the Eighth Judicial District Court of Nevada,  
15 including cases A-10-607772-C and A-10-609292-C. There was also legal action  
16 taken in the Probate Court of the Eighth Judicial District over allegations of  
17 Stephen's financial mismanagement of funds belonging to his mother, Adora S.  
18 Frei in case no. P-09-065235. (*RA PT 00403-00409, PT 00392-00402, and PT*  
19 *00315-00391*).

20 The 2009 Lawsuit was in the middle of a jury trial when, on March 31,  
21 2010, Stephen, through his counsel, Dana Dwiggins, Esq., announced to the  
22 Honorable Kenneth C. Cory of the Eighth Judicial District Court that he had  
23 settled not only that lawsuit, but the other related lawsuits over Stephen's financial  
24 misappropriation of funds from Dr. Frei and Mrs. Frei, as noted in the paragraph  
25 immediately above. (*RA PT 00280-00305*) (transcript from the March 31, 2010  
26 hearing in Eighth Judicial District Court case no. A-09-588750 before Judge  
27 Kenneth C. Cory).

1 On March 31, 2010, Dana Dwiggins, Esq., as counsel for Stephen, Stephen  
2 himself, and Judge Kenneth C. Cory placed this Settlement on the record in case  
3 no. A-09-588750, as follows:

4 MS. DWIGGINS: Paragraph 4, the amounts set forth above, namely  
5 being the [\$175,000]<sup>3</sup>, the 150,000, and the 90,000, shall be paid [to  
6 the Emil Frei Trust] with interest commencing on June 1<sup>st</sup>, 2010, at  
7 the rate of prime interest plus 1, payable over the course of three  
8 years at \$5,000 per month, with the outstanding balance paid May  
9 31, 2013, unless otherwise paid sooner. **This amount shall be**  
10 **secured by Stephen Brock's interest in the joint life insurance**  
11 **policy, which shall not be disclaimed by Stephen Brock.** In the  
12 event the policy is sold, then any amounts received by Stephen  
13 Brock pursuant to his interest in the [Trust] shall at Stephen Brock's  
14 option either be applied to principal or, in the event not applied to  
15 principal, Stephen Brock shall substitute the security with some other  
16 adequate security. Stephen Brock further represents that he has not  
17 previously assigned or otherwise disclaimed his interest in the  
18 [Trust]. In the even there is a default in any of the payments there  
19 shall be a default interest rate of 5 percent.

20 \*\*\*  
21 \*\*\*

22 MS. DWIGGINS: Paragraph 15, all proceedings currently pending  
23 before the Probate Court relating to the Adoria S. Frei Trust, Case  
24 Number P-065235, shall be **dismissed with prejudice**, including the  
25 petition relating to any accounting. Paragraph 16, any  
26 and all actions initiated by and against Stephen Brock,  
27 Public Company Management Corporation, the Adoria  
28 S. Frei Trust, Dr. Frei, and/or his children shall be  
**dismissed with prejudice**, including any counterclaims  
asserted therein, and all parties thereto shall be granted  
a general release.

\*\*\*  
\*\*\*

THE COURT: ... But my position is that this is a binding settlement  
agreement as of now and that if a party desires to seek enforcement  
of that settlement agreement they're free to do so just based on the  
record that's here today.

Now, it will be a **binding settlement agreement** if the individuals  
involved indicate on the record that that is their understanding and  
that they wish to settle the case on those terms. I will ask you, Mr.  
Brock, is that your understanding and do you wish to settle the case  
on those terms?

---

<sup>3</sup> Ms. Dwiggins had stated in a previous statement to Judge Cory that the  
amount was \$175,000.00, but in the paragraph quoted above incorrectly said  
\$170,000.00. See RA PT 00283 (lines 12, 23).

1 [STEPHEN] BROCK: Yes, it is, Your Honor. And I do.

2 THE COURT: All right. Mr. Frei, is that your understanding of the  
3 settlement terms and is it your desire to settle this case on those  
4 terms that have been spread upon the record?

5 DR. FREI: Yes.

6 THE COURT: All right...It appears to me that there has been a  
7 settlement here, and, accordingly, we will end this trial.

8 Emphasis added. (RA PT 00283-00284, 00289, 00302-00303)  
9 relevant portions of March 31, 2010 court transcript).

10 Following the March 31, 2010 hearing before Judge Cory, counsel for  
11 Stephen and others appeared before Probate Commissioner Wesley Yamashita in  
12 case no. P-09-065235-E on June 4, 2010 to reduce the oral Settlement to a written  
13 order. An Order Approving Settlement Agreement was entered in case no. P-09-  
14 065235-E on June 18, 2010 (the "**June 2010 Order**") which memorialized the  
15 Settlement. (RA PT 00306-00314).

16 The June 2010 Order exactly mirrored the oral settlement entered in the  
17 case before Judge Cory, including the critical terms that effected an amendment  
18 to the Trust:

- 19 1. That Stephen would repay hundreds of thousands of dollars  
20 back to Dr. Frei's revocable trust as restitution for his former  
21 misappropriation of funds;
- 22 2. That Stephen's repayment obligation would be secured by  
23 Stephen Brock's beneficial interest in the Frei Irrevocable  
24 Trust dated October 29, 1996; and
- 25 3. That all litigation pending against Stephen would be dismissed  
26 with prejudice, including case numbers: A-09-588750-C, A-  
27 10-609292-C, A-10-607772-C, and P-09-065235-E.

28 (RA PT 00311-00314) (relevant portions of June 2010 Order). (The June 2010  
Order and the oral terms of settlement made before Judge Cory on March 31, 2010

1 are collectively hereinafter known as the “Settlement” or the “Second  
2 Amendment”).

3 The Settlement constituted the second amendment to the Trust as Stephen  
4 pledged and assigned his beneficial interest in the Trust to repay Dr. Frei and the  
5 other children if he failed to make his payments under the Settlement. This pledge  
6 and assignment of Steven’s beneficial interest in the Trust through the Settlement,  
7 was approved Dr. Frei, the surviving settlor who knew the Trust was an  
8 irrevocable spendthrift trust, approved by Stephen the only beneficiary affected  
9 by the Settlement and his attorney who both knew the Trust was an irrevocable  
10 spendthrift trust, and was approved by Judge Cory and by Commissioner  
11 Yamashita.

12 Following the Settlement, Stephen only made a single \$5,000.00 payment  
13 towards his Settlement obligation to Dr. Frei, which was done on or shortly after  
14 the Settlement was finalized before Judge Kenneth C. Cory on March 31, 2010.  
15 (See the District Court’s April 2015 Order at AA *FIT00708*).

16 **D. DR. FREI’S DEATH AND PREMIER TRUST’S DISTRIBUTIONS**  
17 **FROM THE TRUST IN ACCORDANCE WITH THE TERMS OF**  
**THE TRUST AS AMENDED BY THE SETTLEMENT**

18 Dr. Frei died on April 30, 2013 (AA *FIT00708*). His death caused the life  
19 insurance policy held inside the Trust to become liquid, providing approximately  
20 \$7,500,000.00 of cash for the ten beneficiaries of the Trust to equally access at  
21 their choosing, pursuant to the First Amendment made through the June 2009  
22 Order. To date, all of the Trust beneficiaries have elected to take their beneficial  
23 interest in the Trust, less a small amount reserved for various closing and  
24 administrative expenses for the Trust, except Stephen.

25 Because Stephen failed to make the payments to Dr. Frei required under the  
26 court-ordered Settlement, Premier Trust made three payments of \$100,000.00 each  
27 (for a total of \$300,000.00) from Stephen’s beneficial interest in the Trust to the  
28 Emil Frei, III Trust as partial satisfaction of Stephen’s Settlement obligation to Dr.

1 Frei. The first payment was made on or about October 9, 2013, the second  
2 payment was made on or about November 4, 2013, and the third payment was  
3 made on or about January 10, 2014. (*See* the District Court's April 2015 Order  
4 at AA *FIT00708*). The Settlement obligation has still not been fully satisfied and  
5 additional payments from Stephen's beneficial interest of the Trust are pending  
6 the outcome of this litigation.

7 **E. STEPHEN'S 2014 PETITION TO THE DISTRICT COURT**

8 After the \$300,000.00 of payments were made by Premier Trust to the Emil  
9 Frei, III Trust, Stephen brought his Petition to Construe Terms of Trust, to  
10 Compel Compliance With Terms of Trust, to Confirm Removal of Trustee, to  
11 Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the  
12 Trust on November 19, 2014. (AA *FIT 00001-00072*).

13 As noted above, the Eighth Judicial District Court of Nevada denied  
14 Stephen's November 19, 2014 Petition, which Stephen has now appealed to this  
15 Court.

16 More than five years after entering into a binding settlement agreement  
17 twice, once orally before Judge Kenneth C. Cory and another in writing before  
18 Probate Commissioner Wesley Yamashita, and after having Dr. Frei, the other  
19 beneficiaries of the Frei estate and two judges rely upon the Settlement and the  
20 pledge of Stephen's interest in the Trust to insure the Settlement was paid and in  
21 reliance thereon dismiss all claims against Stephen in four lawsuits, with  
22 prejudice, Stephen now seeks to be relieved of his Settlement obligations and asks  
23 this Court to ignore the amendments to the Trust to which he consented and  
24 without which he would never have been able to settle the lawsuits.

VI.

**STANDARD OF REVIEW**

The findings of fact of the District Court in its April 14, 2015 Order cannot be set aside unless those findings are clearly erroneous. *Bopp v. Lino*, 885 P.2d 559, 561, 110 Nev. 1246, 1249 (1994) (citing *Hermann Trust v. Varco-Pruden Buildings*, 796 P.2d 590, 591-92, 106 Nev. 564, 566 (1990)). Therefore, if the District Court's findings are supported by substantial evidence, they must be upheld by this Court. *Id.* (citing *Pandelis Constr. Co. v. Jones-Viking Assoc.*, 734 P.2d 1236, 1237, 103 Nev. 129, 130 (1987)). Substantial evidence is that evidence "which a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *State Emp. Security v. Hilton Hotels*, 729 P.2d 497, 498, 102 Nev. 606, 608 (1986)).

The conclusions of law of the District Court in its April 14, 2015 Order are reviewed *de novo*. *Id.* (citing *City of Reno v. Van Ermen*, 385 P.2d 345, 351, 79 Nev. 369, 381 (1963)); *see also Hannam v. Brown*, 956 P.2d 794, 799, 114 Nev. 350 (1998).

VII.

**ARGUMENT**

**A. A SETTLOR AND BENEFICIARY CAN AGREE TO MODIFY AN IRREVOCABLE TRUST, INCLUDING ONE WITH A SPENDTHRIFT CLAUSE, EVEN AFTER THE DEATH OF ANOTHER SETTLOR**

Stephen argues in his opening brief that an irrevocable trust cannot be amended or otherwise modified, especially when a spendthrift clause is written into the irrevocable trust agreement. *See* Appellant's Opening Brief at pp. 10-20. However, there is no controlling Nevada law which decides this issue. There is at least one Nevada case in which the amendment of an irrevocable trust, after the death of one or more settlors, has been allowed, which of course runs counter to Stephen's argument. Recent statutes enacted in the last legislative session

1 likewise suggest that amendments of an irrevocable trust should be permitted.  
2 Nevertheless, there is presently no controlling law regarding this issue, either  
3 permitting or prohibiting an amendment to an irrevocable trust after the death of  
4 a settlor.

5 Although Nevada has no controlling law on this issue, the majority view  
6 across the country is that a settlor and beneficiary can modify an irrevocable trust,  
7 even if one of the settlors has died. Thirty (30) states plus the District of  
8 Columbia have adopted the Uniform Trust Code (“UTC”), which permits the  
9 modification of an irrevocable trust after the death of a settlor. Likewise, the  
10 Second and Third Restatements of Trusts, clearly say that irrevocable trusts can  
11 be modified, even when they contain spendthrift provisions, and even when a trust  
12 settlor has died.

13 **1. This Court’s *Ambrose* Decision Allows For Modification Of An**  
14 **Irrevocable Trust After The Death Of All Settlors**

15 This Court has previously examined the modification of irrevocable  
16 trusts in *Ambrose v. First National Bank of Nevada*, 482 P.2d 828, 87 Nev. 114  
17 (1971). In *Ambrose* a mother created a trust for her own benefit and, upon her  
18 death, the trust became irrevocable and named her daughter as the sole  
19 beneficiary. 87 Nev. at 114, 116. The mother died in 1969. *Id.* After the  
20 mother’s death the daughter sought an early termination of the trust. *Id.*

21 This Court ruled in favor of the daughter and allowed her to compel an  
22 early termination of the trust. *Id.* at 120.<sup>4</sup> In making this conclusion, this Court  
23 stated that:

24 We are not persuaded that the doctrine of the leading American case  
25 of Clafin v. Clafin, 20 N.E. 454 (Mass. 1889) should rule the trust

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26 <sup>4</sup> In making its ruling, the Nevada Supreme Court did not make a  
27 determination one way or the other regarding whether the daughter was subject  
28 to a spendthrift clause in the trust. *Ambrose*, 87 Nev. at 118.



1 before us. That case announced the principle that a court will not  
2 direct termination prior to the time fixed therefor, even though the  
3 beneficiary desires to terminate, since this would be contrary to the  
4 purpose of the settlor. *This, we think, is an arbitrary view when*  
*applied automatically and without regard to all of the settlor's*  
*underlying motives.*

5 *Id.* at 119 (emphasis added). Therefore, this Court has already recognized that a  
6 trust being irrevocable, in and of itself, is not a sufficient reason to prohibit  
7 amendments to it.

8 **2. The Nevada Legislature Has Expressed The Intent To Allow**  
**Irrevocable Trusts To Be Modified**

9 The Nevada Legislature has likewise expressed an intention to allow  
10 irrevocable trusts to be modified, in at least two statutes (neither of which directly  
11 address this issue).

12 **a. Senate Bill 484**

13 In the 2015 Legislative Session, Senate Bill 484 was adopted  
14 as the law of Nevada. The Legislative Counsel's Digest for Sections 61 and 62  
15 of Senate Bill 484 states that "Section 61 and 62 of this bill provide for the  
16 creation and enforcement of nonjudicial settlement agreements between all  
17 indispensable parties to a trust". Section 61 of Senate Bill 484 specifically states  
18 that:

19 1. Except as otherwise provided in this section, *a settlement*  
20 *agreement entered into by all indispensable parties*, as described in  
21 subsection 1 of section 62 of this act *is enforceable with respect to*  
*the administration of a trust* without approval by the court, as  
defined in NRS 132.116.

22 2. A nonjudicial settlement agreement is void to the extent it violates  
23 a material purpose of the trust and to the extent it includes terms and  
24 conditions that could not be properly approved by the court, as  
defined in NRS 132.116, under the law governing the trust  
instrument.

25 3. Matters that may be resolved by a nonjudicial settlement  
26 agreement include, without limitation:

- 27 (a) The investment or use of trust assets;  
28 (b) The lending or borrowing of money;

- (c) *The addition, deletion or modification of a term or condition of the trust;*
- (d) The interpretation or construction of a term of the trust;
- (e) The designation or transfer of the principal place of administration of the trust;
- (f) The approval of a trustee's report or accounting;
- (g) The choice of law governing the construction of the trust instrument or administration of the trust, or both;
- (h) *Direction to a trustee to perform or refrain from performing a particular act;*
- (i) The granting of any necessary or desirable power to a trustee;
- (j) The resignation or appointment of a trustee and the determination of a trustee's compensation;
- (k) The merger or division of trusts;
- (l) The granting of approval or authority, for a trustee to make charitable gifts from a noncharitable trust;
- (m) The transfer of a trust's principal place of administration;
- (n) Negating the liability of a trustee for an action relating to the trust and providing indemnification therefor; and
- (o) The termination of the trust.

2015 Nev. Stat. 3550 (emphasis added).<sup>5</sup> See also Nev. Rev. Stat. § 669A.233.

This legislation was significantly taken from Section 111 of the Uniform Trust Code.<sup>6</sup> According to Sections 61(1) and 61(3)(c) of Senate Bill 484, a settlement agreement entered into between all “indispensable parties” can be enforceable to add, delete or modify a trust provision. Senate Bill 484 does not distinguish between a revocable or an irrevocable trust and thus it must be assumed to apply to both. For a definition of the term “indispensable parties,” Section 61(1) refers to subsection 1 of Section 62. Subsection 5 of Section 62 states that “for purposes of this section

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<sup>5</sup> Because the legislation passed during the 2015 Legislative Session by the Nevada Legislature has not been incorporated into the Nevada Revised Statutes, a citation to the legislation itself is currently necessary.

<sup>6</sup> A full copy of the Uniform Trust Code can be viewed at: [www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf) (last accessed January 13, 2016).

1 [Section 62], “indispensable parties” refers to all interested persons, as  
2 defined in NRS 132.185.....” N.R.S. § 132.185 defines an “interested  
3 person” as follows:

4 “Interested person” includes, without limitation, an heir,  
5 devisee, child, spouse, creditor, settlor, beneficiary and any  
6 other person having a property right in or claim against a trust  
estate.....

7 As a result, under Senate Bill 484, any non-judicial or judicial  
8 settlement agreement, consented to by all beneficiaries and any surviving  
9 settlor, which resulted in a modification to an irrevocable trust, should be  
10 enforceable. This is precisely what happened in this case. A settlement  
11 agreement was entered into by all surviving “indispensable parties”, Dr.  
12 Frei, the surviving settlor, and Stephen, the only beneficiary with a claim to  
13 the trust money at issue, to modify a provision of the Trust to permit an  
14 assignment of Stephen’s rights to his beneficial interest to secure the  
15 payment of the Settlement.

16 **b. N.R.S. § 163.556**

17 Additionally, the Nevada Legislature enacted N.R.S. §  
18 163.556 in 2009. This statute allows a trustee of an irrevocable trust to  
19 “distribute trust income or principal to or for a beneficiary of the trust...in  
20 favor of a second trust for the benefit of one or more of those beneficiaries.”  
21 N.R.S. § 163.556. This is generally known as “decanting” trust assets from  
22 an old trust to a new one and is, in simple terms, a statutory means of  
23 making amendments to an irrevocable trust.<sup>7</sup>  
24  
25

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26 <sup>7</sup> More information on trust decanting can be found at: Melissa J. Willms,  
27 Decanting Trusts: Irrevocable, Not Unchangeable, 6 Est. Plan. & Cmty. Prop.  
28 L.J. 35 (2013-2014). The Nevada Legislature also made some adjustments to  
the language of Nevada Revised Statutes § 163.556 in the 2015 legislative  
session. *See* Section 57 of Senate Bill 484, enacted effective October 1, 2015.

1 There are certain requirements that the trustee of an irrevocable trust  
2 must satisfy before decanting to a new trust. *See* N.R.S. § 163.556(2).  
3 However, it is significant that the Legislature explicitly allows decanting to  
4 take place even when the irrevocable trust has a spendthrift provision:

5 A trustee's power to appoint property to another trust pursuant to  
6 [N.R.S. § 163.556(1)] is not limited by the existence of a spendthrift  
provision in the original trust.

7 N.R.S. § 163.556(12).

8 Thus, there is a clear expression of intent by the Nevada Legislature  
9 to allow irrevocable trusts to be modified, including those with spendthrift  
10 provisions.

11 **3. The Amendments To The Frei Trust Do Not Violate N.R.S.**  
12 **§ 163.560**

13 Stephen argues that N.R.S. § 163.560 prohibits the Trust from  
14 being amended. *See* Appellant's Opening Brief at p. 10, 11. That statute,  
15 which is entitled "Irrevocable trust not to be construed as revocable," states  
16 in full as follows (with emphasis added where noted):

- 17 1. If the settlor of any trust specifically declares in the  
18 instrument creating the trust that such trust is irrevocable  
it shall be irrevocable for all purposes, **even though the**  
**settlor is also the beneficiary of such trust.**
- 19 2. Such trust shall, under no circumstances, be construed  
20 to be revocable **for the reason that the settlor and**  
**beneficiary is the same person.**

21 The purpose of N.R.S. § 163.560 is not to prohibit the modification of  
22 irrevocable trusts. Instead, it was enacted by the Nevada Legislature in 1973 to  
23 overrule the common law "sole beneficiary" trust rule, which is that "one cannot  
24 at the same instant be both the single trustee and sole beneficiary of the same  
25 estate." *Cunningham v. Bright*, 228 Mass. 385, 389, 117 N.E. 909 (1918). *See*  
26 *also, Langley v. Conlan*, 212 Mass. 135, 138, 98 N.E. 1064 (1912); *Atkins v.*  
27 *Atkins*, 279 Mass. 1, 7, 180 N.E. 613 (1932); 4 *Scott on Trusts* § 341, at 524 (4<sup>th</sup>  
28

1 ed. 1987). This Court has also previously explained that the sole beneficiary  
2 rule renders an otherwise irrevocable trust revocable. *De Lee v. Hicks*, 611 P.2d  
3 211, 212, 96 Nev. 462, 463 (1980).<sup>8</sup>

4 The sole beneficiary rule does not apply to this case because Dr. Frei and  
5 Mrs. Frei, as the Trust's settlors, have never been beneficiaries of the Trust. (*RA*  
6 *PT 00005*). Furthermore, none of the parties involved in this instant litigation  
7 question whether the trust is irrevocable or not. N.R.S. § 163.560 does not  
8 prohibit an amendment or other modification to an irrevocable trust.

9 **4. The *Monzo* Decision Is Clearly Distinguishable From This**  
10 **Case**

11 Stephen cites as authority in his Opening Brief this Court's decision  
12 in *Monzo v. Eighth Judicial Dist. Court of State (In re Irrevocable Trust*  
13 *Agreement of 1979)*, 331 P.3d 881, 886, 130 Nev. Adv. Op. 63 (Nev. 2014), for  
14 the proposition that an irrevocable trust cannot be modified. *See* Appellant's  
15 Opening Brief at pp. 10-11. There is nothing about the *Monzo* case that is  
16 relevant to this instant matter and *Monzo* has nothing to do with modifying an  
17 irrevocable trust. The holding of this Court in *Monzo* was that a donor may  
18 obtain relief from an erroneous gift if he or she proves that the donor's intent  
19 was mistaken and not in accord with the donative transfer. In *Monzo* the settlor  
20 of an irrevocable trust, established for the benefit of the settlor's daughter,  
21 claimed she had mistakenly deeded a condominium into the irrevocable trust.  
22 The settlor wanted to rescind the deed and regain title to the property transferred.  
23 There was no issue in *Monzo* regarding a modification or amendment to an  
24 irrevocable trust, and no holding in *Monzo* that would govern this case.

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26 <sup>8</sup> In addressing the sole beneficiary rule, the Utah Supreme Court  
27 recently concluded that N.R.S. § 163.560 only overrides the common law  
28 sole beneficiary rule as well. *Dahl v. Dahl*, 2015 UT 79, p. 11, n. 9 (Utah  
2015).

1 Here, the intent of the First Amendment was to change the terms of the  
2 Trust governing when distributions to beneficiaries would be required (making  
3 it easier for beneficiaries to withdraw the life insurance proceeds from the Trust  
4 following Dr. Frei's death). The intent of the Second Amendment was to  
5 facilitate the Settlement by permitting Stephen to pledge his beneficial interest  
6 in the Trust and bring back into the Frei estate the money which Stephen had  
7 wrongfully and fraudulently converted. Neither of these amendments were for  
8 the purpose of permitting the settlors to regain possession of property placed in  
9 the Trust. More importantly, the specific purpose of the Second Amendment  
10 was to carry out the settlors intent of treating all their children equally, by  
11 recovering money for their estate taken by Stephen. The *Monzo* decision is  
12 clearly not applicable to this circumstance.

13 **5. The Uniform Trust Code Allows An Irrevocable Trust To Be**  
14 **Modified, Including Those With Spendthrift Clauses**

15 The majority view in the United States permits an irrevocable trust  
16 to be modified or amended. Thirty (30) states plus the District of Columbia have  
17 adopted the Uniform Trust Code ("UTC"). Sections 411 and 412 of the UTC  
18 explicitly allow an irrevocable trust to be modified. Section 411 of the UTC  
19 Model Act, as last revised in 2014, reads as follows:

- 20 [(a) [A noncharitable irrevocable trust may be modified or terminated  
21 upon consent of the settlor and all beneficiaries, even if the  
22 modification or termination is inconsistent with a material purpose  
23 of the trust.] [If, upon petition, the court finds that the settlor and  
24 all beneficiaries consent to the modification or termination of a  
25 noncharitable irrevocable trust, the court shall approve the  
26 modification or termination even if the modification or termination  
27 is inconsistent with a material purpose of the trust.] A settlor's  
28 power to consent to a trust's modification or termination may be  
exercised by an agent under a power of attorney only to the extent  
expressly authorized by the power of attorney or the terms of the  
trust; by the settlor's [conservator] with the approval of the court  
supervising the [conservatorship] if an agent is not so authorized;  
or by the settlor's [guardian] with the approval of the court  
supervising the [guardianship] if an agent is not so authorized and  
a conservator has not been appointed. [This subsection does not  
apply to irrevocable trusts created before or to revocable trusts that

1 become irrevocable before [the effective date of this [Code]  
2 [amendment].]]

- 3 (b) A noncharitable irrevocable trust may be terminated upon consent  
4 of all of the beneficiaries if the court concludes that continuance of  
5 the trust is not necessary to achieve any material purpose of the  
6 trust. A noncharitable irrevocable trust may be modified upon  
7 consent of  
8 all of the beneficiaries if the court concludes that modification is  
9 not inconsistent with a material purpose of the trust.

- 10 [(c) A spendthrift provision in the terms of the trust is not presumed to  
11 constitute a material purpose of the trust.]

- 12 (d) Upon termination of a trust under subsection (a) or (b), the trustee  
13 shall distribute the trust property as agreed by the beneficiaries.

- 14 (e) If not all of the beneficiaries consent to a proposed modification or  
15 termination of the trust under subsection (a) or (b), the  
16 modification or termination may be approved by the court if the  
17 court is satisfied that:

- 18 (1) if all of the beneficiaries had consented, the trust could have  
19 been modified or terminated under this section; and

- 20 (2) the interests of a beneficiary who does not consent will be  
21 adequately protected.

22 Section 412 of the UTC Model Act, as last revised in 2014, reads as  
23 follows:

- 24 (a) The court may modify the administrative or dispositive terms of a  
25 trust or terminate the trust if, because of circumstances not  
26 anticipated by the settlor, modification or termination will further  
27 the purposes of the trust. To the extent practicable, the modification  
28 must be made in accordance with the settlor's probable intention.

- (b) The court may modify the administrative terms of a trust if  
continuation of the trust on its existing terms would be  
impracticable or wasteful or impair the trust's administration.

- (c) Upon termination of a trust under this section, the trustee shall  
distribute the trust property in a manner consistent with the  
purposes of the trust.

For example, Wyoming Statutes Annotated 4-10-412, which is based  
upon UTC Section 412, states, in relevant part, that:

- (a) If upon petition the court finds that the settlor and all  
qualified beneficiaries consent to the modification or  
termination of a noncharitable irrevocable trust, the court  
may enter an order approving the modification or  
termination, even if the modification or termination is  
inconsistent with a material purpose of the trust...

1 ...

- 2 (d) A spendthrift provision in the terms of the trust is not  
3 presumed to constitute a material purpose of the trust for  
4 purposes of this section.

5 Similarly, Arizona Revised Statutes § 14-10412(A) states that:

6 The court may modify the administrative or dispositive terms of a  
7 trust or terminate the trust if, because of circumstances not  
8 anticipated by the settlor, modification or termination will further  
9 the purposes of the trust. To the extent practicable, the  
10 modification must be made in accordance with the settlor's  
11 probable intention.

12 Emphasis added. The “probable intention” language clearly indicates that an  
13 irrevocable trust can be modified following the death or incapacity of the settlor.

14 UTC Section 412 is enacted in numerous other states. *See, e.g.*, Utah Code Ann.  
15 § 75-7-412; N.M. Stat. § 46A-4-412.

16 Additionally, California’s Probate Code expressly allows an irrevocable  
17 trust to be modified. California Probate Code § 15404(a)-(b) states in full as  
18 follows:

- 19 (a) If the settlor and all beneficiaries of a trust consent, they  
20 may compel the modification or termination of the trust.
- 21 (b) If any beneficiary does not consent to the modification or  
22 termination of the trust, upon petition to the court, the other  
23 beneficiaries, with the consent of the settlor, may compel a  
24 modification or partial termination of the trust if the interests  
25 of the beneficiaries who do not consent are not substantially  
26 impaired.

27 Therefore, not only can irrevocable trusts be modified under the UTC, the  
28 full consent of all beneficiaries is not required where the non-consenting  
beneficiary’s interest is not harmed through the modification. This is the case  
even in trusts that have incorporated a spendthrift clause in them.



1           **6.     An Irrevocable Trust May Be Modified To Facilitate A**  
2           **Settlement Between Parties Related To The Trust**

3           In 1990 the Texas Court of Appeals heard the case of *Musick v.*  
4 *Reynolds*,<sup>9</sup> which has facts that are extremely analogous to this case. Ted  
5 Musick created the “Revised Ted Musick Trust” on March 10, 1972 (the  
6 “*Musick Trust*”). The trust was irrevocable and included the following  
7 spendthrift clause:

8           No interest or any part of the interest of any beneficiary of this  
9 Trust shall be subject in any event to sale, alienation,  
10 hypothecation, pledge, transfer, or subject to any debt of said  
beneficiary or any judgment against said beneficiary or process in  
aid of execution of said judgment.

11 *Id.* 798 S.W.2d at 627. The Musick Trust was funded with two pieces of real  
12 property the same day it was created. *Id.*

13           In 1979 a Texas lawsuit, captioned *Hollingsworth v. Lucas*, was filed. *Id.*  
14 at 628. That lawsuit contested the ownership of the two properties held by the  
15 Musick Trust. *Id.* The lawsuit ultimately settled and the parties to the case,  
16 including Ted Musick and certain beneficiaries of the Musick Trust, all entered  
17 into a settlement agreement that the *Hollingsworth* court approved. *Id.* Ted  
18 Musick later died on December 14, 1981. *Id.*

19           Years later, on May 8, 1985, two beneficiaries of the Musick Trust who  
20 were also parties to the 1979 settlement agreement brought another lawsuit to  
21 challenge the prior settlement. *Id.* at 628-29. The trial court dismissed their  
22 1985 lawsuit on summary judgment. *Id.* at 629. On appeal, these two  
23 beneficiaries argued that the 1979 settlement agreement and the real estate deeds  
24 signed because of the settlement were:

25  
26  
27  
28           <sup>9</sup> 798 S.W.2d 626 (Tex. App. 1990).

1 ...legal nullities because a beneficiary cannot alienate his interest  
2 in a spendthrift trust and because [their] interest in the [Musick  
Trust] was only a future contingency or expectancy at the time of  
[the settlement].

3 *Id.* at 630. The Texas Court of Appeals rejected this argument, stating that  
4 “[t]he settlement agreement and quitclaim deeds [signed as a result of the  
5 settlement] were executed to affectuate a modification to the [Musick Trust]  
6 in conformity with the settlement agreement.” *Id.* (emphasis added).

7 These same beneficiaries further argued that “even if an irrevocable  
8 spendthrift trust can be modified and if the trust was in fact modified, the trust  
9 was not properly modified because ‘all’ of the parties did not consent to the  
10 modification.” *Id.* The Court also rejected this argument, holding that “a trust  
11 can be modified without the consent of unascertained beneficiaries if their  
12 interests are not prejudiced by the modification.” *Id.* (citing the Restatement  
13 (Second) of Trusts § 338(2) (1959)).

14 Just like the *Musick* case, here there was a court-based Settlement between  
15 the Trust’s settlor, Dr. Frei, and a Trust beneficiary, Stephen, in 2010. Now,  
16 after the settlor has died, the beneficiary has come, years later, challenging the  
17 nature of the former settlement. Stephen makes the exact arguments the  
18 challengers did in the *Musick* matter: that the Settlement is invalid because the  
19 Trust was irrevocable and had a spendthrift clause and that the consent of all of  
20 the Trust beneficiaries was necessary to properly effectuate the Settlement. *See*  
21 Appellant’s Opening Brief at pp. 16-19.

22 Just as the Texas Court of Appeals did, this Court should hold that: (1) the  
23 Settlement entered into between Stephen and Dr. Frei was a valid modification  
24 to the Trust between the parties so that the Trust would conform with the nature  
25 of the Settlement and (2) that Stephen was the only Trust beneficiary whose  
26  
27  
28

1 consent was necessary to the amendment, if such a consent was required at all<sup>10</sup>,  
2 to make the amendment to the Trust because the interests of the other Trust  
3 beneficiaries were not affected by the Settlement in any way.

4 **7. The Second Restatement Of Trusts Allows Irrevocable Trusts**  
5 **To Be Amended, Including Those With Spendthrift Clauses**

6 The Second Restatement of Trusts also allows an irrevocable trust  
7 to be amended.<sup>11</sup> Section 338 of the Second Restatement of Trusts states in full  
8 as follows:

- 9 (1) If the settlor and all of the beneficiaries of a trust consent  
10 and none of them is under an incapacity, they can compel  
11 the termination or modification of the trust, although the  
12 purposes of the trust have not been accomplished.
- 13 (2) Although one or more of the beneficiaries of a trust do not  
14 consent to its modifications or termination or are under an  
15 incapacity, the other beneficiaries with the consent of the  
16 settlor can compel a modification or a partial termination of  
17 the trust if the interests of the beneficiaries who do not  
18 consent or are under an incapacity are not prejudiced  
19 thereby.

20 This language of Section 338 of the Second Restatement of Trusts is extremely  
21 similar to California Probate Code Section 15404, cited above. Section 338 of  
22 the Second Restatement of Trusts also applies to any trust with a spendthrift  
23 clause. It states, in relevant part, as follows:

24 Even if some of the beneficiaries do not consent to the modification  
25 of the trust or are under an incapacity, if the settlor and the  
26 beneficiaries who do not consent are not under an incapacity, they

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27 <sup>10</sup> See Respondent's discussion at VII.A.7-8 of this Answering Brief,  
28 where Premier Trust demonstrates that a court can modify an irrevocable trust  
even if the necessary or relevant beneficiaries of that trust do not consent.

<sup>11</sup> The Nevada Supreme Court has cited, recognized, and relied upon the  
terms and provisions of the Second Restatement of Trusts in numerous cases.  
*See, e.g., Namow Corp. v. Egger*, 668 P.2d 265, 267, 99 Nev. 590, 592 (1983);  
*In re Newman's Estate*, 465 P.2d 616, 618, 86 Nev. 151, 155 (1970); *I.C.A.N.*  
*Foods, Inc. v. Sheppard*, 129 Nev. Advance Opinion 97, 11 (2013);  
*Pryor v. Pryor*, 734 P.2d 718, 719, 103 Nev. 148, 150 (1987); *Humane Soc. of*  
*Carson City and Ormsby County v. First Nat. Bank of Nevada*, 553 P.2d 963,  
965, 92 Nev. 474, 477-78 (Nev. 1976).

1 can compel the modification of the trust although the purposes of  
2 the trust with respect to the consenting beneficiaries have not been  
3 accomplished, if the interests of the beneficiaries who do not  
4 consent or are under incapacity are not prejudiced thereby. Thus,  
5 although by the terms of the trust or by statute the interest of one  
6 or more of the beneficiaries is made inalienable by him, if he is  
7 not under an incapacity and the settlor consents, he can transfer  
8 his interest, although the other beneficiaries do not consent, since  
9 their interests are not affected by the transfer. The restraint on  
10 the alienation of the interest by the beneficiary can be removed  
11 by the consent of the beneficiary and the settlor.

12 Restatement (Second) of Trusts § 338, cmt. h (1959) (emphasis added).

13 **8. The Third Restatement Of Trusts Allows Irrevocable Trusts**  
14 **To Be Amended, Including Those With Spendthrift Clauses,**  
15 **Even After The Death Of The Settlor**

16 The Third Restatement of Trusts also allows for irrevocable trusts  
17 to be modified, even after the death of the settlor of the trust. The Third  
18 Restatement at Section 65 states as follows:

- 19 (1) Except as stated in Subsection (2), if all of the beneficiaries  
20 of an irrevocable trust consent, they can compel the  
21 termination or modification of the trust.
- 22 (2) If termination or modification of the trust under Subsection  
23 (1) would be inconsistent with a material purpose of the  
24 trust, the beneficiaries cannot compel its termination or  
25 modification except with the consent of the settlor, or, after  
26 the settlor's death, with authorization of the court if it  
27 determines that the reason(s) for termination or  
28 modification outweigh the material purpose.

Restatement (Third) of Trusts § 65 (2003) (emphasis added).

A comment to Section 65 of the Third Restatement of Trusts also makes  
it clear that a court can modify an irrevocable trust even if all of the beneficiaries  
of the trust do not consent:

Where consent of all beneficiaries cannot be obtained, the other  
beneficiaries cannot compel termination or modification under this  
Section. Even in such a case, however, if the court is satisfied that  
the best interests of the beneficiaries as a whole would be served by  
a proposed termination or modification and if continuation of the  
trust is not required by Subsection (2), a court may order a partial  
termination of the trust (or other arrangement that might involve  
bonding, insurance, or impounding of some trust property) in a

1 *manner that will not prejudice the interests of nonconsenting*  
2 *beneficiaries.*

3 Restatement (Third) of Trusts § 65 cmt. c (2003) (emphasis added).

4 Additionally, the Third Restatement allows an irrevocable trust to be  
5 modified even if the trust contains a spendthrift clause. The Third Restatement  
6 states that:

7 ...[S]pendthrift restrictions are not sufficient in and of themselves  
8 to establish, or to create a presumption of, a material purpose that  
9 would prevent termination by consent of all of the beneficiaries.  
10 This is also true, in many contexts, of discretionary provisions.

11 A spendthrift clause may be included as a routine or incidental  
12 provision of a trust (unimportant or even unknown to the settlor) as  
13 a part of a trust established for tax purposes, or merely to provide  
14 successive enjoyment, or for other reasons not inconsistent with  
15 allowing premature termination...

16 *Id.* at § 65 cmt e.

17 This Court should adopt the reasoning of the *Musick* decision and adopt  
18 the language of the Restatements and the Uniform Trust Code in permitting an  
19 irrevocable trust to be modified, either by agreement of the beneficiaries and the  
20 settlor, or by a court after the death of a settlor, even where a spendthrift clause  
21 exists in the irrevocable trust agreement.

22 Furthermore, there are strong public policy reasons why this Court should  
23 hold that it is permissible and beneficial to allow irrevocable trusts to be  
24 modified. The needs of the settlors of an irrevocable trust can change over time  
25 due to unexpected circumstances. Dr. Frei and the Trust are a perfect example  
26 of this. Dr. Frei never anticipated that he would enter into prolonged litigation  
27 with Stephen that would involve Stephen's beneficial interest in the Trust when  
28 the Trust was initially created. Providing flexibility to a settlor of an irrevocable  
trust to allow for change in circumstances is vital to carry out the material  
purposes of the trust. The majority rule across the country, as set forth in the  
Restatements and the Uniform Trust Code, recognizes the necessity of some

1 flexibility, particularly in situations where settlements are entered into between  
2 a settlor and the affected beneficiaries of an irrevocable trust.

3 Additionally, allowing an irrevocable trust to be modified after it is  
4 created is consistent with the general rule of this Court to interpret the intent of  
5 a testator of testamentary documents when the testamentary document's  
6 language or the actions of the testator are at issue. *Dahlgren v. First Nat. Bank*  
7 *of Nev.*, 590 P.2d 478, 479, 94 Nev. 387, 390 (1978) ("The standard for the  
8 interpretation of a will is the intention of the testator"). Allowing a settlor of an  
9 irrevocable trust to make changes as circumstances necessitate honors the  
10 settlor's intentions and encourages the use of irrevocable trusts as a valid and  
11 useful planning tool for passing wealth to others from the settlor.

12 a. **No material purposes of the Trust were violated in**  
13 **amending the Frei Trust and, even if they were, the**  
14 **District Court had the authority to make the**  
15 **amendments**

16 Stephen argues that allowing the Trust to be modified would  
17 be contrary to a "material purpose" of the Trust. *See* Appellant's Opening Brief  
18 at pp. 12-16. However, the facts and law of this case clearly demonstrate that:  
19 (i) no material purpose of the Trust was violated through either the First  
20 Amendment or the Second Amendment and (ii) even if such a material purpose  
21 were violated the District Court had the discretion to make the amendment  
22 anyway.

23 i. **The material purpose of an irrevocable life**  
24 **insurance trusts is to pass wealth to heirs without**  
25 **subjecting that wealth to federal estate taxes**

26 The requirement that the trust no longer serve a  
27 material purpose before it can be modified or terminated does not mean that the  
28 trust has no remaining function. In order to be material, the purpose must be  
significant:

1 Material purposes are not readily to be inferred. A finding of such  
2 a purpose generally requires some showing of a particular concern  
3 or objective on the part of the settlor, such as concern with regard  
to the beneficiary's management skills, judgment, or level of  
maturity.

4 Restatement (Third) of Trusts § 65 cmt. d (2003).

5 The Trust at issue in this case is commonly known as an irrevocable life  
6 insurance trust (hereinafter known as an "ILIT"). There are specific purposes  
7 for establishing an ILIT:

8 An irrevocable life insurance trust is designed to serve as the  
9 transferee of life insurance policies insuring the life of the grantor  
of the trust. Its primary purpose is to eliminate the insurance death  
10 proceeds from the grantor's gross estate for federal estate tax  
purposes...An irrevocable life insurance trust also may be used for  
11 general family estate planning to achieve flexibility as to future  
income disbursements to minimize income taxes and also  
flexibility for future dispositions...

12 William S. Huff, *The Irrevocable Life Insurance Trust*, 38 Ark. L. Rev. 139  
13 (1984-1985).

14 Beyond these general purposes for establishing an ILIT, the only other  
15 pertinent terms or conditions contained in the Trust itself pertain to how and  
16 when distributions are to be made to the beneficiaries of the Trust following Dr.  
17 Frei and Mrs. Frei's death, which were modified by Stephen's attorney, with the  
18 consent of Dr. Frei, through the First Amendment.

19 Appellant argues that the very existence of the spendthrift clause in the  
20 Trust agreement is evidence that it is intended to serve a material purpose in the  
21 Trust. *See* Appellant's Opening Brief at p. 15. However, the Third Restatement  
22 of Trusts, quoted previously in this Answering Brief above<sup>12</sup>, demonstrates that  
23 the spendthrift clause, in and of itself, is not generally considered a material  
24 purpose of a trust.

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25  
26  
27  
28 <sup>12</sup> *See* Part VII.A.8 of this Answering Brief above.

1 Had the spendthrift clause been a material purpose of the Trust, Dr. Frei  
2 would have opposed Stephen's 2009 Petition that resulted in the First  
3 Amendment, allowing the Trust beneficiaries to simply make a written request  
4 to withdraw their entire beneficial interest in the Trust following Dr. Frei's  
5 death. As is demonstrated below in this Answering Brief, the right of withdrawal  
6 provided to the Trust beneficiaries through the First Amendment had the defacto  
7 effect of nullifying the Trust's spendthrift protection.<sup>13</sup>

8 Under the clear majority view, the existence of a spendthrift provision  
9 alone is insufficient to consider such a provision to be a material purpose of the  
10 Trust, and obviously in this case neither the Settlor nor Probate Commissioner  
11 Yamashita considered it to be a material purpose or the First Amendment would  
12 never have been permitted and the Second Amendment would never have been  
13 confirmed with a Court order entered by both the Probate Commissioner and the  
14 Probate Judge.

15 **ii. The District Court had authority to modify the**  
16 **Frei Trust even if a material purpose of the Trust**  
17 **was at issue**

18 Although no Nevada law exists on this issue, the laws  
19 of other states and the Restatement clearly allow a court to modify an  
20 irrevocable trust without having to consider whether the modification would  
21 violate a material purpose of the trust.

22 For example, California law states that:

23 If the continuance of the trust is necessary to carry out a  
24 material purpose of the trust, the trust cannot be modified or  
25 terminated *unless the court, in its discretion, determines*  
*that the reason for doing so under the circumstances*  
*outweighs the interest in accomplishing a material purpose*  
*of the trust...*

26 Cal. Prob. Code § 15403(b) (emphasis added).

27  
28 <sup>13</sup> See Part VII.B of this Answering Brief below.



1 Similarly, as noted earlier above, the Third Restatement of Trusts states  
2 that:

- 3 (1) Except as stated in Subsection (2), if all of the beneficiaries  
4 of an irrevocable trust consent, they can compel the  
5 termination or modification of the trust.  
6 (2) If termination or modification of the trust under Subsection  
7 (1) would be inconsistent with a material purpose of the  
8 trust, the beneficiaries cannot compel its termination or  
9 modification except with the consent of the settlor, or, after  
10 the settlor's death, with authorization of the court if it  
11 determines that the reason(s) for termination or  
12 modification outweigh the material purpose.

9 Restatement (Third) of Trusts § 65 (2003) (emphasis added). Significantly, the  
10 Third Restatement of Trusts encourages a court-based modification of an  
11 irrevocable trust when such a modification would facilitate the settlement of  
12 litigation:

13 The fact that the beneficiaries could not terminate a trust because  
14 to do so would be inconsistent with a material purpose of the settlor  
15 does not preclude the court from approving a compromise under  
16 which a part of the trust would be terminated in order to settle a  
17 bonafide contest of the will that would create the trust or settle  
18 bonafide litigation challenging the litigation of an inter vivos trust.

16 Restatement (Third) of Trusts § 65 cmt h (2003). This is exactly what happened  
17 with the Settlement between Stephen and Dr. Frei. Therefore, even if a material  
18 purpose was threatened due to the Settlement, the courts that approved the  
19 Settlement had the right to overrule that material purpose.

20 **B. STEPHEN'S RIGHT OF WITHDRAWAL ARISING FROM THE**  
21 **FIRST AMENDMENT NULLIFIED ANY SPENDTHRIFT**  
22 **PROTECTIONS HE MAY HAVE OTHERWISE HAD AS A**  
23 **BENEFICIARY OF THE TRUST**

23 Although Nevada law recognizes the validity of spendthrift provisions in  
24 a trust, the spendthrift protections are not unlimited. The Second Restatement  
25 of Trusts states, in relevant part, that:

26 If the beneficiary is entitled to have the principal conveyed to him  
27 immediately, a restraint on the voluntary or involuntary transfer of  
28 his interest in the principal is invalid.

1 Restatement (Second) of Trusts § 153(2) (1959). An illustration in a comment  
2 to Section 153(2) of the Second Restatement further explains the purposes of  
3 this section:

4       A transfers Blackacre to B in trust to hold Blackacre for the benefit  
5       of C and to convey it to C whenever C shall demand a conveyance.  
6       By the terms of the trust it is provided that C's interest shall not be  
7       transferable by him and that his creditors cannot reach it. The  
8       restraint on alienation is invalid and C can transfer his interest and  
9       his creditors can reach it.

10 *Id.*, cmt. c, illustration 4.

11       Many courts across the country have sided with the rule promulgated by  
12 Section 153(2) of the Second Restatement of Trusts. *See, e.g., In re Hannegan*,  
13 155 B.R. 209, 214 (Bankr. E.D. Mo. 1993) (“The issue is not whether the trust  
14 beneficiary has tried to exercise dominion and control over the trust proceeds  
15 but, rather, whether under the terms of the trust instrument he has the power to  
16 exercise dominion or control over the trust.”); *Miller v. Kresser*, 34 So. 3d 172,  
17 175 (Fla. App. 2010) (“If the trust allows the beneficiary to control all of the  
18 trust assets by terminating the trust or demanding distribution of the entire trust  
19 corpus, a court will allow the beneficiary's creditor to reach the entire trust  
20 corpus”); *Lunkes v. Gecker*, 427 B.R. 425, 431 (N.D. Ill 2010) (quoting *In re*  
21 *McCoy*, 274 B.R. 751, 763 (Bankr. N.D. Ill 2002)) (“A trust cannot be a valid  
22 spendthrift trust if the beneficiary is entitled to have the principal conveyed to  
23 him immediately”); *Morrison v. Doyle*, 570 N.W.2d 692, 697 (Minn. App. 1997)  
24 (citing Restatement (Second) of Trusts § 153(2) (1959)) (“[I]f the beneficiary is  
25 entitled to receive the principal of the trust immediately, a restraint on the  
26 voluntary or involuntary transfer of the beneficiary's interest in the principal is  
27 invalid.”); *In re Mitchell*, 423 B.R. 758 (Bankr. E.D. Wis. 2009) (“[The Second  
28 Restatement of Trusts § 153(2)] is precise. It means that, where a beneficiary  
is entitled to immediate payment of principal upon demand, a restraint on a  
transfer of principal, whether such transfer is voluntary or involuntary,  
invalidates the entire spendthrift provision.”); *In re Marble*, 136 Me. 52, 1 A.2d

1 355 (1938) (beneficiary, acquiescing in payment of income not authorized by  
2 trust, estopped).<sup>14</sup>

3 Here, Stephen, by and through his attorney, Daniel Goodsell, Esq., sought  
4 for and obtained the First Amendment through the June 2009 Order. As noted  
5 previously, that order states, in relevant part, that:

6 Upon an election in writing by any child of ours delivered to our  
7 Trustee, the trust share set aside for such child shall forthwith  
8 terminate and our Trustee shall distribute all undistributed net  
9 income and principal to such child outright and free of the trust.

10 (See RA PT 00264) (relevant part of the June 2009 Order).

11 Under the terms of the First Amendment Order, Stephen, as a beneficiary  
12 of the Trust, is entitled to have the principal of the Trust conveyed to him  
13 immediately. The fact that Stephen has not exercised his rights under the First  
14 Amendment is irrelevant and, pursuant to the Second Restatement of Trusts §  
15 153(2), the spendthrift protections of the Trust are invalid and offer no  
16 protection to Stephen from his creditors.

17 In summary, the spendthrift protections of N.R.S. Chapter 166 that  
18 Stephen argues he is entitled to simply don't apply to him as a beneficiary of the  
19 Trust and he had every right to assign and transfer his beneficial interest in the  
20 Trust under the Settlement before Judge Cory on March 31, 2010 and later  
21 confirmed again by the June 2010 Order of Commissioner Yamashita.

22 Because the spendthrift protection of the Trust no longer apply to  
23 Stephen, and because the June 2010 Order has never been rescinded, Premier  
24 Trust is bound to follow the terms of the June 2010 Order and pay Stephen's  
25 creditor, which is Dr. Frei (through his trust following his death) from Stephen's  
26 portion of the Trust funds.

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27 <sup>14</sup> See also *In re Kaplan*, 97 B.R. 572, 577 (9<sup>th</sup> Cir. BAP 1989);  
28 *Croom v. Ocala Plumbing & Elec. Co.*, 62 Fla. 460, 57 So. 243, 244 (1911).

1 **C. THE DOCTRINE OF JUDICIAL ESTOPPEL BARS STEPHEN**  
2 **FROM ARGUING THAT THE SETTLEMENT IS INVALID**

3 **1. The Doctrine Of Judicial Estoppel In Nevada**

4 Nevada recognizes the doctrine of judicial estoppel. *See, e.g.,*  
5 *Marcuse v. Del Webb Communities, Inc.*, 163 P.3d 462, 123 Nev. 278 (2007).  
6 According to the doctrine, a party who has “stated an oath in a prior proceeding,  
7 as in a pleading, that a given fact is true, may not be allowed to deny the same  
8 fact in a subsequent action.” *Vaile v. Dist. Ct.*, 44 P.3d 506, 514, 118 Nev. 262  
9 (2002) (quoting *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 549-50, 396  
10 P.2d 850, 854 (1964)). One of the primary purposes of judicial estoppel is to  
11 prevent a party from deliberately shifting their position to “suit the requirements  
12 of another case concerning the same subject matter.” *Id.*

13 The application of judicial estoppel is a question of law. *Marcuse v. Del*  
14 *Webb Communities, Inc.*, 163 P.3d 462, 468, 123 Nev. 278 (2007). There are  
15 five elements to the doctrine:

- 16 1. A party has taken two positions;
- 17 2. The positions were taken in judicial or quasi-judicial  
18 administrative proceedings;
- 19 3. The party was successful in asserting the first position (i.e.,  
20 the court adopted the position or accepted it as true);
- 21 4. The two positions are totally inconsistent; and
- 22 5. The first position was not taken as a result of fraud or  
23 mistake.

24 *Id.* (citing *NOLM, LLC v. County of Clark*, 100 P.3d 648, 663, 120 Nev. 736,  
25 743 (2004)). A party asserting judicial estoppel does not need to show all of  
26 these elements exist to successfully assert the doctrine. *Mainor v. Nault*, 101  
27 P.3d 308, 120 Nev. 750, 765 (2004) (“Although not all of these elements are  
28 always necessary, the doctrine generally applies when...”).

1 A party may be estopped under the doctrine of judicial estoppel “merely  
2 by the fact of having alleged or admitted in his pleadings or former pleadings the  
3 contrary of the assertion sought to be made.” *Brelant v. Preferred Equities*  
4 *Corp.*, 918 P.2d 314, 317, 112 Nev. 663, 668 (1996) (quoting *Sterling Builders,*  
5 *Inc.*, 80 Nev. at 549, 396 P.2d at 854). The “mistake” portion of the fifth  
6 element of judicial estoppel is for mistakes of fact only, not mistakes of law.  
7 *Vaile v. Dist. Ct.*, 44 P.3d at 514 (quoting *Sterling Builders, Inc.*, 80 Nev. at 549-  
8 50, 396 P.2d at 854 (“according to the rule of judicial estoppel, a party who has  
9 stated an oath in a prior proceeding, ‘as in a pleading,’ that a given fact is true  
10 may not be allowed to deny the same fact in a subsequent action”)).

11  
12 **2. Judicial Estoppel Applies Against Stephen Brock Under the**  
13 **Facts And Circumstances Of This Case**

14 In June 2009, Stephen filed the 2009 Petition through which  
15 Stephen sought to modify the terms of the Trust to permit him to withdraw all  
16 of his beneficial interest at any time by simply making a request to the trustee.  
17 This was done so that once Dr. Frei had died and the life insurance proceeds had  
18 funded the Trust, Stephen could control when his share of the money would be  
19 distributed to him. The 2009 Petition was filed after the death of Mrs. Frei, with  
20 only one of the two settlors still alive. The 2009 Petition was seeking to modify  
21 the very irrevocable trust Stephen is now claiming cannot be modified. The  
22 2009 Petition claimed that Probate Court had jurisdiction and the authority to  
23 modify the Trust. As a result of the 2009 Petition, the Probate Court permitted  
24 this irrevocable Trust to be modified, effectively stripping the spendthrift  
25 provision protection from creditors. Neither Dr. Frei nor any of the beneficiaries  
26 objected to this modification.

1 Nothing had changed less than one year later when Stephen again sought  
2 to modify the Trust through the Settlement. The only way the Settlement could  
3 be reached was if Stephen pledged his interest in the Trust to insure that the  
4 Settlement payments were made. The Settlement effected a modification of the  
5 Trust by permitting a transfer of the Stephen's beneficial interest as security for  
6 the Settlement. The Settlement was placed on the record before Judge Cory with  
7 a representation by Stephen and his attorney that this Settlement was something  
8 he consented to and could and would perform. The Settlement was again  
9 confirmed in the June 2010 Order from Commissioner Yamashita and Judge  
10 Sturman, effectively modifying the Trust by judicial order.

11 In comparing this proceeding to the 2009 Petition and the 2010 Settlement  
12 the stark contrast between Stephen's positions is apparent: (i) Stephen has taken  
13 a second, and opposite position from the position he took in two different  
14 judicial proceedings in 2009 (before Commissioner Yamashita) and 2010  
15 (before Judge Cory and Commissioner Yamashita), (ii) the first positions taken  
16 in 2009 and 2010 were both made in judicial proceedings, (iii) Stephen was  
17 successful in amending the Trust through the June 2009 Petition and subsequent  
18 Order, and Stephen willfully entered into the 2010 Settlement (through another  
19 attorney of Stephen's, Dana Dwiggins, Esq.) by taking the position, before  
20 Judge Cory and Commissioner Yamashita, that he could pledge his beneficial  
21 interest in the Trust, (iv) the position taken by Stephen during the 2009 and 2010  
22 proceedings is wholly opposite and contrary to the position taken by Stephen  
23 now during this appeal, and (v) Stephen did not enter into the 2009 and 2010  
24 amendments due to any fraud or mistake.

25 District Court Judge Gloria Sturman came to the exact same conclusion  
26 in her April 2015 Order that Stephen has now appealed to this Court. (*AA FIT*  
27 *00710*). To quote from Judge Sturman:

1 Dr. Frei justifiably relied upon Stephen's covenants and promises  
2 made in the Settlement, including Stephen's agreement to pledge  
3 his full beneficial interest in the Trust as security in the event he  
failed to fully pay the [funds owed to Dr. Frei as a result of the  
Settlement].

4 The justifiable reliance by Dr. Frei in entering into the Settlement  
5 with Stephen judicially estops Stephen and the arguments he has  
6 made before this Court. The doctrine of judicial estoppel exists to  
7 prevent a party from taking a benefit of settling a case, telling four  
8 judges you want to settle, and then later try to void those  
settlements. To allow Stephen to void the Settlement would  
completely disregard his former promises to Dr. Frei. Therefore,  
Stephen cannot argue the Trust could not be amended through the  
2010 Settlement.

9 (*See* the District Court's April 2015 Order at p. 8, lines 1-9 at AA *FIT 00711*).

10 Stephen has argued to this Court that judicial estoppel should not apply  
11 to his situation because the Settlement was a result of "...abusive counsel..." *See*  
12 Appellant's Opening Brief at p. 20. Judicial estoppel does not consider the  
13 relationship between an attorney and client, and there is no evidence that  
14 Stephen was defrauded or that he did not understand what he was promising to  
15 do. Quite to the contrary, Judge Cory and Commissioner Yamashita both  
16 required an acknowledgment by Stephen that he fully understood the Settlement  
17 and that he had agreed to pledge his beneficial interest in the Trust to accomplish  
18 the Settlement.

19 Stephen's appeal to this Court fails because his arguments are barred by  
20 the doctrine of judicial estoppel. You simply cannot take one legal position  
21 when it benefits you and then take the exact opposite position when you no  
22 longer wish to be bound to your agreements.

23 **D. STEPHEN IS TIME BARRED FROM SEEKING TO MODIFY THE**  
24 **JUNE 2009 ORDER OR THE 2010 SETTLEMENT**

25 This Court has previously held that once a final judgment has been  
26 entered, a district court lacks jurisdiction to reopen the matter unless a timely  
27 motion is made under the Nevada Rules of Civil Procedure. *SFPP, L.P. v. Dist.*  
28 *Ct.*, 173 P.3d 715, 717, 123 Nev. 608, 612 (2007) (citing *Greene v. Dist. Ct.*, 990

1 P.2d 184, 186, 115 Nev. 391, 394-95 (1999)). An order of dismissal that  
2 disposes of all claims at issue is a final judgment. *Id.*

3 The June 2009 Order and the Settlement before Judge Cory on March 31,  
4 2010 were both followed by a Notice of Entry of a final appealable order which  
5 completely closed those proceedings. (*RA PT 00271-00274*) (June 16, 2009  
6 Notice of Entry of Order following the June 2009 Order); (*RA PT 00410-00414*)  
7 (April 22, 2011 Notice of Entry of Stipulation & Order For Dismissal following  
8 the Settlement). Pursuant to Nevada Rules of Appellate Procedure 4(a)(1),  
9 Stephen's time for appealing the June 2009 Order and Settlement was in July of  
10 2010 and May of 2011 respectively.

11 Thus, any attempt to now seek to modify either the June 2009 Order or the  
12 Settlement is time barred by N.R.C.P. 59(e), and any attempt to overturn either  
13 of these orders is time barred by N.R.A.P. 4(a)(1).

14 **E. THE DISTRICT COURT CORRECTLY HELD THAT PREMIER**  
15 **TRUST HAS NOT VIOLATED ANY FIDUCIARY DUTY**  
16 **TOWARDS STEPHEN**

17 **1. Stephen Cannot Hold Premier Trust Liable For Something**  
18 **That He Consented To**

19 Stephen further accuses Premier Trust of failing in its fiduciary  
20 duties as Trustee of the Trust because Premier Trust has complied with the Trust  
21 as modified by the June 2010 Order. *See* Appellant's Opening Brief at pp. 22-  
22 25. However, under the common law Stephen is prohibited from holding  
23 Premier Trust liable for something he competently consented to previously. The  
24 Second Restatement of Trusts states the following:

- 25 (1) Except as stated in Subsections (2) and (3), a beneficiary  
26 cannot hold the trustee liable for an act or omission of the  
27 trustee as a breach of trust if the beneficiary prior to or at the  
28 time of the act or omission consented to it.
- (2) The consent of the beneficiary does not preclude him from  
holding the trustee liable for a breach of trust if:



- (a) the beneficiary was under an incapacity at the time of such consent or of such act or omission; or
  - (b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or
  - (c) the consent of the beneficiary was induced by improper conduct of the trustee.
- (3) Where the trustee has an adverse interest in the transaction, the consent of the beneficiary does not preclude him from holding the trustee liable for a breach of trust not only under the circumstances stated in Subsection (2), but also if the transaction to which the beneficiary consented involved a bargain which was not fair and reasonable.

Restatement (Second) of Trusts § 216 (1959).<sup>15</sup> See also *Hartmann v. Bertelmann*, 39 Hawaii 619 (1952) (delay in sale at request of beneficiaries); *Hagerty v. Clement*, 195 La. 230, 196 So. 330 (1940) (premature termination of trust); *Hull v. Rolfsrud*, 65 N.W.2d 94 (N.D. 1954); *In re Schlicht's Estate*, 231 Wis. 324, 285 N.W. 730 (1939) (nine years' acquiescence in unauthorized investment).

Here, Premier Trust has fully complied with the terms of the Trust, as amended by Stephen and with Stephen's consent, and thus cannot have breached any of its duties (fiduciary or otherwise) as Trustee of the Trust. However, assuming *arguendo*, that Premier Trust's actions with Stephen's beneficial interest in the Trust could be called into question because Premier Trust followed the terms of the June 2009 Order and the 2010 Settlement, Stephen cannot hold Premier Trust liable because he previously consented to the actions Premier Trust has taken, which were completely based upon the terms and conditions of the June 2009 Order and Settlement.

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<sup>15</sup> For the reasons set forth at the beginning of Section VII.A.7 of this Answering Brief, the Second Restatement of Trusts is authoritative law in Nevada due to this Court's prior adoption of it in a multitude of cases.

1        Additionally, even if this Court were to find that the spendthrift provisions  
2 of the Trust agreement still apply to Stephen's beneficial interest of the Trust,  
3 a comment from Section 216 of the Restatement should be adopted by this Court  
4 to determine that Premier Trust would still not be liable to Stephen for its actions  
5 as Trustee:

6        *Consent by beneficiary of spendthrift trust.* Although the interest  
7 of the beneficiary is not transferable by him or subject to the claims  
8 of his creditors, he cannot hold the trustee liable for an act or  
omission for the trustee as a breach of trust if he consented to it,  
except as stated in Subsection (2).

9 Restatement (Second) of Trusts § 216, cmt. e. *See also, In re Perkins' Trust*  
10 *Estate*, 314 Pa. 49, 170 A. 255 (1934); *Lipsitt v. Sweeney*, 317 Mass. 706, 59  
11 NE.2d 465, 469 (1945); *In re Lonard's Will*, 285 App Div 530, 138 NYS.2d  
12 271, 279 (1955).

13        Neither subsections 2 or 3 of Section 216 of the Second Restatement  
14 apply. Stephen had his full capacity in 2010, all of the material facts relating to  
15 the June 2009 Order and Settlement were before him, and he was represented by  
16 very competent counsel at all relevant times. It was his attorneys who initiated  
17 all of the very proceedings he is now appealing to this Court. Premier Trust was  
18 not even the Trustee of the Trust at the time of either the entry of the June 2009  
19 Order or the Settlement and has absolutely no adverse interest in either court  
20 action, the Trust, or any other trust or party that is relevant in this matter.

21        **2. Premier Trust Is Not Liable To Stephen Because It Simply**  
22        **Followed Valid Court Orders**

23        The actions of a trustee are presumed to be in good faith and the  
24 burden is on the party who is trying to show otherwise. *Young v. McCoy*, 147  
25 Cal. App. 4<sup>th</sup> 1078, 1087 (2007). Stephen has failed to show anything other than  
26 the fact that Premier Trust has complied with the June 2009 Order and the terms  
27 of the 2010 Settlement. Neither the June 2009 Order or the terms of the  
28 Settlement have ever been revoked or otherwise struck down by a court of

1 competent jurisdiction. Therefore, at the present time, Premier Trust is bound  
2 to follow those judicial decrees, which includes using Stephen's beneficial  
3 interest in the Trust as collateral for his failure to previously satisfy his  
4 obligations under the Settlement.

5 Contrary to Stephen's argument, and for the reasons shown herein,  
6 Premier Trust would be at a much greater risk of violating its fiduciary duties  
7 had it disregarded the June 2009 Order and the 2010 Settlement. As long as  
8 these judicial orders are in place, Premier Trust must follow them.

9 **VIII.**

10 **CONCLUSION**

11 For the foregoing reasons, Appellants have failed to establish  
12 reversible error. Premier Trust respectfully requests that this Court affirm the  
13 rulings of the District Court.

14 DATED this 24<sup>th</sup> day of February, 2016.

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**CERTIFICATE OF COMPLIANCE (N.R.A.P. 28.2(a))**

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires that assertion in the brief regarding matters in the record be supported by a reference to the page of the transcript or appendix of exhibits where the matter relied on is to be found. 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.

DATED this 24<sup>th</sup> day of February, 2016.

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**CERTIFICATE OF COMPLIANCE (N.R.A.P. 32)**

I hereby certify that I have read this brief , and to the best of my knowledge, information, and belief, it complies with the typeface and type style requirements of Rule 32(a)(4-6). The typeface is proportionally styled and the type style is 14 point Times New Roman font.

This Answering Brief complies with the length and limitation of N.R.A.P. 32(a)(7)(A)(ii) as it contains less than 14,000 words (13,120 actual words).

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.

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