IN THE SUPREME COURT OF THE STATE OF NEVADA

PEGGY CAIN, AN INDIVIDUAL; JEFFREY CAIN, AN INDIVIDUAL; AND HELI OPS INTERNATIONAL, LLC, AN OREGON LIMITED LIABILITY COMPANY,

Appellants,

vs.

RICHARD PRICE, AN INDIVIDUAL; AND MICKEY SHACKELFORD, AN INDIVIDUAL,

Respondents.

/

No. 69333

PEGGY CAIN, AN INDIVIDUAL; JEFFREY CAIN, AN INDIVIDUAL; AND HELI OPS INTERNATIONAL, LLC, AN OREGON LIMITED LIABILITY COMPANY,

Appellants,

vs.

RICHARD PRICE, AN INDIVIDUAL; AND MICKEY SHACKELFORD, AN INDIVIDUAL,

Respondents.

/

No. 69889

PEGGY CAIN, AN INDIVIDUAL; JEFFREY CAIN, AN INDIVIDUAL; AND HELI OPS INTERNATIONAL, LLC, AN OREGON LIMITED LIABILITY COMPANY,

Appellants,

vs.

RICHARD PRICE, AN INDIVIDUAL; AND MICKEY SHACKELFORD, AN INDIVIDUAL,

Respondents.

/

No. 70864

APPELLANTS' OPENING BRIEF

APPEAL FROM JUDGMENT AND POST-JUDGMENT ORDERS IN THE NINTH JUDICIAL DISTRICT COURT, DOUGLAS COUNTY, THE HONORABLE THOMAS W. GREGORY, DISTRICT JUDGE

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for appellants hereby certifies that the

following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg

Matuska Law Offices, Ltd.

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3. If litigant is using a pseudonym, the litigant's true name: *N/A*

DATED: 11/29/16

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JURISDICTIONAL STATEMENT

These are consolidated appeals from a summary judgment and post-judgement orders. The judgment is appealable under NRAP 3A(b)(1) [final judgment]. The orders awarding attorneys' fees are appealable under NRAP 3A(b)(8) [special orders after final judgment]. Appellants also appealed an order granting a motion to quash subpoenas and for sanctions, entered on February 10, 2015, as a special order after final judgment.

Dates establishing timeliness of the appeal are as follows:

Notice of entry of the summary judgment order, entered on November 5, 2015, was served by mail on November 9, 2015. 7 A.App. 1610. A timely notice of appeal was filed on December 9, 2015. 6 A.App. 1340.

Notice of entry of the Order Granting Attorneys' Fees, entered on February 5, 2016, was served by mail on February 10, 2016. 7 A.App. 1459. A timely amended/supplemental notice of appeal was filed on February 25, 2016. 7 A.App. 1498.

Notice of entry of the order quashing subpoenas and for sanctions, entered on February 10, 2016, was served on February 16, 2016, by mail. 7 A.App. 1484. This order was included in the amended/supplemental notice of appeal filed on February 25, 2016. 7 A.App. 1499.

Notice of entry of the order granting attorneys' fees as a sanction, entered on July 1, 2016, was served on July 5, 2016. 7 A.App. 1592. A timely supplemental notice of appeal was filed on July 18, 2016. 7 A.App. 1599.

ROUTING STATEMENT

These are consolidated appeals arising out of extremely unusual and complex commercial transactions. The appeal includes issues of first impression and issues of statewide public policy, which would be presumptively retained by the supreme court. NRAP 17(a)(14).

STATEMENT OF ISSUES

1. Whether the district court erred when it granted judgment on the pleadings and summary judgment in favor of Price and Shackelford (and denied the Cains' cross-motion) based on a release clause in a Settlement Agreement.

2. Whether the district court erred by awarding attorneys' fees.

3. Whether the district court erred by denying the Cains' motion to compel tax returns and financial information relating to misallocation of the proceeds and the claim for punitive damages.

4. Whether the district court erred by ruling that it would try the issues of personal jurisdiction and alter ego prior to the jury trial.

5. Whether the district court erred by granting the motion to quash subpoenas and awarding sanctions.

STATEMENT OF THE CASE

The Cains filed their complaint for breach of contract, fraud and civil conspiracy on September 14, 2011, against seven defendants. 1 A.App. 1. After the district court denied various motions attacking the complaint (1 A.App. 45-52; 2 A.App. 262-75), the Cains filed amended complaints. 2 A.App. 276; 4 A.App. 757. The Third Amended Complaint is the operative complaint for purposes of this appeal. It included multiple claims. 4 A.App. 757. The Cains eventually obtained default judgments against several defendants and a settlement with another defendant, leaving respondents Richard Price and Mickey Shackelford as the only remaining defendants. 2 A.App. 293-96; 5 A.App. 1138-39.

Price and Shackelford obtained an order granting summary judgment on November 5, 2015. 5 A.App. 1150. They also obtained an order awarding attorneys' fees and an order awarding sanctions. 6 A.App. 1444; 7 A.App. 1585-89. These appeals followed.

STATEMENT OF FACTS

Facts relating to the underlying transaction

Peggy and Jeffrey Cain are residents of Douglas County, Nevada, and they are the owners of Heli Ops International, which has its principal place of business in Douglas County. 1 A.App. 165:26-166:1-3. In 2009, the Cains were considering the purchase of another helicopter company for $20,000,000. 1 A.App. 166:4-5.

The Cains talked to their accountant, Dan Witt, regarding potential investments to generate funds for the purchase, and Witt referred the Cains to a business consultant and loan broker, Kerry Rucker. 1 A.App. 166:5-8. Rucker informed the Cains of a program being offered through a company called C4 WorldWide (C4) for the purchase of Collateralized Mortgage Obligations (CMOs). CMOs are essentially financial interests that were selling at low prices due to the financial crisis at that time. 5 A.App. 1038:19-21.

Witt and Rucker researched C4's web site and printed materials regarding C4, its principals, and the CMO investment program. 1 A.App. 174:5-18. This information included resumes of C4's officers and directors, which portrayed them as leaders in industry and finance. 1 A.App. 174:9-10. Witt and Rucker also reviewed a memorandum regarding C4's CMO program, which claimed that a $1,000,000 investment in the program would return $20,000,000 and a substantial monthly interest dividend. 1 A.App. 191:8-12.

Witt and Rucker also personally met with C4's Chief Executive Officer, Mr. Rawson, in November 2009. 1 A.App. 174:11-12. An individual named John Hayner also attended this meeting on behalf of C4; he represented himself as an attorney, although he was not admitted to practice law. 1 A.App. 174:12-14. At the meeting, Rawson stated that members of C4 operated as a team; that he had the full support and involvement of all board members; and that the board members and C4

were experienced in this type of investment. 1 A.App. 191:16-18. He explained the investment in great detail, indicating that the CMOs had been devalued to the point that a $1,000,000 investment could purchase CMOs with a face value of $1,000,000,000 ($1 billion), and the CMOs could then be sold and/or leveraged to generate cash and dividends. 1 A.App. 191:18-23.

Witt and Rucker forwarded the information to the Cains, and the Cains continued to investigate C4's CMO program. 1 A.App. 166:15-22. Their investigation included reviewing information on C4's website regarding C4, its principals, and the CMO program. *Id.* The Cains would never have invested in C4's CMO program if Rawson had been promoting the program by himself. 1 A.App. 167:5-6. Instead, the Cains were led to believe that C4 was comprised of individuals who were very respected, successful and established in their various industries; that they were experienced in the type of financial investments they were promoting; and that they were all actively engaged in the program.[1] 1 A.App. 167:7-10.

Relying upon the information the Cains had received from C4 and its principals, the Cains decided to go forward with the C4 investment program. Several things occurred on November 29, 2009. First, C4's officers and directors adopted a corporate resolution authorizing Rawson and Jeffrey Edwards to open a brokerage

[1] One of the principals in C4 later admitted to Rucker that C4's members had no experience with the investment they were promoting. 1 A.App. 192:1-2.

account and to purchase and sell securities. 1 A.App. 180:24-26. Also, C4 adopted a resolution to proceed with a joint venture agreement with the Cains, confirming that the Cains were promised a return of $20,000,000. 1 A.App. 181:1-4.

Also on that date, Jeffrey Cain executed a Joint Venture Agreement (JVA) on behalf of Heli Ops. 5 A.App. 1053, 1058. Rawson signed the JVA as the CEO of C4. 5 A.App. 1058. As part of the JVA, Heli Ops was to loan $1,000,000 to C4, for the purchase of CMOs that would be resold or leveraged. 5 A.App. 1053-54. Initially, C4 would have a 51 percent ownership interest in the CMOs, and Heli Ops would own the remaining 49 percent. 5 A.App. 1054. In exchange for $1,000,000 from Heli Ops, C4 gave Heli Ops a promissory note, which was attached to the JVA, requiring C4 to pay Heli Ops $20,000,000 within 30 days. 5 A.App. 1054, 1061-62. The JVA and the promissory note were executed concurrently on November 29, 2009. *Id.* The documents provided that once the $20,000,000 was paid by C4 to Heli Ops, the CMOs would be owned solely by C4. 5 A.App. 1054.

On November 30, 2009, the Cains fulfilled their part of the agreement on behalf of their business, Heli Ops, and they wire transferred $1,000,000 to C4's bank account. 5 A.App. 1074-75. C4 and its officers and directors began improperly diverting the loan proceeds the very next day. 5 A.App. 1078-81. Then, three days after obtaining $1,000,000 from the Cains, C4 committed a nearly identical fraud when it entered into a second JVA with another company, New Hope Capital

Foundation, on terms very similar to (actually, more favorable than) the Heli Ops agreement, and with New Hope providing a second $1,000,000 loan to C4. 5 A.App. 1038; 27-1039:2, 1084-89. The two JVAs were completely incompatible, because C4 promised each joint venture partner the first returns from the CMOs, and C4 secured both loans with the same CMOs. *Id.* There is no evidence that C4 ever informed the Cains of the New Hope JVA.

With $2,000,000 from Heli Ops and New Hope, C4 eventually purchased only approximately $986,000 worth of CMOs through a brokerage account; C4 and its officers and directors diverted the remaining $1,014,000. 5 A.App. 1039, 1102-09, 1111-15. Respondent Price, in particular, knew about both JVAs, and he was personally responsible for executing the wire transfers and withdrawals that diverted the funds. 5 A.App. 1111-15.

The bulk of the money withdrawn from C4's account was paid to the individual C4 principals or their family members. 1 A.App. 182:9-14. Within one month of receiving Heli Op's $1,000,000, C4 had given nearly $500,000 to its principals. 1 A.App. 182:15-16.

In the meantime, within days after obtaining the Cains' $1,000,000, C4 began giving false excuses to the Cains regarding the purchase of the CMOs. On December 8, 2009, Rawson sent a letter blaming the trader/broker for a failure to obtain CMOs,

and Rawson promised that "today/tomorrow" CMOs would be purchased for $1,000,000. 1 A.App. 182:18-24.

C4 never paid the Cains the $20,000,000 that was due upon expiration of the 30-day deadline; nor did C4 repay any of the original $1,000,000 loan. 1 A.App. 168:21-22, 169:8.

Facts relating to the settlement

When C4 failed to pay any money to the Cains, the parties attempted to resolve their differences. On February 28 and March 1, 2010, they signed a Settlement Agreement and Release of All Claims (Settlement Agreement). 5 A.App. 1119-22. The Settlement Agreement recited that it was entered into between Peggy Cain, Jeffrey Cain, Heli Ops, Rawson and C4.[2] 5 A.App. 1119. Although the first paragraph of the Settlement Agreement recited the fact that Rawson was "Chairman/CEO" of C4, his signature block did not indicate that he signed it in any representative capacity. It merely stated: "DR Rawson." 5 A.App. 1122. Nor did Rawson write anything on the signature line suggesting that he was signing as C4's representative or in any capacity other than as an individual. *Id.* The district court subsequently found that Rawson signed the Settlement Agreement "in his individual capacity." 5 A.App. 1165:14.

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[2] It is noteworthy that the Settlement Agreement did not identify the names of any officers or directors of C4, other than Rawson.

The Settlement Agreement was riddled with typographical and grammatical errors. 5 A.App. 1119-20. After some initial "Whereas" clauses, the Settlement Agreement contained a section entitled "Consideration." 5 A.App. 1119. The first paragraph in this section stated:

> 1.1 In consideration of the Releases set forth below in Section 2 and the other terms set forth herein, C4 WorldWide stipulates that it owes the Cains Twenty Million USD ($20,000,000) and that said amount was due on December 30, 2009 and remains unpaid. C4 WorldWide acknowledges its obligation to pay and agrees to pay the sum of $20,000,000, plus all accumulated interest, to Cains no later than 90 days from February 25, 2010, less any advance payments made, and C4 WorldWide shall use all reasonable efforts to pay this obligation off in full as quickly as possible.

5 A.App. 1119.

In other words, this subpart 1.1 merely repeated and confirmed the fact that C4 already owed, and still owed, the $20,000,000 that was due on December 30, 2009, and which remained unpaid. Subpart 1.1 then contained an illusory promise in which C4 "agrees to pay" the $20,000,000 debt that C4 already owed, but with an extended due date no later than 90 days from February 25, 2010, and with C4 agreeing to pay "this obligation" as quickly as possible. *Id.*

The next part of the Settlement Agreement dealt with the CMOs, which would be the security for the payment. Subpart 1.2 referred to "payment to the Cains of the $20,000,000 (plus all accumulated interest), contemplated by this Agreement." 5 A.App. 1119. This subpart then stated that C4 would assign a 49 percent interest in the CMO account to the Cains. *Id.* Upon payment of the $20,000,000 (plus interest) to the Cains, the parties agreed that the Cains would have no further ownership interest in the CMO account, and C4 would own 100 percent of the account. *Id.*

The next section of the Settlement Agreement consisted of a "Release" provision. The first subpart read as follows:

> 2.1 The Cains, their successors, predecessors, parents, assigns, agents, employees, officers, directors, insurers, and all other affiliated persons, firms, or corporations, hereby fully and forever releases [sic] and discharges [sic] C4 WorldWide, from any and all claims that exist arising out of C4 worldwide's [sic] financial misfortunes and resultant inability to timely pay the promissory Note and Security Interest in the CMO Securities dated November 29, 2009 (a true and accurate copy which is attached hereto as Exhibit A and is incorporated herein by reference). Such release covers the Cains, their successors, predecessors, parents, assigns, agents, employees, officers, directors, insurers, and all other affiliated persons, firms, or corporations, [sic;

> incomplete sentence] hereby fully and forever release and discharge C4 WorldWide, its successors, predecessors, parents, assigns, agents, employees, officers, directors, insurers, and all other affiliated persons, firms, or corporations, of and from any and all past, present, and future claims, demands, obligations, causes of action for damages of any kind, known and unknown, the basis for which now exists or may hereafter become manifest that are directly or indirectly related to the facts in any of the claims of any kind asserted against or which could have been asserted in any of the claims.

5 A.App. 1120.

Although this release provision broadly referred to C4's officers and directors, without specifically identifying these people, the actual scope of the release was very narrow. It only released any claims that existed arising out of C4's "financial misfortunes and resultant inability to timely pay the Promissory Note [to the Cains]." *Id.*

In summary, the Settlement Agreement repeated and confirmed C4's obligation to pay $20,000,000 to the Cains; it emphasized that this obligation would be fully satisfied not later than 90 days after February 25, 2010; it secured the obligation with a 49 percent interest in the CMO account; and it released C4 and its

officers and directors from claims arising out of C4's "financial misfortunes and resultant inability to timely pay." *Id.*

As the Cains discovered later, C4 and its principals never had any intention or even the ability to fulfill their obligation to the Cains, and to pay the consideration that the Settlement Agreement required. When the parties signed the Settlement Agreement, C4 did not have the money and did not have realistic prospects for obtaining the money; C4 had already assigned the 49 percent interest in the CMOs and the brokerage account to New Hope (which was the other victim of C4's fraud); and C4 had already promised New Hope the first returns from the CMOs. 5 A.App. 1040-41. In other words, C4 could not possibly perform as represented in the Settlement Agreement with the Cains at the time Rawson signed the Settlement Agreement, because C4 did not have the money and C4 had already given the security for the obligation (the CMOs) to someone else. Because C4 was unable to pay the consideration and comply with its obligations when the Settlement Agreement was signed, C4 subsequently defaulted on its obligation and then

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transferred the CMOs beyond the Cains' reach, thereby completing the full impairment of the Cains' security interest.[3] 1 A.App. 142-43, 149, 153, 170.

Facts relating to the litigation

When C4 defaulted and failed to pay the Cains any money under the original JVA, and then defaulted and failed to pay any money under the Settlement Agreement, the Cains filed a complaint for breach of contract, fraud and civil conspiracy against C4, Rawson and four other principals in C4. 1 A.App. 1. The complaint alleged that, based upon inducement from the defendants, Heli Ops loaned C4 $1,000,000 pursuant to the JVA; that no part of the loan obligation had been repaid; that Rawson and C4 acknowledged their liability in the Settlement Agreement; and that Rawson and C4 failed to pay their obligations under the Settlement Agreement. 1 A.App. 3-4. The complaint alleged breach of the Settlement Agreement by Rawson and C4; Rawson's fraud regarding the original loan; and civil conspiracy against all defendants, based upon their knowing participation in the fraudulent scheme to induce the Cains to loan funds in the first place, and then later to induce the Cains to defer taking legal action. 1 A.App. 4-6.

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[3] All of the individual defendants, including Price and Shackelford, were parties to communications with the Cains regarding C4's alleged efforts to pay Heli Ops and the Cains. 1 A.App. 169; 15-19. Further, the CMOs had been in a joint account, but Rawson convinced Jeffrey Cain to authorize Rawson to transfer the CMOs to a new account. 1 A.App. 169:24-170:2. Rawson then transferred the CMOs to a new account, from which he transferred them beyond the Cains' reach. 1 A.App. 170:3-24.

The defendants all moved to dismiss the complaint. 1 A.App. 13. The defendants contended that (1) the complaint did not state a legal claim against Rawson, individually, because he allegedly "executed the [Settlement Agreement] in his official capacity on behalf of the corporation," (even though his signature line does not so indicate; 5 A.App. 1122); (2) the Settlement Agreement constituted an accord and satisfaction regarding the original loan obligations; (3) allegations of fraud and conspiracy were not specific enough; and (4) Nevada courts had no personal jurisdiction over the individual defendants. 1 A.App. 16-21. The Cains opposed the motion to dismiss. 1 A.App. 24.

This case was originally assigned to former District Judge Michael Gibbons. In the first of what would become a series of orders largely ruling in favor of the Cains, Judge Gibbons denied the motion to dismiss. 1 A.App. 45. Regarding Rawson, the court found that the Cains "presented credible claims" regarding the 2009 and 2010 agreements, and allegations of the complaint were sufficient. 1 A.App. 47-48. Regarding the fraud claims, the court found that the allegations in the complaint were sufficient as to Rawson, but regarding the other individual defendants, the allegations of fraud and conspiracy were "less clear." 1 A.App. 49. Accordingly, the court denied the motion to dismiss, but required the Cains to amend their complaint regarding these five defendants. *Id.*

The last part of the motion to dismiss was based upon lack of personal jurisdiction regarding the individual defendants. 1 A.App. 20-21. The individual defendants, including respondents Price and Shackelford, contended that they had insufficient contacts with Nevada. 1 A.App. 20. Judge Gibbons found that "it does not appear that the five defendants were parties to this [Settlement Agreement]," but that their involvement in the loan was unclear. 1 A.App. 51:15-17. The court found sufficient evidence of jurisdictional facts to prevail on a pretrial motion, and the court therefore denied the motion to dismiss on this ground. 1 A.App. 51-52. Nonetheless, the denial was without prejudice; the parties were allowed to commence discovery regarding personal jurisdiction; and the Cains were allowed to file an amended complaint on that issue. 1 A.App. 52.

After the Cains filed an amended complaint, all of the defendants again moved for dismissal or summary judgment. 1 A.App. 53. The motion first argued that Nevada courts had no personal jurisdiction over the individual defendants. 1 A.App. 61. This argument was based upon the contention that the individual defendants did not have sufficient minimum contacts with Nevada.[4] 1 A.App. 61-70.

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[4] As discussed below, later in the litigation respondents Price and Shackelford contended that they were third-party beneficiaries under the Settlement Agreement, and that the Settlement Agreement should be enforced in favor or Price and Shackelford. At the early stages of the lawsuit, however, Price and Shackelford were contending that the Nevada court did not have jurisdiction over them. The Settlement Agreement specifically provides that "any action arising out of this Agreement shall be filed in Douglas County, Nevada." 5 A.App. 1121. (continued)

The motion to dismiss or for summary judgment also contended that the defendants were protected by the "fiduciary shield doctrine." 1 A.App. 70-72. And the motion again attacked sufficiency of the Cains' allegations of fraud, conspiracy and negligence. 1 A.App. 72-74.

The Cains opposed the motion to dismiss or for summary judgment. 1 A.App. 138. After considering a large volume of evidence regarding the motion, Judge Gibbons again ruled for the Cains. 2 A.App. 262. The court carefully reviewed evidence establishing personal jurisdiction regarding the individual defendants (1 A.App. 269-71.) The court found that the Cains had made a sufficient showing of jurisdictional facts to prevail on the pretrial motion, although the Cains would still need to establish personal jurisdiction at trial. 2 A.App. 271-72.

Regarding defendants' attack on the fraud claim, the court observed that the Cains alleged that all five individual defendants played a part in inducing the Cains to make the loan; the Cains alleged that the individual defendants knew the Settlement Agreement was illusory, and that C4 actually had no ability to repay the loan; that the Cains alleged that the individual defendants knowingly comingled the funds; and that the Cains alleged that the individual defendants knowingly allowed

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(Continued) Yet, in their motion to dismiss, Price and Shackelford were contending that they were not subject to personal jurisdiction in Nevada. In other words, Price and Shackelford were seeking to enforce one part of the Settlement Agreement (i.e., the release provision), but at the same time they wanted to avoid enforcement of another part of the same Settlement Agreement (the forum-selection clause).

Rawson to misrepresent facts and improperly dispose of the Cains' funds. 2 A.App. 272. These allegations were sufficient to survive the part of the motion seeking dismissal. 2 A.App. 272-73.

Judge Gibbons also denied the defendants' request for summary judgment in the motion, ruling that there were material issues of fact regarding involvement of the individual defendants. 2 A.App. 274. The court's order also dealt with a separate motion by the Cains, seeking leave to file a second amended complaint. 2 A.App. 263:1-2. The court granted the Cains' motion. 2 A.App. 275:13-17.

The Cains filed a second amended complaint (SAC) in November 2012. 2 A.App. 276. The SAC contained many of the prior allegations, including contentions regarding non-payment and breach of the original $1,000,000 loan obligation, and non-payment and breach of the subsequent Settlement Agreement. 2 A.App. 278-79. The SAC stated claims for breach of contract, fraud, civil conspiracy, negligence, conversion and constructive trust. 2 A.App. 279-84.

Defendant Baker filed a motion for summary judgment, primarily contending that the Settlement Agreement contained release provisions applicable to C4's officers and directors, and that Baker was therefore a third-party beneficiary of the release provisions. 2 A.App. 298:11-19. Defendants Price and Shackelford (respondents in this appeal) filed a joinder in Baker's motion for summary judgment. 2 A.App. 362. The joinder contended that each of Baker's arguments applied

equally to Price and Shackelford. 2 A.App. 363. The Cains opposed Baker's motion and the joinders by Price and Shackelford. 2 A.App. 379-80.

On November 21, 2014, Judge Gibbons issued an order on various pending motions, including Baker's motion for summary judgment, to which Price and Shackelford had joined. 3 A.App. 577-79. Once again, Judge Gibbons ruled in favor of the Cains. The court denied Baker's motion for summary judgment (and the joinder), finding that there were disputed material facts regarding whether these defendants were protected by the release provision in the 2010 Settlement Agreement. 3 A.App. 585:9-16. The court also found the existence of material disputed facts regarding the Cains' claims for fraud, conversion, conspiracy and negligence. 3 A.App. 585:17-20. Judge Gibbons denied summary judgment. *Id.*

In the meantime, Judge Gibbons had entered a default judgment against defendants Rawson, C4 and Kavanagh. 2 A.App. 293-96. On March 30, 2015, the Cains filed a third amended complaint (TAC), adding a claim for intentional interference with contractual advantage. 4 A.App. 757. Three months earlier, Judge Gibbons had been elevated to the Nevada Court of Appeals, and he was replaced by a newly-appointed judge, Thomas Gregory. The remaining defendants seized upon this change of judges as an opportunity to revisit old issues and obtain different rulings from the new judge. On April 21, 2015, while a motion to compel discovery by the Cains was still pending (3 A.App. 588), Baker filed a motion for judgment

on the pleadings. 4 A.App. 792. Once again, Baker argued that he was an officer and/or director of C4, and he was therefore a third-party beneficiary entitled to protection under the release provision of the Settlement Agreement. 4 A.App. 793-95. Price and Shackelford joined in Baker's motion. 4 A.App. 840. The Cains opposed the motion and asserted their own cross-motion for partial judgment on the pleadings, seeking a judgment in their favor regarding invalidity of the affirmative defense based on the release. 4 A.App. 804:22-24, 814:20-23.

The new district judge revisited the release issue, and the new judge issued an order granting most of Baker's motion (to which Price and Shackelford had joined). 4 A.App. 935-47. The judge ruled that the Cains were barred from obtaining recovery against the remaining defendants under the Settlement Agreement, although the judge ruled that there were material issues of fact regarding the impact of the release on claims relating to the original loan. 4 A.App. 946.

Less than three weeks after this order, Baker filed yet another motion for summary judgment. 5 A.App. 982. Once again, Baker relied upon the release provision in the Settlement Agreement. 5 A.App. 985-88. To avoid the appearance that Baker was simply repeating the old unsuccessful arguments he had made to Judge Gibbons, Baker phrased his new argument as being based upon the Cains' "election of remedy." 5 A.App. 982. As they had done in the past, Price and

Shackelford filed a joinder in Baker's motion. 5 A.App. 1028. The Cains opposed the motion. 5 A.App. 1036.

On November 5, 2015, Judge Gregory issued an order granting summary judgment against the Cains.[5] 5 A.App. 1150. The order held that "the doctrine of election of remedies is not applicable." 5 A.App. 1159:13-15. Also, the order recognized that the Cains' third amended complaint alleged fraud by Price and Shackelford relating to their role in inducing the Cains to enter into the JVA and later the Settlement Agreement. 5 A.App. 1156:9-11. The order found that even though the Cains had not received any money owed to them under the Settlement Agreement, the release provision was nevertheless binding and enforceable by the third-party beneficiaries, Price and Shackelford. 5 A.App. 1162-68. Therefore, the court granted summary judgment to Price and Shackelford on all claims in the TAC. 5 A.App. 1168.

Facts relating to other district court orders being challenged in this appeal will be presented below.

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[5] After Baker filed his motion for summary judgment on August 17, 2015, and before Judge Gregory ruled on it, the Cains and Baker entered into a stipulation for dismissal of the case against Baker. 5 A.App. 1135. The district court approved the stipulation and dismissed Baker. 5 A.App. 1138. Price and Shackelford had joined in Baker's motion for summary judgment. Therefore, Judge Gregory's order granting Baker's motion is entitled: "Order Granting Summary Judgment as to Richard Price and Mickey Shackelford." 5 A.App. 1150.

SUMMARY OF ARGUMENT

The Cains were the victims of an ongoing, perpetual type of fraud, including, but not limited to, when they were induced to give C4 and its officers/directors $1,000,000, and when they were induced to enter into the Settlement Agreement, based upon false promises. Respondents Price and Shackelford were principals in the ongoing fraud.

The district court erred, as a matter of law, by applying the release to relieve third-party beneficiaries Price and Shackelford of all obligations to the Cains, despite the fact that the Cains have never received any repayment of the $1,000,000 loan and the Cains have never received any of the $20,000,000 in consideration, which was the basis of the Settlement Agreement.

The district court compounded its error by awarding attorneys' fees and costs to Price and Shackelford. There was no legal basis for the district court's award of attorneys' fees based upon a finding that the Cains' claims were brought without reasonable grounds, particularly when the Cains' claims survived multiple attacks during four years of litigation. Nor was there any legal or factual basis for the district court's subsequent rulings, after the dismissal, in which the district court quashed subpoenas and ordered the Cains to pay even more attorneys' fees to Price and Shackelford.

If this court reverses the judgment, the court should also consider errors that the district court made prior to the judgment, to make sure these errors do not occur again on remand. First, the district court erred by ruling that it would try issues of personal jurisdiction and alter ego prior to the jury trial. The district court had already ruled that the Cains made a prima facie case for personal jurisdiction and alter ego, essentially involving the same evidence that will be presented to the jury on the fraud claims. These matters should all be tried together.

Additionally, the district court erred by denying the Cains' requested discovery regarding tax returns and financial information. This evidence was clearly discoverable and admissible, relating to misallocation of loan proceeds, and relating to punitive damages.

ARGUMENT

1. The district court erred when it granted judgment in favor of Price and Shackelford based upon the release clause in the Settlement Agreement.

Contract interpretation is subject to *de novo* review. *May v. Anderson,* 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). *De novo* review applies to release terms in contracts. See *In re Amerco Derivative Litig.,* 127 Nev. 196, 211, 252 P.3d 681, 693 (2011). When the parties' intent in a release is not clearly expressed in the contractual language, this court may consider the circumstances surrounding the agreement. *Id.*

An order granting summary judgment is reviewed *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence demonstrate that no genuine issue of material fact remains, and the moving party is entitled to judgment as a matter of law. *Id.* On a motion for summary judgment, the evidence and any reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.*

A district court may grant a motion for judgment on the pleadings when material facts are not in dispute and the moving party is entitled to judgment as a matter of law. NRCP 12(c). Because an order granting a motion for judgment on the pleadings presents a question of law, this court's review is *de novo*. *Sadler v. PacifiCare of Nev.*, 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1266 (2014). In reviewing a judgment on the pleadings, this court will accept the factual allegations in the complaint as true, and this court will draw all inferences in favor of the non-moving party. *Id.*

Dismissal of the Cains' lawsuit was actually a combination of two orders. First, on July 28, 2015, the district court granted defendant Baker's motion for judgment on the pleadings (to which Price and Shackelford had joined). 4 A.App. 935. The district court dismissed certain causes of action, but found the existence of material issues of fact with respect to enforceability of the release. 4 A.App. 942-

46. On November 5, 2015, the district court granted summary judgment to Price and Shackelford on all of the remaining claims. 5 A.App. 1150-68.

In the present case, the TAC alleged that the defendants failed to pay their obligations under the JVA, the promissory note, and the Settlement Agreement. 4 A.App. 759-60. The TAC alleged that the individually named defendants committed fraud by creating a false perception regarding C4 and Rawson, including distribution of promotional materials regarding all the individually named defendants. 4 A.App. 761-62. The Cains alleged that all the defendants knowingly allowed Rawson to make misrepresentations to the Cains, with fraud relating to the initial transaction and the subsequent Settlement Agreement. 4 A.App. 762:4-9. The TAC also alleged that the individual defendants participated in a civil conspiracy to further the fraudulent scheme against the Cains. 4 A.App. 762:21-763:3. Additionally, the TAC alleged that the individual defendants were guilty of negligence, conversion and interference with contractual relations. 4 A.App. 763-66.

The district court recognized that a motion for judgment on the pleadings requires factual allegations to be deemed admitted, and such a motion cannot succeed if the allegations in a complaint, if proved, would permit recovery. 4 A.App. 940:19-26.

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a. Third-party beneficiaries cannot enforce the release because C4 failed to perform

Price and Shackelford were not parties to the Settlement Agreement. As such, their only status was as third-party beneficiaries of the Settlement Agreement. The existence of a release is an affirmative defense that must be pleaded and proved by the defendant. See NRCP 8(c). To rely on the release provision in the Settlement Agreement, Price and Shackelford needed to prove that they were entitled to enforce the Settlement Agreement. *Schwartz v. Schwartz,* 95 Nev. 202, 206, 591 P.2d 1137, 1140 (1979) (requiring defendant to prove affirmative defenses). In essence, Price and Shackelford needed to prove that the Cains breached the Settlement Agreement by failing to comply with the release provision.

Fundamental fairness dictates that a release cannot be enforceable by a third-party beneficiary if the releasor has never been paid. In *Coles v. Glaser,* 205 Cal. Rptr. 3d 922 (Cal. Ct. App. 2016), plaintiff Coles loaned money to Cascade, which was a real estate investment company. The loan was guaranteed by Glaser (Cascade's president) and Taylor (Cascade's vice-president). Cascade did not repay the loan. The parties entered into a settlement agreement requiring Cascade to pay approximately $300,000, with Coles giving a release in favor of Cascade, Glaser and Taylor. Cascade paid the money, and Coles gave the release. Shortly thereafter, Cascade filed for bankruptcy, and the bankruptcy trustee demanded return of the settlement proceeds (a bankruptcy "clawback"), as a recoverable preferential pre-

bankruptcy payment. Coles was subsequently forced to surrender $200,000 in cash to the bankruptcy trustee. *Id.* at 924-25.

After having to return most of the settlement proceeds previously received from Cascade, Coles then sued Glaser and Taylor, because Coles did not ultimately receive the full sum he was due. The trial court ruled in Coles' favor against Glaser and Taylor. The trial court found, as a matter of law, that the payment that had been promised and delivered, but which was subsequently clawed back, did not legally exist; and because the release was based upon a payment that was subsequently clawed back by the bankruptcy trustee, the release was ineffective. 205 Cal. Rptr. 3d at 925.

The Court of Appeal affirmed. The court noted that Coles performed his obligation under the settlement agreement by giving the release, but that Coles did not receive his money because of the bankruptcy clawback. *Id.* at 927. In exchange for Coles' release, he was to be paid more than $300,000, but "the full amount of the obligation was not paid, and none of the three defendants paid the amount reflected in clawback." *Id.* As a result of the clawback, Coles "effectively by operation of law never received . . . payment." *Id.* "Not only was the full amount not paid, but also the portion reflected in the clawback was not paid by any of the three defendants, including Cascade, as required by the agreement." *Id.* at 928.

In ruling that the two officers of Cascade could not get the benefit of the release, the court also observed that the "purpose of the law of contracts is to protect the reasonable expectations of the parties." *Id.* at 928. "No one suggests that the parties intended for Coles to provide a release regardless of whether he got paid." *Id.* (emphasis added). Finally, the court rejected the defendants' argument that Coles' original breach of contract claim was covered by the release, thereby barring the lawsuit. The court held: "Having failed to keep their end of the bargain, Glaser and Taylor are in no position to argue that the release, which Coles gave to keep his end of the bargain, bars Coles from recovering the damages he incurred as a result of their breach." *Id.* at 928.

The present case is similar to *Coles* in many respects. Here, the Cains gave a release to C4's principals as part of a Settlement Agreement. The Settlement Agreement called for the Cains to receive $20,000,000 from C4 and Rawson, secured by CMOs. The Cains never received any of the money or the security, and nobody can plausibly argue that the parties intended for the third-party beneficiaries to get the full benefit of the release regardless of whether the Cains ever got paid. As in *Coles*, Price and Shackelford are in no position to argue that the release bars the Cains from recovering damages, when the Cains never got their money from the Settlement Agreement in the first place. The third-party beneficiaries, Price and

Shackelford, should not be entitled to obtain the benefit of the release in the Settlement Agreement.

b. The motion for judgment on the pleadings was an improper attempt to obtain rehearing or reconsideration

During the time when Judge Gibbons was the district judge assigned to this case, he consistently denied efforts by the defendants to resolve the case on motions, including motions that asserted the release provision in the Settlement Agreement. This series of rulings is set forth in the Statement of Facts, above. When Judge Gibbons was elevated to the Court of Appeals, Thomas Gregory became a new district judge, and he took over the case. At that point the remaining defendants sought to revisit issues already decided by Judge Gibbons. The defendants convinced new Judge Gregory to review and second-guess more than three years of litigation decisions made by Judge Gibbons.

DCR 13(7) provides: "No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore, after notice of such motion to the adverse parties." Such a rule is intended to prevent "judge shopping" once a motion has been granted or denied. See *Moore v. City of Las Vegas,* 92 Nev. 402, 404, 551 P.2d 244, 246 (1976) (referring to similar former DCR 27). The rule's purpose is to

preclude litigants from having an unfavorable determination by one district judge overruled by another judge. *Id.*

In *Moore,* the first judge denied a motion for summary judgment. The case was assigned to another judge after the first judge lost his bid for re-election. The defendant filed a second motion on the same issue, and the new judge granted it. On appeal, the *Moore* court noted that the first judge had perceived certain triable issues of fact. *Id.* at 405, 551 P.2d at 246. The only feature that distinguished the second motion from the previous motion was the citation of additional authorities. The second motion raised no new issues of law and no new or additional facts. As such, the second motion "was superfluous and, in our view, it was an abuse of discretion for the [second district judge] to entertain it." *Id.* "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Id.* Accordingly, the *Moore* court reversed the second judge's order.

In the present case, the effect of the Settlement Agreement and its release clause on the defendants had already been raised and addressed by Judge Gibbons twice previously. In both prior occasions, Judge Gibbons held that the Cains' claims could survive. After Judge Gibbons was replaced by Judge Gregory, the defendants decided to try again, taking advantage of the change of judges. Although the defendants gave their new motion a different title, the motion was the functional

equivalent of the previously denied motions. After all, the contract language had never changed, and the basic underlying facts were undisputed and unchanged.

c. The release in the Settlement Agreement did not pertain to the Cains' claims against Price and Shackelford

The Settlement Agreement was entered into by the Cains and Rawson, on behalf of C4, when C4 breached the original agreement embodied in the JVA and the Promissory Note, i.e., when C4 failed to pay the promised $20,000,000. In the Settlement Agreement, C4 expressly acknowledged the obligation, conceded the breach, and agreed to pay the $20,000,000 debt to the Cains in a certain time frame. C4 also agreed to give the Cains a 51 percent holding in the CMOs, if C4 failed to pay as promised. This security in the CMOs was a critical part of the Settlement Agreement, because C4's default would have allowed the Cains to become the sole owners of the CMOs. In exchange, the Cains agreed to cease all collection efforts and to refrain from filing complaints with the Securities and Exchange Commission and the Department of Justice of any state. 5 A.App. 1119.

It is not uncommon for settlement agreements to include release clauses. Sometimes releases and settlement agreements are broad and all-encompassing. In this case, however, the release was very specific regarding the claims that were being released. The release only applied to claims "arising out of C4 worldwide's [sic] financial misfortunes and resultant inability to timely pay" the Cains. 5 A.App.

1120. This provision turned out to be part of the defendants' ongoing attempts to defraud the Cains. As noted above, the $1,000,000 transferred from the Cains to C4 in 2009 was almost immediately diverted for the personal benefit of C4's officers and directors, not for purchase of the CMOs. And as part of C4's scheme, C4 entered into a second agreement with another company, obtaining a second $1,000,000 loan and promising security consisting of the same CMOs as the Cains' agreement. Then, C4 began giving false excuses to the Cains, blaming "the way markets are," and blaming "the previous trader [who] was not adequately representing our interests." 1 A.App. 182:21-23.

Later, when C4 and its principals were desperate to avoid litigation with the Cains, and desperate to avoid complaints with the SEC and/or departments of justice, C4 and Rawson used the Settlement Agreement to reaffirm their obligations to the Cains, while still not fully disclosing the extent of their fraud. As part of this ongoing scheme, the release provision in the Settlement Agreement referred to C4's "financial misfortunes and resultant inability to timely pay." 5 A.App. 1120. But C4's inability to pay was never the result of "financial misfortunes," which is a term that would suggest negative market forces or factors beyond the control of C4 and its principals. The word "misfortune" is defined as bad luck or an unlucky condition or event. *Merriam-Webster Online Dictionary* (2016). The word "resultant" means "coming from or caused by something else." *Id.* Thus, the Settlement Agreement's

release phrase "financial misfortunes and resultant inability to timely pay" would mean an inability to pay caused by an unlucky condition or event.

Here, there was no evidence that C4's inability to pay was caused by any financial "misfortunes." Just the opposite is true. C4's inability to pay was directly the result of misappropriation of the Cains' money by C4's principals. This intentional fraud and theft cannot possibly be deemed a "financial misfortune" within the scope of the release.

Moreover, as the Cains subsequently learned, C4 had already sold almost all of its interests in the CMOs (which were supposed to be security for the Cains), and C4 only owned a 2 percent stake when C4 entered into the Settlement Agreement. 4 A.App. 813:4-5. C4 concealed this fact and therefore had no chance of performing the Settlement Agreement as promised, at the time C4 entered into the Settlement Agreement. Thus, when C4 obtained a release that was limited to claims arising out of C4's "financial misfortunes and resultant inability to timely pay" the prior obligation, C4 already had an additional inability to pay its obligation under the Settlement Agreement itself, and C4's principals would have known it.

Releases, which can have devastating consequences, should be narrowly construed to assure that the parties fully understand the rights being released and the resulting consequences. See *Brown v. Drillers, Inc.*, 630 So. 2d 741, 753 (La. 1994). In *Brown*, a husband sued for personal injuries and his wife sued for loss of

consortium. They settled jointly for $1,000,000, and they gave a full release of all claims "relating in any way" to the husband's injuries, including any damages "which may be sustained in the future" as a result of the husband's accident. *Id.* at 745. The husband eventually died from his injuries, and his wife sued for wrongful death. The *Brown* court held that the release did not bar the wife's second lawsuit, because the release did not unambiguously cover the wrongful death claim. *Id.* at 755. Because of the ambiguity, the release did not show that the parties clearly contemplated that the release would cover the wife's future wrongful death claim. *Id.* The ambiguous release, therefore, was not applicable to the wrongful death claim, and the release did not support dismissal of the second case. *Id.*

Here, the release provision did not call for a release of any and all claims of any nature. Instead, the release specifically dealt with "any and all claims that exist arising out of C4 worldwide's [sic] financial misfortunes and resultant inability to timely pay." 5 A.App. 1120. As a matter of law, this language was not broad enough to protect the alleged third-party beneficiary officers and directors of C4 from their own fraudulent and conspiratorial theft of the Cains' money—conduct that cannot be characterized as a mere "financial misfortune." At the very least, there is a question of fact regarding what the parties intended as to the scope of this release language. Judgment on the pleadings was improper.

d. The release portion of the Settlement Agreement itself was procured by fraud and is unenforceable.

A release is a contract, and like any other contract, it is subject to avoidance on the ground of fraud. *Shannon v. Memorial Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 631 (Tex. App. 2015); *Indus. Commercial Elec., Inc. v. McLees,* 101 P.3d 593, 597 (Alaska 2004).

In *Chase v. Dow Chem. Co.,* 875 F.2d 278 (10th Cir. 1989), a building owner made a claim against Dow dealing with cracking in parts of the building. Dow paid the owner $30,000, and the owner signed a release. The owner subsequently sued Dow, alleging that Dow fraudulently induced the owner to sign the release. The trial court granted summary judgment to Dow. The Tenth Circuit reversed. The owner had sufficient evidence to show that Dow made numerous false and misleading misrepresentations, which induced the owner to enter into the release agreement. *Id.* at 281-82 (the owner "alleged and offered evidence of affirmative misrepresentations and misleading half-truths on the part of Dow"). Because there were material fact issues relating to the owners' claim that Dow fraudulently induced the release, the trial court erred in granting summary judgment. *Id.* at 284.

In *Bitler v. Nationwide Mut. Ins. Co.,* 2001 WL 484101 (E.D. Penn. 2001), the plaintiff was an insured on an automobile insurance policy issued by Nationwide. The plaintiff made an uninsured motorist claim, which he settled for approximately $10,000. He received a check and signed a release. He subsequently sued

Nationwide for additional coverage benefits. Nationwide moved for summary judgment, asserting the release as a complete bar to the plaintiff's claim. *Id.* at *1. The plaintiff contended that the release was fraudulently obtained, because a Nationwide representative gave wrong information regarding the insurance policy's coverage, failed to mention additional coverage, failed to tell the plaintiff about the possibility of stacking coverage, and failed to inform the plaintiff about available medical payment coverage. *Id.* at *3. The court denied summary judgment, holding that the plaintiff had established triable issues of fact regarding whether the release was procured by fraud. *Id.*

The present case is similar to *Bitler.* Here, the Cains were the victims of ongoing fraud, starting with the 2009 fraud in the original JVA and promissory note arrangement with C4. When C4 defaulted in its obligations to the Cains, C4 committed breaches of duties to the Cains and even more fraud by extracting a release within the Settlement Agreement for third-party beneficiaries. This time C4 and Rawson convinced the Cains not to sue and not to file complaints with the SEC or other government authorities. In exchange, C4 promised to pay $20,000,000 to the Cains, secured by the CMOs. When C4 induced the Cains to give the release and to enter into the Settlement Agreement, C4 had no ability to pay, no intention to pay, and no ability to provide the CMOs as security for the obligation (because C4 had already given away its ownership of the CMOs). This situation is much like the

fraud committed by the insurance company in *Bitler*, where the insurance company induced the insured to sign a release, but the insurance company withheld critical information from the insured. At the very least, the Cains should have an opportunity to prove their fraud claims at trial regarding the release, and their alter ego claims against Price and Shackelford.

e. The Settlement Agreement provided the Cains with no new consideration for the release.

When the third-party beneficiary defendants contended that the release provision in the Settlement Agreement barred the Cains' lawsuit, the Cains asserted that the Settlement Agreement really did not provide any additional consideration for the release. 5 A.App. 1047-50. An illusory obligation does not constitute adequate consideration for a contract. Cf. *Shoen v. Amerco, Inc.*, 111 Nev. 735, 741-42, 896 P.2d 469, 473-74 (1995) (employee's promise to render lifetime services in retirement contract was not illusory, and therefore constituted adequate consideration). It is well settled that promising to do what a person is already legally bound to do does not constitute consideration for a new promise. *Yerkovich v. AAA*, 610 N.W.2d 542, 546 (Mich. 2000); *California Grocers Assn. v. Bank of America*, 27 Cal. Rptr. 2d 396, 405 (Cal. Ct. App. 1994) (consideration cannot consist of a promise to perform a preexisting duty).

The district court rejected the Cains' argument regarding the lack of any new or separate consideration for the release. 5 A.App. 1164:22-23. The district court

first found that the JVA had not obligated C4 to pay $20,000,000; rather, the JVA only required C4 to purchase CMOs, and to pay Heli Ops the first $20,000,000 in profits thereafter. 5 A.App. 1164:25-1165:2. The district court's reasoning, however, ignores the fact that the JVA was signed concurrently with a promissory note, and both documents together formed the agreement between the parties, creating a definite, non-contingent obligation.

Additionally, the district court's finding ignored the fact that the Settlement Agreement conclusively establishes the parties' own interpretation and understanding of C4's obligations under the promissory note and the JVA. Specifically, the Settlement Agreement recites that it dealt with C4's "unpaid financial obligations" arising out of the promissory note. 5 A.App. 1119. The Settlement Agreement recites the parties' express understanding that C4 "owes the Cains" $20,000,000, and that "said amount was due on December 30, 2009 and remains unpaid." *Id.* The Settlement Agreement also expressly states that C4 "acknowledges its obligation to pay" the $20,000,000. *Id.*

In other words, the parties themselves specifically and expressly viewed the 2009 agreements (JVA and promissory note) as creating a definite and certain obligation by C4 to pay $20,000,000 to the Cains. There was no basis for the district court to discard the intent and understanding of the parties, as expressed in the

Settlement Agreement. Thus, C4's agreement in the Settlement Agreement provided no new consideration for the release.

As a second basis for finding new consideration, the district court noted that the Settlement Agreement called for interest, whereas the JVA did not mention C4 having to pay interest. 5 A.App. 1165:3-8. Thus, in the district court's view, the interest provision in the JVA was new and sufficient consideration for the release. The district court ignored the fact that, under NRS 99.040(1)(a), interest must be allowed on a contract even if there is no express interest provision in the contract. Thus, even though the JVA did not specifically mention an interest obligation, such an obligation was imposed by statute and therefore essentially implied into the contract.[6]

As a third basis for finding new consideration, the district court focused on the fact that the JVA only included obligations to Heli Ops, not the Cains, and allowing the Cains to be parties in the Settlement Agreement was new consideration. 5 A.App. 1165:21-25. This ignored the fact that Heli Ops and the Cains were, for all practical purposes, one and the same. The Cains were the sole owners of Heli Ops; C4's principals dealt with the Cains; and the Cains paid the $1,000,000 to C4.

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[6] The Settlement Agreement provides that C4 was already obligated to pay the $20,000,000 to the Cains, "plus all accumulated interest." 5 A.App. 1119 (subparagraph 1.1). Thus, even the parties recognized an interest obligation under the original 2009 JVA and promissory note, despite the fact that those documents may not have contained express interest provisions.

Any doubt on this point is eliminated by the express language of the Settlement Agreement itself, which reflects the understanding and intent of all the parties. The first paragraph of the Settlement Agreement refers to "Peggy and Jeffrey Cain and Heli Ops International, LLC (hereinafter, the 'Cains')." 5 A.App. 1119. In other words, all the parties considered Peggy Cain, Jeffrey Cain and Heli Ops to constitute a single interested party, referred to as the "Cains," for purposes of recognizing C4's unpaid obligations.

On this same point, the Settlement Agreement recites that C4's obligation was due, and remained unpaid, to the Cains. *Id.* The agreement recited that, upon payment to the Cains, the Cains would have no further ownership interest in the bank account established under the joint venture agreement. 5 A.App. 1119 (subparagraph 1.2). The Cains also agreed to execute documentation necessary to reassign ownership interests in the account to C4. *Id.* These provisions obviously reflect the parties' clear understanding that the JVA gave Peggy and Jeffrey Cain interests in the account and in the CMOs. Otherwise, there would have been no reason for the parties to include Peggy and Jeffrey Cain in the Settlement Agreement, and there would have been no reason for the Cains to agree not to file a complaint against C4 and not to file grievances with the SEC or any Department of Justice.

Finally, the district court believed new consideration was provided to the Cains because Rawson signed the Settlement Agreement in his individual capacity,

even though he was not a party to the JVA and did not have any personal financial obligation under the JVA. 5 A.App. 1165:12-17. But the relevant question is not merely whether Rawson had express contractual obligations under the JVA. The real question is whether he already had legal obligations to Heli Ops and the Cains, including tort obligations, when he signed the Settlement Agreement in his individual capacity. He clearly did have obligations, or at least potential tort obligations, including alter ego obligations, fraud liability, and potential liability for punitive damages. Therefore, when he signed the Settlement Agreement, he and C4 were merely affirming and acknowledging obligations that already existed. 5 A.App. 1119. His signature on the Settlement Agreement did not provide the Cains with any new and additional consideration.

Accordingly, there were no bases for the district court's rejection of the Cains' argument that the Settlement Agreement did not provide new or separate consideration for the release.

For all of the foregoing reasons, the district court erred by ruling that the release had the effect of barring the Cains' lawsuit against Price and Shackelford. The district court's orders granting the defense motions should be reversed, and this case should be remanded for entry of an order granting Cains' motion for partial judgment on the pleadings (and thereby striking the affirmative defense based upon

the release). At the very least, the Cains should be allowed a trial regarding factual issues relating to the release.

2. The district court erred by awarding attorneys' fees

The district court awarded attorneys' fees to Price and Shackelford, and the Cains contend this was error. This court does not need to reach the merits of the district court's fee award if this court reverses the underlying judgment against the Cains. When a judgment is reversed, an award of attorneys' fees based upon the judgment must also be reversed. See *Gibby's Inc. v. Aylett,* 96 Nev. 678, 681, 615 P.2d 949, 951 (1980) (attorneys' fee award to respondent, as prevailing party, must be reversed where judgment is reversed); see also, e.g., *Loomis v. Lange Financial Corp.,* 109 Nev. 1121, 1129, 865 P.2d 1161, 1166 (1993) (fee award reversed where underlying judgment reversed). But if this court affirms the underlying judgment, the court should still reverse the fee award, which was independently erroneous for the reasons discussed below.

An award of attorneys' fees is generally reviewed for abuse of discretion. *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). But *de novo* review applies to whether a district court properly applied legal requirements. See *Yamaha Motor Co., USA v. Arnoult,* 114 Nev. 233, 251-52, 955 P.2d 661, 672-73 (1998) (award of fees reversed).

After obtaining dismissal of the Cains' complaint, Price and Shackelford moved for attorneys' fees. 6 A.App. 1210. They claimed entitlement to attorneys' fees based upon offers of judgment and NRS 18.010(2)(b); they claimed fees based upon a prevailing-party section in the Settlement Agreement. 6 A.App. 1212. The district court awarded fees only under NRS 18.010(2)(b), and expressly declined to reach the merits of the remaining two alternative theories. 6 A.App. 1450:16-19.

The court found: "The Court does not fault Plaintiffs, who were not paid under either the JVA or the SA, for seeking legal recourse." 6 A.App. 1451:1-2. The court then found that the Cains demonstrated "legitimacy of their dispute and general good faith." 6 A.App. 1451:3-4. Nonetheless, the district court found that Price and Shackelford were beneficiaries of the Settlement Agreement's release provision, and the lack of liability by Price and Shackelford was "obvious." 6 A.App. 1452:20-24. The district court concluded that the Cains' position "was unreasonable from the inception of the lawsuit through the granting of summary judgment." 6 A.App. 1453:20-22. As such, the district court found that the statute applied, and the court ordered the Cains to pay attorneys' fees in the amount of $95,843.56. 6 A.App. 1456:5-8.

Under NRS 18.010(2)(b), an award of attorneys' fees may be made where a complaint was brought or maintained without reasonable ground or to harass the prevailing party. The statute states that its intent is to punish and deter frivolous or

vexatious claims. *Id.* A claim is groundless under the statute if it is "not supported by any credible evidence at trial." *Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (emphasis added). A plaintiff's success in defending against dispositive motions tends to establish that the plaintiff's case was brought on reasonable grounds. See *id.* at 1353-54, 971 P.2d at 386.

In the present case, the Cains were the innocent victims of a scheme that defrauded them out of $1,000,000. The money was never returned, and the Cains never got any of the millions of dollars C4 and its principals had promised. The fraud continued when C4 and its principals induced the Cains into signing the Settlement Agreement, in exchange for illusory and meaningless promises that C4 never intended to keep and did not have the ability to keep.

The Cains then sued C4 and its principals. The Cains successfully defended against an onslaught of multiple dispositive motions filed by the defendants. Then, in early 2015, Judge Gibbons was elevated to the Court of Appeals, and a new judge was appointed to the bench and took Judge Gibbons's seat on the bench in Douglas County. Price and Shackelford were able to convince the new judge to turn everything around and to apply the release provision as a matter of law, granting third-party beneficiary status to Price and Shackelford, and granting them full immunity under the release provision.

The Cains' lawsuit clearly satisfies the "any credible evidence" standard, to avoid an award of attorneys' fees under the statute. If the release provision was so clear and unambiguous that it supported a judgment on the pleadings or a summary judgment in favor of Price and Shackelford, surely Judge Gibbons would have granted such relief early in the case. This simply did not occur. Even if this court somehow determines that Price and Shackelford get the advantage of the release provision, despite the fact that the Cains never received any of the money they should have received as consideration for the Settlement Agreement, it is impossible to conclude that the Cains' lawsuit was "not supported by any credible evidence," for purposes of an award of statutory attorneys' fees. The award must be reversed.

3. The district court erred by denying the Cains' motion to compel tax returns and financial information.

If this court reverses the summary judgment and remands for trial, the court may offer additional instruction to the district court, to avoid potential error on remand. See e.g., *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014) (court reversed on holdings of error, then offered additional instruction regarding other errors, to preclude repeat of errors on remand).

During discovery, the Cains filed a third motion to compel discovery. 3 A.App. 588. The motion dealt with three requests for production, which sought financial documents relating to the Cains' contention that money from the Cains was improperly diverted to C4's principals, and documents relevant to the claim for

punitive damages. 3 A.App. 590-91, 626-40. Price and Shackelford did not produce the documents. 3 A.App. 627-633. The motion to compel argued that the documents were relevant and not privileged. 3 A.App. 591-93. Price and Shackelford opposed the motion. 3 A.App. 662-68. The district court denied the motion, finding that the defendants had already adequately responded, and also finding that the documents were not discoverable on the Cains' claim for punitive damages. 4 A.App. 797-803.

Discovery orders are generally reviewed for abuse of discretion. *Club Vista Fin. Servs. v. District Court,* 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). *De novo* review applies to whether the district court used the proper legal standard. See *Staccato v. Valley Hosp.,* 123 Nev. 526, 530-31, 170 P.3d 503, 505-06 (2007).

The standard for discovery of documents is different from the standard for admissibility at trial. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the litigation. NRCP 26(b)(1). A request is acceptable if it is reasonably calculated to lead to the discovery of admissible evidence. *Id.* Nevada's discovery rules grant broad powers to litigants, promoting and expediting the trial of civil matters by allowing litigants an adequate means of discovery before trial. *Maheu v. District Court,* 88 Nev. 26, 42, 493 P.2d 709, 719 (1972). In the discovery context, the relevancy requirement "has been construed broadly to encompass any matter that bears on, or that reasonably could

lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).

In the present case, the Cains alleged that C4's principals diverted the $1,000,000 loan money to their own personal accounts, and these contentions related to Price and Shackelford. The requests for production merely sought documents related to these claims. The documents were clearly relevant and not privileged. Therefore, they were discoverable.

Moreover, the documents were certainly discoverable regarding the Cains' claim for punitive damages. The complaint was based, in part, on allegations of fraud. Under Nevada law, punitive damages may be awarded against a defendant who commits fraud. NRS 42.005(1). The district court found that the Cains' requests for production, which included requests for the defendants' tax returns, were improper under *Hetter v. District Court,* 110 Nev. 513, 874 P.2d 762 (1994), which requires a plaintiff to make a preliminary showing on a fraud claim, before obtaining otherwise confidential tax returns or financial records from the defendant. 4 A.App. 801-802. The district court denied discovery of these documents, finding that none of the Cains' allegations demonstrated a basis for finding fraud on the part of Price or Shackelford. 4 A.App. 801:23-26.

The district court's analysis and reliance on *Hetter* was misplaced. In *Hetter*, a patient sued her plastic surgeon for using before-and-after pictures on the surgeon's

brochures, without the patient's consent. The *Hetter* opinion dealt with several discovery matters, including the plaintiff's request for the doctor to disclose his tax returns for his medical practice. The *Hetter* court noted that production of income tax returns is not always precluded, and such returns can be relevant in a case involving potential punitive damages. Nevertheless, the court also recognized that claims for punitive damages can be easily asserted and can result in abuse or harassment. Consequently, the court held that before tax returns are discoverable on the issue of punitive damages, "the plaintiff must demonstrate some factual basis for its punitive damages claim." *Id.* at 520, 874 P.2d at 866.

In the more than 20 years since *Hetter*, this court has never interpreted *Hetter* as requiring a full-blown trial or prove-up showing on a punitive damages claim. *Hetter* only requires a plaintiff to demonstrate "some factual basis" for its punitive damages claim. Federal courts have interpreted this phrase in *Hetter* as requiring a plaintiff to make only a prima facie showing of merit on the punitive damages claim before obtaining discovery of a defendant's financial information. See *Sherwin v. Infinity Auto Ins. Co.,* 2011 WL 4500883 (D. Nevada 2011).

In the present case, the Cains submitted documentation from C4 and others, showing that C4 distributed money to corporate principals almost immediately after the money was received from the Cains. The Cains also showed that C4 and its principals orchestrated a similar fraudulent scheme with another lender, at virtually

the same time, dealing with the same CMOs that C4 promised to buy for the Cains. This evidence was more than enough to establish a prima facie claim for punitive damages based upon fraud against Shackelford and Price, who were principals in the transactions. Discovery should have been allowed, and the district court erred as a matter of law by precluding the discovery.

4. The district court erred by ruling that it would try the issues of personal jurisdiction and alter ego prior to the jury trial

This court reviews a decision regarding bifurcation of a trial for abuse of discretion. E.g., *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 621, 173 P.3d 707, 712 (2007) (district court did not use its discretion by bifurcating counterclaim for equitable rescission).

This issue had its genesis early in the case, when the individual defendants asserted lack of personal jurisdiction. 1 A.App. 20-21. Specifically, the individual defendants asserted that they had insufficient contacts with Nevada, for purposes of personal jurisdiction. *Id.*

On January 19, 2012, Judge Gibbons denied dismissal for lack of personal jurisdiction. 1 A.App. 50-52. Judge Gibbons noted that a court may dispose of such a motion in three ways: (1) based solely upon the pleadings in the pretrial motion; (2) defer a decision until discovery or a hearing on the motion; or (3) if jurisdictional facts are intertwined with the merits of the case, the court may defer a determination until trial. 1 A.App. 50:20-27. Judge Gibbons noted that the evidence included a

settlement agreement containing a Douglas County, Nevada, choice-of-forum provision. 1 A.App. 51:13-14. The judge questioned whether this provision would apply to the five defendants who were not parties to the settlement agreement, and their involvement in the loan transaction was unclear. 1 A.App. 51:15-17. Judge Gibbons found that the Cains did present a prima facie showing of jurisdictional facts, sufficient to prevail on the motion to dismiss. 1 A.App. 51:24-26. Accordingly, Judge Gibbons denied the motion to dismiss, but he did so without prejudice to renewal of the motion after limited discovery. 1 A.App. 52:1-14.

In July of 2012, the individual defendants filed a renewed motion to dismiss, again asserting lack of personal jurisdiction. 1 A.App. 53, 61-70. The motion was supported by 60 pages of affidavits and exhibits. 1 A.App. 76-137. The Cains opposed the motion, providing 40 exhibits of their own. 1 A.App. 138:25 (reference to Exhibits 1-40). The Cains also provided several affidavits. 1 A.App. 165-93.

On November 20, 2012, Judge Gibbons once again denied dismissal on personal jurisdiction grounds. 2 A.App. 262. Judge Gibbons summarized the background facts and all of the evidence presented on the personal jurisdiction issue. 2 A.App. 263-67. He noted evidence showing that the individual defendants had knowledge of the loan transaction with the Cains before the money was loaned and after receipt of the funds by C4; that all the individual defendants received some of

the money; and that the Cains have not recovered any of the money under the original agreements or the subsequent settlement agreement. 2 A.App. 269.

Judge Gibbons then noted the existence of additional evidence showing the involvement of the individual defendants both before and after the Cain transaction, "showing they were aware of the loan arrangements." 2 A.App. 270:7-11. The individual defendants "engaged in conducting business through C4, a corporation created under the laws of the State of Nevada." 2 A.App. 270:11-13. The judge also noted that it was foreseeable that C4 would obtain Nevada customers; that the Cains relied upon the background skills and abilities of the individual defendants; that the individual defendants delegated some decision-making power to Rawson; that the individual defendants may have known about the settlement agreement and its provision for dispute resolution in Nevada; and that Nevada has an interest in allowing the Cains, who are Nevada residents, to obtain a remedy in Nevada. 2 A.App. 270:13-271:2.

Taking everything into consideration, Judge Gibbons found that resolving the case in Nevada was "the most efficient use of judicial resources, and is reasonable." 2 A.App. 271:8-11. Judge Gibbons also found: "Based on these and other facts presented, the court finds the Five Defendants could, or should have, reasonably expected to answer Cain's claims in a Nevada court." 2 A.App. 271:16-18. The judge expressly found that the evidence supports a prima facie showing of

jurisdictional facts sufficient to defeat the motion. 2 A.App. 271:20-23. Therefore, the judge denied the motion to dismiss, but the judge did indicate that the Cains must still establish personal jurisdiction at trial. 2 A.App. 271:21-272:4.

Once Judge Gibbons was promoted to the Court of Appeals and was replaced by a brand new district judge, the defendants again attempted to take advantage of the new judicial appointment, and they sought to revisit the issue that Judge Gibbons had twice decided against them. In July of 2015, defendant Baker filed a motion to bifurcate the jurisdictional issue, and to determine the issue (again) before trial. 4 A.App. 864. Price and Shackelford joined in the motion. 4 A.App. 954. The Cains opposed it. 4 A.App. 948. Amazingly, despite the fact that Judge Gibbons had denied personal jurisdictional challenges twice, Judge Gregory granted the motion, bifurcated the issue of personal jurisdiction, and determined that this issue would be tried separately from issues that were going to the jury. 4 A.App. 980. The new judge set the case for a "full evidentiary hearing on the issues of personal jurisdiction and alter ego," to be held before trial.[7] 4 A.App. 981:6-9.

The case of *Trump v. District Court,* 109 Nev. 687, 857 P.2d 740 (1993), involved a New Jersey casino owner who lured a Las Vegas casino executive from his Las Vegas employer. The Las Vegas employer sued the New Jersey casino

[7] Judge Gregory subsequently dismissed the case in its entirety, before holding the evidentiary hearing on personal jurisdiction. If this case is remanded for trial, presumably the judge intends to hold an evidentiary hearing before trial.

owner in Clark County, and the defendant challenged personal jurisdiction. The district court denied the jurisdictional attack, and the defendant filed a writ petition.

This court denied the petition, finding that the plaintiff had established a prima facie case of personal jurisdiction over the New Jersey casino owner. In doing so, the *Trump* court held that if a plaintiff makes a prima facie case of jurisdiction prior to trial, "the plaintiff must still prove personal jurisdiction at trial by a preponderance of the evidence." 109 Nev. at 693, 857 P.2d at 744 (emphasis added). The court also noted that a plaintiff does not have the benefit of the resolved facts regarding jurisdiction in his or her favor "at trial." *Id.*

The original ruling by Judge Gibbons relied upon *Trump* and established the rule in this case that, although the Cains showed a prima facie case for personal jurisdiction, the Cains still needed to prove jurisdiction at trial. 2 A.App. 271-72. When a district court has made a decision in a case, the decision should be followed in future proceedings in the case, unless a party appropriately follows procedural rules allowing an attack on the prior order, such as a proper motion for reconsideration. A prior judge's decision should be respected, and it should not be discarded in the absence of extreme or unusual circumstances. Here, Price and Shackelford joined in Baker's motion to bifurcate. They presented no legitimate argument for discarding the decision Judge Gibbons had made nearly three years earlier. This court's *Trump* decision holds that the ultimate decision may be made

"at trial," and Judge Gibbons followed *Trump.* There was no basis for Judge Gregory's later decision to remove the issue from the trial.

Additionally, although a district court may have discretion to bifurcate issues, the discretion should not be abused. In the present case, the issue of personal jurisdiction was intimately intertwined with the alter ego issue. The activities of corporate officers and directors, such as Price and Shackelford, cannot be considered in a vacuum when determining issues of personal jurisdiction and alter ego liability. Otherwise, there is a potential for inconsistent or contrary decisions on the issues. The prejudice to the Cains will be profound if the issues of personal jurisdiction and alter ego liability are tried separately in two separate trials, with two separate finders of fact. Under these circumstances, the district court abused its discretion by bifurcating the trial.

5. The district court erred by granting a motion to quash subpoenas and by awarding sanctions.

A district court's decision on a motion to quash a subpoena is reviewed for abuse of discretion. See e.g. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). But this court conducts *de novo* review of whether a district court properly applied the law in quashing a subpoena. E.g. *Jaeger v. State,* 113 Nev. 1275, 1280-81, 948 P.2d 1185, 1188-89 (1997).

In early August of 2015, the Cains filed a motion for issuance of commissions for out-of-state depositions. 4 A.App. 957. The Cains were seeking C4's bank records from two branch banks in Texas. *Id.* The Cains established that they had been attempting to obtain the records; their efforts were stalled because of defendant Price's delays; and the records were needed in the case. 4 A.App. 957-59. Price and Shackelford did not oppose the motion. 5 A.App. 1147:27-1148:1. The district court granted the motion on September 29, 2015, finding good cause and ordering the court clerk to issue the commissions requested by the Cains. 5 A.App. 1147-48. As ordered by the court, the clerk issued the commission for the bank custodians of records on October 8, 2015. 6 A.App. 1435-36 (Bank of America), 1437-38 (Wells Fargo). The records depositions were scheduled for November 30, 2015, in Texas. *Id.*

After this process was already under way (pursuant to the court's order), the district court subsequently entered its order granting summary judgment against the Cains. 5 A.App. 1150. But the records depositions were apparently not cancelled, and notices of subpoenas were subsequently served. 6 A.App. 1410.

Rather than simply contacting the Cains' counsel to discuss the issue, Price and Shackelford filed a motion to quash the subpoenas, and for sanctions. 6 A.App. 1401. The Cains filed opposition, asserting various grounds for denial of the motion. 6 A.App. 1426-33. Among other things, the Cains argued that Price and Shackelford

had failed to comply with mandatory "meet and confer" requirements. 6 A.App. 1430-31.

The district court granted the motion to quash. 7 A.App. 1474. Amazingly, the district court found that the subpoenas were not authorized by the court's earlier order granting the commissions for out-of-state depositions. 7 A.App. 1476:18-22. The district court subsequently entered an order granting attorneys' fees as a sanction against the Cains, in the amount of $9,514. 7 A.App. 1585-89. The Cains appealed. 7 A.App. 1599 (Docket Number 70864).

Preliminarily, this court does not need to reach the merits of the district court's post-judgment rulings on the subpoenas and the fee award, if this court reverses the underlying judgment against the Cains. See *Gibby's*, 96 Nev. at 681, 615 P.2d at 951. The district court's orders quashing the subpoenas and awarding sanctions were premised entirely upon the district court's perception that the Cains were improperly seeking discovery after the court had granted summary judgment in favor of Price and Shackelford. 7 A.App. 1474. Consequently, if the summary judgment falls, the district court's foundation for its orders quashing subpoenas and imposing sanctions must also fall.

As the Cains noted in their opposition, the entire issue regarding the subpoenas was a result of confusion resulting from the sequence of events involving issuance of the commissions (pursuant to the court's order), scheduling of the

depositions, issuance of the summary judgment order, and confusion involving activities by the Cains' counsel in Texas. 6 A.App. 1426-31. As the Cains informed the district court, Price and Shackelford never attempted to meet and confer with the Cains' counsel prior to filing the motion to quash and for sanctions. 6 A.App. 1430-31.

Although the motion to quash did not cite a rule governing circumstances in which a subpoena may be quashed, the motion accused the Cains of conducting "impermissible discovery" and the "use of post-judgment discovery." 6 A.App. 1405:4 and 1405:28-1406:1. Thus, the motion to quash framed the dispute as a discovery matter. Furthermore, the motion sought a protective order. 6 A.App. 1401. Under NRCP 26(c), on such a discovery motion there is a mandatory certification that the moving party has in good faith conferred or attempted to confer with the other party, in an attempt to resolve the dispute without court action.

The Cains' opposition informed the district court that Price and Shackelford did not attempt to meet and confer before filing the motion. Based upon the other arguments in the Cains' opposition, it appears quite obvious that a pre-motion attempt to meet and confer would probably have resolved the dispute without the need for the motion, and without the need for Price and Shackelford to incur attorneys' fees dealing with out-of-state bank records discovery to which they never objected in the first place. Unfortunately, the district court's order ignored the meet-

and-confer requirement, and ignored the failure by Price and Shackelford to comply with the requirement.

In any event, the record reflects that the subpoenas and the notice were directly related to the bank records that the Cains had properly sought prior to the date when summary judgment was granted—discovery that was specifically authorized by the court's order granting the out-of-state commissions. In the flurry of activity after the court granted summary judgment, the court-authorized effort to obtain the bank records was unfortunately not immediately halted. This certainly cannot constitute grounds for imposing a sanction of nearly $10,000 against the Cains. Accordingly, the sanction award should be reversed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, the affirmative defense based upon the release should be stricken, and this case should be remanded for further proceedings (including resolution of motions that were pending when the case was dismissed) and for a trial on the merits, with instructions regarding procedural errors discussed above.

DATED: November 29, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman in 14 point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, beginning with the statement of the case [NRAP 32(a)(7)(C)] and excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,152 words.

Finally, 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 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, if any, of the transcript or appendix 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: 11/29/16

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellants' Opening Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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In addition, 7 volumes of Appellants' Appendix, along with a disk, were filed by hand delivery with the Clerk of the Nevada Supreme Court and disks of the Appendix were sent by U.S. Mail to:

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