IN THE SUPREME COURT OF NEVADA DOCKET NO. 71045

HALL PRANGLE & SCHOONVELD, LLC, MICHAEL PRANGLE, ESQ., KENNETH M. WEBSTER, ESQ. AND JOHN BEMIS, ESQ.
Petitioners,

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Elizabeth A. Brown
Clerk of Supreme Court

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, HONORABLE JUDGE RICHARD SCOTTI
Respondent,

-and-

MISTY PETERSON, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JANE DOE
Real Party in Interest

PETITION FOR EXTRAORDINARY WRIT RELIEF

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

DISTRICT COURT CASE NO.: A-09-595780-C

REAL PARTY IN INTEREST'S ANSWERING BRIEF

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Docket 71045 Document 2016-32530

NRAP 26.1 DISCLOSURE

Misty Peterson, as Special Administrator of the Estate of Jane Doe, identified by Hall Prangle as the "Real Party In Interest", by and through its attorneys of record Murdock & Associates, Chtd., and Eckley M. Keach, Chtd. hereby submits its Disclosure Statement pursuant to NRAP 26.1

The undersigned counsel of record certifies that there are no parent corporations and/or publicly held company that owns 10% or more of the party's stock.

The Estate of Jane Doe, by and through its Special Administrator, Misty Petersen, has been represented by the law firms Murdock & Associates, Chtd., and Eckley M. Keach, Chtd. in all proceedings before the District Court and in the instant matter.

DATED this 17th day of October, 2016.

MURDOCK & ASSOCIATES, CHTD.
ECKLEY M. KEACH, CHTD.

/s/ Robert E. Murdock

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I. INTRODUCTION

This case is over. It has been over for some time. Despite that, Hall Prangle, the law firm involved in part of the defense of the case, feels aggrieved by Judge Scotti's Order of **November 2015**. It waited until **August of 2016** to file the Writ after the case had long been dismissed. It is untimely and should not be accepted. The Writ is meritless. It attempts to spin misleading statements to the Court into zealous advocacy. Simply put, it should never have been filed. It only serves to make clear that what Hall Prangle did should have subjected the firm to much harsher sanctions. Judge Scotti's slap on the wrist was obviously not enough. This Court thus needs to step in. Hall Prangle's conduct is a stain on the profession. It is sad.

It should also be pointed out that the "Real Party in Interest" here is not really Misty Peterson, as Special Administrator of the Estate of Jane Doe despite what Hall Prangle states. The Estate has no interest at all in this matter as it only has to do with Hall Prangle. Whether Hall Prangle is successful or not has no bearing on the Estate.

That being said, per this Court's Order of September 16, 2016, as Officers of the Court, counsel for Ms. Petersen are providing this Court with information in order to aid its determination of the matter.

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction per **Watson Rounds, P.C. v. Eighth Judicial Dist. Court,** 358 P.3d 228 (Nev. 2015)(finding that extraordinary writs are the proper way for an attorney to appeal attorney sanctions).

III. STANDARD OF REVIEW

The court reviews sanctions for an abuse of discretion. See **Watson Rounds, P.C. v. Eighth Judicial Dist. Court**, 358 P.3d 228, 231 (Nev. 2015). "An abuse of discretion occurs when the district court's decision is not supported by substantial evidence. **Finkel v. Cashman Prof'l, Inc.**, 128 Nev. ___, ___, 270 P.3d 1259, 1262 (2012). "'Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion.'" Id. (quoting *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001))." **Otak Nev., LLC v. Eighth Judicial Dist. Court of Nev**., 312 P.3d 491, 496 (Nev. 2013).

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether A Writ Filed Nine Months After The Sanction Was Ordered And Six Months After The Case Was Dismissed Is Timely.
2. Whether The District Court Abused Its Discretion In Sanctioning Hall Prangle For Misleading The Court.

V. <u>LEGAL ARGUMENT</u>

1. Hall Prangle Waited Nine Months to File Its Writ—It Must Not Feel That Aggrieved.

Procedurally, there is no issue with how Hall Prangle has "appealed" this issue.[1] However, though the writ statute (NRS 34.150 et seq) does not have a time limitation, and, this Court has allowed writs to be filed months after a judgment (see **Widdis v. Second Judicial Dist. Court**, 114 Nev. 1224, 1227-1228 (Nev. 1998)--see also, **State v. Eighth Judicial Dist. Court**, 118 Nev. 140, 148 (Nev. 2002)), there is something unseemly about the matter being basically over, the settlement fulfilled, and, a writ being filed by defense counsel from an Order <u>from late November 2015</u>. Though there is no real prejudice to any party here, the delay seemingly is *res ispsa loquitor* that Hall Prangle does not need a "speedy" remedy.[2]

Though the Legislature has not identified a bright line rule regarding the time for filing a Writ, common sense must enter into the analysis at some point.

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[1] **Watson Rounds, P.C. v. Eighth Judicial Dist. Court**, 358 P.3d 228 (Nev. 2015)(finding that extraordinary writs are the proper way for an attorney to appeal attorney sanctions).

[2] Plaintiff is not making an actual "laches" argument here because laches requires prejudice (see **Memory Gardens v. Pet Ponderosas**, 88 Nev. 1, 4, 492 P.2d 123, 124 (1972)) and there is no demonstrable prejudice. While the delay certainly caused the Estate's counsel to have to spend an inordinate amount of time trying to recall the events of this matter in order to draft this Brief, such is not really prejudice. That being said, this Court must draw some line for this type of Writ and nine months is simply too long.

Would the Court allow a year? Two years? Could Hall Prangle wait Five years? If the only issue is prejudice (as demonstrated by **Widdis**, supra), there would be no prejudice in ten years let alone five. The issues may be somewhat stale, but, the "prejudice" issue is the same now as it would be in ten years.

This Court should analyze each Writ individually and determine what would be a reasonable time for the filing of same. In this matter, 30 days from the Order, or, 30 days from the dismissal of the underlying action seems reasonable. 90 days from the Order aggrieved from is certainly the outer limits. And, nine months, well, there is no rational reason to allow the Writ to be filed at that point.

It is hard to fathom why Hall Prangle—who apparently feels incredibly aggrieved because Judge Scotti believed their conduct amounted to a violation of Rule 3.3 *but did not sanction them monetarily for such conduct*—did not file the Writ immediately. The original Order from Judge Scotti was signed on November 4, 2015. PA1309-1347. It was entered on the same date. PA1348-1389. No writ was filed then.

Instead, the Valley entities filed a Motion for Rehearing wherein the exact same arguments made by Hall Prangle in the Writ were argued. PA1390-1589. See Motion for Reconsideration of This Court's November 4, 2015 Order at PA1406-1411, Reply in Support of Motion for Reconsideration at PA1832-PA1836. Judge Scotti's denial of the Motion for Reconsideration on December 10,

2015 wherein Judge Scotti stated quite clearly that "Though the Court addressed instances of professional misconduct in its findings, the sanctions imposed upon Defendant Centennial are for Centennial's own actions." PA1839-1841. The Order Denying Motion for Reconsideration at 2:8-9 (PA1840), makes clear that **Hall Prangle's conduct was not punished**. Notwithstanding the lack of punishment, Judge Scotti also made clear that Hall Prangle's denials and inconsistencies were "odiferous." Id. at 2:12-14 (PA1840). So, while Judge Scotti certainly did take notice of Hall Prangle's conduct, neither the firm as a whole nor its individual attorneys were sanctioned in any way.

Nevertheless, *as of December 10, 2015*, Hall Prangle was aware that Judge Scotti was not going to reverse himself. And, as of the date of the original order (November 4, 2015), the firm was well aware that Judge Scotti thought their conduct amounted to a violation of Rule 3.3. If the firm was so distressed by Judge Scotti's "findings," it should have filed a writ immediately. Instead, **it waited Nine Months.** Hall Prangle did not tell this Court why it waited so long in the Writ (or in the Motion to Consolidate). However, it is quite possible that the only reason it was filed is that the Valley entities figured out that the Valley appeal (See Dkt 70083) could have problems in that there is no actual controversy for that appeal and needed the Writ to "create" a controversy for the Court to hear that appeal. Although the latter is supposition, unless Hall Prangle can actually explain why it

took nine months to file its Writ, supposition is necessary. Perhaps Hall Prangle has a good reason as to why it took nine months to file a Writ—perhaps not.

The underlying case was set for trial on January 4, 2016. The case settled. However, it took some time for the various stipulations to be entered. Ultimately, the stipulation to dismiss was signed by Judge Scotti on February 18, 2016 but was filed on February 29, 2016. PA1848-1853. Hence, an appeal was due by March 30, 2016. **Valley Health did indeed file their appeal on that day**. See Dkt 16-10605. Even then no Writ was filed by Hall Prangle.

August 16, 2016. That is the date when Hall Prangle filed its writ based upon Judge Scotti's Order of November 4, 2015 (and presumably Judge Scotti's Order Denying the Motion for Reconsideration of December 10, 2015 (PA1839-PA1841)). Hall Prangle gave itself over nine months to file a Writ that it knew about and was so aggrieved about. Though there is no hard and fast rule about when a Writ can be filed, at some point, the Court must draw a line. At this point in time, when the case has been over (save for the Valley Health sanction appeal) for nine months, and Hall Prangle failed to even file their Writ along with the appeal of the Valley entities on March 30, 2016, there is no compelling reason or even rationale to hear this matter now.

Between March 30, 2016 and August 16, 2016, Hall Prangle was silent. Hall Prangle's due date for the filing of the Writ should not be six months after the

appeal was filed by Valley and nine months after the original Order. Allowing this type of a Writ (which is basically an appeal for attorney sanctions) to be filed in such a tardy way would make a mockery of the Writ process. It would effectively aid those who slumber on their rights.

Writs are discretionary. See NRAP 21(b)(1); **Smith v. Eighth Judicial Dist. Court**, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (stating that a petition for extraordinary writ relief is **purely discretionary** with this court). Though the filing of a Writ in this instance was available as an "appeal" of the "sanctions" against Hall Prangle, that does not mean that this Court must accept the Writ: "Even when mandamus is available as a remedy, we are not compelled to issue the writ because it is purely discretionary." **State ex. rel. Dep't Transp. v. Thompson**, 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983).

This Court should deny the Writ on the delay alone. A nine month delay on a matter where counsel is so "wronged" does not warrant this Court's attention. There is no compelling reason for the Court to hear this matter *now*. If it was so important for this Court to hear, **Hall Prangle should have filed the Writ immediately**. Hall Prangle slept on their rights and wants this Court to awaken them. The delay makes clear that the Writ was filed for some other reason, and, before this Court even entertains the idea of accepting the Writ, it should satisfy itself that there is no ulterior improper purpose for the Writ to have been filed.

2. Hall Prangle Was On Notice That Plaintiff Was Alleging Hall Prangle Violated Rule 3.3.

On May 15, 2015, Mr. Murdock wrote to Mr. Bemis about issues specifically related to Hall Prangle's statements about their statement that "there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe." PA1799-1801. Mr. Murdock started off the letter specifically referencing Rule 3.3 stating:

> "Dear Mr. Bemis,
>
> As you are aware, Rule 3.3 of the Nevada Rules of Professional Conduct states "(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.""

PA1799.

On May 18, 2015, Plaintiff[3] filed a Motion for Summary Judgment in this matter and, **within the first two paragraphs of the Motion** specifically advised that Hall Prangle violated Rule 3.3 and asked the Court to sua sponte take action about the misleading statements in their briefs:

> "In the fall winter of 2014, the UHS Defendants (Centennial, Valley Health Systems, and UHS collectively "UHS") came to this Court and argued that the actions of Steven Farmer (hereinafter "Farmer") weren't remotely foreseeable as Farmer had done nothing at all to arouse suspicion. What was fascinating at the time was that the UHS Defendants simply told this Court the aforementioned without any Affidavits whatsoever. The UHS Defendants specifically told this

[3] Rather than refer to itself as "Real Party in Interest," the Estate will use the term "Plaintiff" since that is the term used below.

Court, *without an Affidavit*, that Farmer's conduct was not foreseeable in that "there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial Hills on notice that Mr. Farmer would assault a patient." Centennial Opp. MSJ at 9. Now, we know why there was no Affidavit--**IT WAS FALSE**. Incredibly, the UHS Defendants recently reiterated this fiction before the Nevada Supreme Court. See Writ of Mandamus at 14-15. Plaintiff recently came into the possession of Nurse Margaret Wolfe's (hereinafter "Wolfe") 5/30/08 statement to the LVMPD. There is no way the UHS Defendants did not have this document—as the UHS Defendants' counsel was a consultant to the criminal attorneys of Farmer and it would be hard to fathom that a criminal defendant's consultant would not have all of the statements.

While **the conduct of the UHS Defendants is seriously an issue for this Court's review in that Mr. Bemis has violated Nev. R. Pro. Resp. 3.3 (and this Court should *sua sponte* take action regarding same**), the issue herein is that there is no genuine issue of material fact regarding foreseeability. Summary judgment on the Affirmative Defense of NRS 41.745 must be granted and the UHS Defendants must be vicariously liable for the actions of Farmer. The UHS Defendants were well on notice of Farmer's actions."

PA1804.

The Brief for the Evidentiary Hearing filed by Plaintiff on August 26, 2015 again is specific that Plaintiff is asking the court to find Hall Prangle violated Rule 3.3:

"Now in terms of misleading look at the timing again. **Rule 3.3 of the Nevada Rules of Professional Conduct states "(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."** Giving Centennial every benefit of the doubt, at the very least, as of May of 2013, Centennial had the Wolfe and Murray LVMPD Statements, knew that Nurse Murray discussed a sitter situation with Farmer and Nurse Wolfe discussed what Nurse Sumera told her, and they knew it "could

> be relevant" to Plaintiff's case. Still, Centennial and its counsel told this Court in October of 2014, a minimum of eighteen (18) months after admitting they had the criminal file with the names and statements, that "In the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient." CH. Opp. to MSJ at 9. That was simply untrue. Then, to make matters worse, Centennial filed a Writ in May 2015 with the Nevada Supreme Court and made the same statement: Centennial "urged that there were no known prior acts or any other circumstances that could have put Centennial on notice that Farmer would sexually assault Ms. Doe." Writ at 14-15. That was simply untrue. Centennial concedes that it knew the witnesses and documents could be relevant to Plaintiff's case. So, telling this Court and the Nevada Supreme Court that Centennial had no knowledge about any issues with Farmer, was misleading. And, intentionally so."

Plaintiff's Evidentiary Hearing Brf. At 9: 5-25 (PA0744).

Despite being on notice of its Rule 3.3 problems, Hall Prangle never filed a brief disputing Plaintiff's allegations (in any pleading) until after Judge Scotti's Order. See, e.g., Defendant's Evidentiary Hearing Brief PA0612-PA0735. The failure of a party to respond to arguments can be taken as an admission of those arguments. See **Bates v. Chronister**, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the failure to respond to an argument as a confession of error). Hence, by failing to respond to the Rule 3.3 issue when it was raised time and again by Plaintiff should act as a waiver of same by Hall Prangle.

Additionally, the failure to respond to the argument goes to the issue of "notice" that Hall Prangle argues. Hall Prangle argues that it was entitled to specific notice that the Court was going to decide the 3.3 issue. However, Hall

Prangle forgets that Plaintiff had specifically brought up the issue in its pleadings. Hence, Hall Prangle had notice—it just decided to not respond.

However, though Hall Prangle did not respond in writing, at the Evidentiary Hearing, Mr. Prangle took on the issue directly, as did the Court. See PA1179-1182. Though neither Mr. Prangle nor Judge Scotti mentioned the Rule by name, both were talking about the alleged "misleading statements." See PA1179 and PA1182.

The Rule 3.3 issue did not come out of thin air as is suggested by Hall Prangle. Plaintiff specifically brought up the issue (time and again). So, when Judge Scotti determined that Hall Prangle had violated Rule 3.3 in the Order (See PA1309-1347), Hall Prangle could not have been surprised since Mr. Prangle specifically argued about the misleading statements at the evidentiary hearing (PA1179-1182). Curiously, Mr. Prangle never once asked for a separate hearing about Rule 3.3 nor did he ask for a continuance or anything else. He never brought up due process until afterwards. Instead, Mr. Prangle was well aware that the Court was interested in hearing issues relating to the alleged misleading statements, and, heard arguments related to same (PA1179-1189). These "Monday morning Quarterback" claims have no depth and are, in a sense, just as misleading as the initial statements since Mr. Prangle argued the misleading issue at the hearing and never once complained about due process until after the Order.

Hall Prangle is correct that it is entitled to due process—but it is not entitled to *extraordinary* process. Hall Prangle seems to believe that Judge Scotti should have specifically told Hall Prangle that he was going to analyze the matter with Rule 3.3 in mind. This may be true if Plaintiff had not placed Hall Prangle on notice—but, Hall Prangle was clearly on notice. One can't put their head in the sand to avoid notice.

There is no question that all attorneys, including the lawyers at Hall Prangle, owe a duty of candor to the Court. That duty is fulfilled by being candid about law and fact. Rule 3.3 requires such. And, Rule 3.3 is not advisory and is not commentary. It is a Rule that lawyers, as officers of the Court, must follow. Without it, attorneys are no more than hired guns willing to do any and all for a particular client regardless of the law. The point is, Hall Prangle, and all counsel, well know that their actions are guided by the Rules. And, Plaintiff specifically alleged that Hall Prangle violated same.

In addition to Rule 3.3, District Courts have an inherent power to sanction attorneys. **Emerson v. Eighth Judicial Dist. Court**, 127 Nev. 672, 680 (Nev. 2011). This Court has certainly accepted a violation of Rule 3.3 as a basis for sanctions. See **Bahena v. Goodyear Tire & Rubber Co**., 126 Nev. 243 (Nev. 2010); **Bahena v. Goodyear Tire & Rubber Co**., 126 Nev. 606 (Nev. 2010)(**Bahena II**). In **Bahena II**, This Court specifically made clear that though a

lawyer's statements are not evidence, a district court must be able to rely upon same for their truthfulness based upon the duty of candor in Rule 3.3. Id. at 610.

The point is, as Officers of the Court, Hall Prangle was well aware of Rule 3.3 and was well aware of its duties related to same. Hall Prangle was also well aware that Plaintiff was alleging they had violated Rule 3.3 with misleading statements. Though Hall Prangle did not respond to same in writing, Hall Prangle did argue the issue of the misleading statements to Judge Scotti at the Evidentiary Hearing. Mr. Prangle argued all about the statements and argued that he was not trying to mislead the Court PA1179-1182.

Accordingly, for Hall Prangle to feign notice now is simply, well, misleading.

3. Hall Prangle Intentionally Tried To Mislead The Court (and Plaintiff)

This is a fairly simple matter. In essence, Hall Prangle objects to Judge Scotti's finding that it mislead the Court per Rule 3.3 of the RPR. Writ at p. 1, 2, 33. Hall Prangle disputes Judge Scotti's finding. Hall Prangle is wrong. Judge Scotti made his ruling via a Motion to Strike the Answer of Hall Prangle's client. Judge Scotti read probably hundreds (if not more) of pages of documents. He held an evidentiary hearing. He witnessed the body language of Mr. Bemis on the witness stand, and, of Mr. Prangle testifying while not on the stand. Judge Scotti's decision came in the form of a detailed 38 page Order where he goes through his

detailed factual findings. PA1309-1347. In effect, it is based upon Hall Prangle's knowledge of three witnesses and two witness statements that completely contradict Hall Prangle's statements to the District Court and to the Supreme Court in a prior Writ.

The underlying case involved the sexual assault of Jane Doe at Centennial Hills Hospital by a CNA. In a civil case related to same, the issue of foreseeability is primary. See generally, **Doud v. Las Vegas Hilton Corp**., 109 Nev. 1096, 864 P.2d 796, (1993); **Scialabba v. Brandise Const. Co**., 112 Nev. 965, 921 P.2d 928 (1996); **Early v. N.L.V. Casino Corp**., 100 Nev. 200, 678 P.2d 683 1984); NRS 41.745. So, obviously, if witnesses would testify about issues related to foreseeability, such is relevant to the case.

There are two statements by Hall Prangle that are at issue here. The first came in an Opposition to a Motion for Summary Judgment dated October 14, 2014, Hall Prangle stated:

> "there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient."

PA0107 (emphasis added). On a writ to the Supreme Court (not this one, but a prior one dated April 27, 2015), Hall Prangle doubled down about what it had said in the Opposition (above) and told the Court:

> "Centennial and UHS… urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe."

PA0386-0387. The problem was, when these statements were made, Hall Prangle knew that the statements were not true. Importantly, the statements were not made in a vacuum. Instead, they were made while Centennial (and Hall Prangle) failed to provide documents and witnesses that they were mandated to via NRCP 16.1 and which ultimately led to the striking of Centennial's Answer.

When Hall Prangle filed the Opposition above on October 14, 2014, it was aware of evidence that it had not disclosed to Plaintiff which rendered the statement false. And, upon being caught, that is when Judge Scotti saw what had happened and what Hall Pringle was doing.

There are three witnesses and two statements that are at the heart of this matter. The witnesses are Christine Murray, Margaret Wolfe, and Ray Sumera. Each was a nurse at Centennial Hills. The statements were police statements of Christine Murray and Margaret Wolfe. The statements were given to the Police in relation to the sexual assault of RC[4] by Farmer which had happened in the same time frame as Farmer's sexual assault of Jane Doe. The difference is that RC reported the incident right away to Centennial and the LVMPD. Jane Doe reported her incident to the police several weeks later upon seeing Farmer on the news.

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[4] RC was a patient who was also sexually assaulted by Farmer. Her real name is within the record.

However, in the civil cases related to negligence, whether it was RC or Jane Doe, <u>the same issues of foreseeability were present</u>. So, be it in the RC or Jane Doe cases, statements of witnesses that contained matters relating to foreseeability would be relevant to inquiries.

Hall Prangle was retained in the RC case virtually immediately on May 22, 2008. PA0996. Hall Prangle interviewed Nurse Murray, Nurse Wolfe and Nurse Sumera. Id. at 16-24. Though notes of the interviews and internal memos related to same are work product (PA1055), any attorney who knows basic law in Nevada would know to ask about foreseeability and issues related to foreseeability, such as, had Farmer ever done anything like this before. Hall Prangle certainly was aware of this and at least knew to ask those type of questions. This is especially true because Centennial knew the answers!

Hall Prangle's client, Centennial, knew all about what Nurse Murray and Nurse Wolfe had told the LVMPD by August of 2008. PA1054. So, what did Nurse Murray and Nurse Wolfe discuss with the LVMPD?

A. Nurse Murray

In a statement to the LVMPD, Nurse Christine Murray stated that Farmer was attentive to female patients regarding the placement of leads where one would have to move a woman's breast. PA3172-3173. Then, she told the Officer:

> "Q- Oh. Okay, um, can you think of anything else that I didn't ask you or I might not be aware of that you feels important, that might

assist me in my investigation or something that I need to be made aware of?
A. The only thing I can think of like I said, is the older lady that he did the one to one sittings with.
Q- Um-hum.
A. Which means that the doctor ordered for somebody to be in the room with her at all times. He was in there, on the evening shift, it was dark because he has the lights out. The door was closed. Which is unusual for a one to one. I, if I had been the nurse, which I wasn't. I would want the door open. I want to see what is going on. But we did hear her yelling. I don't want you by me, get out of here. And we thought, she is a little crazy.
Q. Um-hum.
A. She is a little crazy, old lady, that-s why she has the sitter.
Q. Um-hum.
A. So we didn't put any credence into what she was saying.
Q. Okay. Do you remember when that occurred?
A. I don't.
Q. Okay. Before or after this incident, that we're talking about?
A. Before. Before.
Q. Okay. A couple of weeks, couple of days?
A. It had to be more toward the beginning of when we opened up because it was on the sixth floor here and we didn't open the seventh floor until about two and a half. Three months after we opened. So, obviously, it have to be probably in February or March, something like that."

PA3175-3176.[5] The Court should recall that the Jane Doe incident was in May.

Hence, Nurse Murray knew there was an incident earlier with Farmer.

And that was just Nurse Murray.

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[5] To make it a bit more legible for this Court, Plaintiff has fixed obviously typographical errors. However, the original may be viewed at PA3175-3176.

B. Nurse Wolfe

Admittedly, Nurse Murray's statement, while certainly "potentially" putting Centennial on notice of wrongdoing with Farmer, was not specific that there was anything but "smoke" and not "fire." Nurse Wolfe's statement, however, was extraordinarily different. It was the proverbial "smoking gun" with regard to foreseeability.

On May 30, 2008, Nurse Wolfe gave a statement to the LVMPD. When asked about prior issues with Farmer, Nurse Wolfe stated that a relief Charge Nurse (Ray Sumera) **came to her weeks before the incident with Jane Doe and the others and stated the following** about Farmer

> "A: **Um, the same nurse, Ray Sumera, had told me um, another time that he—to watch him around my female patients. That he was concerned because he was very overly attentive with female patients** and very anxious to connect them to the monitors and disconnect them from the monitors which would require him to reach into their clothing.
> …
> A: **He was just very suspicious in his activities. Um, such as going into rooms with doors closed with female patients when he was not asked to**.
> …
> Q: How…if you had to give me an estimate, how many times would you say that you…you've seen him walk into rooms, for female patients, where the doors are closed but there's no, no need for him to be in that room?
> A: **Multiple times. I couldn't put a number on it**.
> …

Q: Okay. Um…and you said that he just—**these actions that he was doing is what made uh..it was of a concern and made you suspicious?**
A: **Yes.**
…
Q: Okay. Um, anything else you can think of that might be of uh, useful information to me to assist me in my investigation?
A: Um, nothing comes to mind other than, **like I said, there were other people that had um told me that they had the same**—
Q: Ex-expressed concerns?
A: **Yeah. Concerns about him**.
…
A: There's one other nurse that had come to me…
A: Kim, that's her name. Kim."

PA2828-PA2833.

A good lawyer can spin what Nurse Wolfe said. But, armed with the knowledge of what she said, **there is no way that a lawyer could tell the Court that there is "absolutely" no evidence at all of even potential foreseeability**. Yet, that is exactly what Hall Prangle did. Hall Prangle argues that it did not have the document—however, as will be demonstrated below, Hall Prangle has stated multiple inconsistent statements about what it had.

C. Ray Sumera

Nurse Sumera worked with Margaret Wolfe and his importance based upon the statement of Nurse Wolfe is obvious. Nurse Wolfe stated that Sumera told her to watch out for Farmer because of issues with female patients.

Again, Nurse Sumera bolsters Nurse Wolfe and additionally provides information regarding foreseeability.

D. Centennial Knew All About Murray, Wolfe and Sumera

At some point in time, Nurse Murray met with the Chief of Nursing who had read Nurse Murray's statement to the LVMPD, and the Chief of Nursing knew what she had told the police:

> "Q: But the director of nursing called you down after she read the statement, is that correct?
> A: Yes. She talked to all of us.
> Q: What do you mean, she talked to all of you?
> A: She talked to all the nurses that were involved in this.
> Q: Did you go through the statement with her?
> A: She asked me what happened. I told her what I knew. We didn't pick this up and go through it line by line like we are now, but she knew what was -- I mean she had read it."

PA2873. However, Ms. Murray does not recall if she specifically discussed the sitter incident. Id. She also met with Centennial Administration (Amy Bochenek) at some point. She does not recall when or the exact details of the discussion. PA3220-3221. CNO Butler does not recall specifically meeting with Wolfe but **became aware of Wolfe's Metro Statement at some point before August 1, 2008.** PA3195. The Head of the Emergency Room, Amy Blasing (aka Bochenek) testified that she did not recall the specifics of Nurse Wolfe's allegations, but she was aware that Nurse Wolfe was alleging something about Farmer, and that while Sumera and Wolfe disagreed about the details of certain events relating to Farmer's misconduct, she never investigated the issue to determine which story was correct. PA3228-3238. However, the point for the Evidentiary Hearing was

that Nurse Blasing was well aware of Wolfe and Sumera's involvement in this case as it relates to allegations of misconduct by Farmer—she just doesn't remember the details, nor did she attempt to get to the bottom of this. **<u>But, she was aware of the issues before August 1, 2008</u>**. PA3243-3246. Ms. Blasing testified that she and Carol Butler met with Nurses Wolfe, Sumera, and others shortly after the incident but in any event, **before August 2008**. PA3223-3228.

E. Hall Prangle Knew All About Murray Wolfe and Sumera

At the Discovery Commissioner Hearing on the Motion to Strike, Mr. Bemis had the following exchange with Commissioner Bulla:

> DISCOVERY COMMISSIONER: -- you were never told by Metro prior to August of 2009 as to who gave statements, not the substance of their statements, but who gave statements to them?
> MR. BEMIS: It was --
> DISCOVERY COMMISSIONER: Be really careful how you answer this question.
> MR. BEMIS: It was an ongoing investigation from everything that we were prevented from getting from Metro with --
> DISCOVERY COMMISSIONER: That's not --
> MR. BEMIS: -- both cases--
> DISCOVERY COMMISSIONER: That's not my question. **Was the hospital aware, prior to 2009, who the nurses were that gave statements to Metro?**
> **MR. BEMIS: Not all of 'em, no.**
> **DISCOVERY COMMISSIONER: Okay. But you were aware that some statements were given by your nursing staff.**
> **MR. BEMIS: That is correct.**
> ……
> DISCOVERY COMMISSIONER: The problem is I really would like some confirmation, and maybe I have enough. Maybe I have enough, but I don't really have a good explanation as to why those names

weren't disclosed, and I'm pretty confident that they were known. Mr. Bemis.

MR. BEMIS: I don't believe that all of them were known at that time, but I do believe that there were some that were known.

DISCOVERY COMMISSIONER: How about the three that we're worried about today -- Murray, Wolfe, and Sumera?

MR. BEMIS: Murray for sure, Wolfe is a possibility, and Sumera is a possibility as well. I think Sumera was known at the time I believe.

PA0591 and PA0597-0598.

In its Evidentiary Hearing Brief (PA0612-0735), Hall Prangle told Judge Scotti (and Plaintiff) that it received the statements in **May of 2013**. PA0614.

At the Evidentiary Hearing (in the morning), Mr. Prangle told Judge Scotti:

"it wasn't until May of 2013 that the statements became known to us. We had no idea about—well, we had no idea the content before then." PA0989

"We didn't know that Nurse Murray was going to testify about the sitter incident. We just had no knowledge of that until we got the statement." PA0989-0990.

"As to Nurse Wolfe…the first time that we learned of [her statements that Sumera warned her weeks before the Doe incident about Farmer's actions with female patients] was in the RC case…in May of 2013." PA0990.

"Main point being is that it wasn't until May 6, 2013, that we learned of the content of those statements." PA0991.

"The Court: So you acknowledge that you knew the statements existed prior to May 2013, but…you never actually read the statements and no one in your office read the statements before May of 2013?

Mr. Prangle: That's correct." PA0992.

> "I will tell you we were aware, and Amy Bochenk Blasing and Carol Butler acknowledge, that they were aware that Wolfe and Murray went to the police and gave statement. That's all we knew." PA 0992.
>
> "My firm was retained…on May 22, 2008 specifically to investigate the RC case…We met with, among others, Nurse Murray, Nurse Wolfe and Nurse Sumera because they were involved with the RC case…We met with Nurse Wolfe I believe it was mid-June of 2008. We met with nurse Murray in Mid-July of 2008, and we met with Nurse Sumera in mid-August 2008." PA 0996.
>
> "I believe it was either May 6th or 8th that we actually get physical possession of the file that includes now the statements of Wolfe and Murray…I will acknowledge constructive receipt of them on May 6, 2013." PA 1002.
>
> "But because of the sensitive nature of it in the ongoing criminal case, there was a protective order that precluded us from disclosing the statements." PA1002.
>
> "I acknowledge to you in hindsight this is very relevant information that is relevant to the Doe case." PA1003.
>
> "So we have now May of 2013 information that admittedly I should have disclosed the names. And I could have done some characterizations of subject matter consistent with 16.1." PA1004.

Then, Mr. Bemis testified in the morning and afternoon. At the noon hour, he realized that he and Mr. Prangle had allegedly made a mistake. But this Court should look at all of what he testified to (the following is a summary of important points):

1. He worked on the case since 2009 sometime. PA1021.
2. Both the RC case and Doe case involve issues of foreseeability. PA1022.

3. Prior instances of inappropriate conduct with female patients by Farmer are relevant to foreseeability issues. PA 1023.
4. Any information the hospital had regarding this misconduct were discoverable and should have been timely produced, both documents and witnesses. PA1023.
5. He became aware that Murray Wolfe and/or Sumera had information about facts that would go to issues related to Farmer's inappropriate conduct with female patients in May of 2013. PA1027.
6. Once he got the statements, he knew that it was relevant, but didn't disclose it because of a protective order. PA1032.
7. The Protective Order did not preclude identifying names or a description of testimony. PA1035.
8. The information about prior misconduct is relevant in the Jane Doe case and the RC case because if the hospital is on notice, they're liable. PA1036.
9. "I think I knew the fact that there was a statement from Murray…in February 2013." PA1040-41.
10. "I did not disclose it." PA1041.
11. "I got a CD that had an audio file on it, but I did not listen to it." PA1041
12. He received the audio portion of Christine Muray's recorded statement from the public defender's office in February 2013 and never listened to it. PA 1041.
13. He believed Mike Prangle knew of the existence of the CD. PA1042.
14. As of February 2013, he had the audio of Christine Murray's statement. PA1048-49.
15. He got the CD in February but did not listen to it in February, March, April. PA1052.
16. Dave Ferrainolo from Hall Prangle met with Murray Wolfe and Sumera in the summer of 2008. PA1054-55.
17. Information relative to those meeting is in correspondence to the client. PA1056-57.
18. At least as of May 2013, he was aware of allegations of inappropriate conduct with female patients by Famer. PA1061.
19. There was no disclosure of Murray, Wolfe or Sumera until the morning of the Evidentiary Hearing. PA1073.
20. In his 10/14/14 Opposition to plaintiff's motion for summary judgment, he stated that there were absolutely no known prior acts by

Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient. PA1074.
21. And he made the statement to the District Court and a similar statement to the Supreme Court. PA1076.
22. He was incorrect about the May 2013 issue—Nurse Wolfe's statement was not in there. PA1086.
23. He received Murray's statement 9and others in February of 2013. PA1091-1092.
24. Before May of 2013, he did not listen to the audio statement of Nurse Murray because his computer didn't have speakers. PA1093.
25. He did not have the Wolfe statement before May 2013. PA1103.
26. He does not recall when he got it. Id.
27. The hospital knew that Wolfe did give a statement to the police in 2008. PA1105.
28. Amy Blasing knew that within the statement there was an issue with Sumera and Wolfe and the details of what Sumera had told Wolfe. PA1105.
29. He didn't disclose the audio statement of Murray in February 2013 because he did not listen to it. PA1106-07.
30. Prior to his testimony, he did not go back and look for when he received the Wolfe statement. PA1118.
31. There is the possibility that he could have gotten the Wolfe statement from the hospital if they had it. PA1118-19.
32. Christine Muray testified that Carol Butler (head nurse at the hospital) had read her statement. PA1119.
33. He does not know if he got Wolfe's statement in 2013 or not. PA1122.

Then, Mr. Prangle told the Court in Closing:

1. When the Doe lawsuit was filed in 2009, Amy Bochenek and Nurse Butler were no longer employees. PA1168.
2. "The reality of the situation is that we get Murray's statement in an audio file apparently in February of 2013." PA1170.
3. "..he didn't listen to the file…" PA1170.
4. "We did not withhold Nurse Wolfe's statement. We did not take that out [of the LVMPD production]. If that were true, report me to the Bar. Because that is absolutely improper." PA1173.
5. "I'll be honest with you. If—as I stand here now, I don't know when we got it. I don't know from what source we got it." PA1173.

> Judge Scotti: "One of the critical issues is why did you delay in turning over the Wolfe statement. And, no one from your firm apparently researched when and how you got the Wolfe statement. Is that—that kind of troubles me why that wasn't done." PA1174.

Back to Mr. Prangle:

> "For purposes of what I'm here to argue with you today, I'm prepared to accept that [we received the Wolfe statement] was May of 2013." PA1176.

Regarding the misleading statements made to the District Court:

> Mr. Prangle:…"So did I inartfully or over state that position in the briefs with the court?
> Perhaps.
> THE COURT: Well, you would acknowledge it's one thing to argue your interpretation of documents in exhibits that have -- in evidence that have been produced and say looking at this group of information, you know, nobody could possibly conclude that, that Mr. Farmer was a danger to [PA1180] the patients, but, but -- but then -- but it's quite a different thing to say absolutely there's no possible -- there's -- there's -- I'm trying to remember the language here.
> MR. PRANGLE: It's extreme.
> THE COURT: Absolutely nobody could conclude from anything that's out there that – that Mr. Farmer did anything wrong and base that on documents that haven't been produced. It's almost like you're representing to the court there's nothing out there to look at.
> MR. PRANGLE: And at that point --
> THE COURT: Which is different than saying to the court there's nothing out there to look at is a lot different than being an advocate and saying my view of these records is that my client should win.
> MR. PRANGLE: Okay. And if I --
> THE COURT: How would -- do you recognize the distinction?
> MR. PRANGLE: No, I understand the distinction. And I guess what I would advise the court is I guess I always looked at it as we were saying here's what the evidence is gonna show. If I overstated that, it certainly [PA1181] was not with an intent to mislead Your Honor. **<u>And although statements that were made before Your Honor</u>**

> **were with full knowledge of the Wolfe and Murray statements. So it wasn't as if I was trying to say those things didn't exist. All I would say is my point with that, it wasn't like I was trying to say the Murray and Wolfe statement don't exist and there's nothing out there, ignore everything they're saying. That's not what I was trying to get across.**
> My point was --
> THE COURT: Wasn't one of those statements made before the -- before the Murray Metro statement had been disclosed?
> MR. PRANGLE: I believe the -- I don't think so. Well, actually, I don't know.
> THE COURT: Well, let's double check that.
> MR. PRANGLE: I'm not sure. I'm not sure.
> THE COURT: Go ahead.
> MR. PRANGLE: It has been, it is, and it will be our position as advocates for our clients there was nothing sufficiently out there with Mr. Farmer at Centennial Hills Hospital that would have [PA1182] put us on notice that he was a potential risk for sexually assaulting a patient. And, you know, I'll soften the phraseology, but that is, that is my position. [PA1183]

Again, let's look at what Mr. Prangle told this Court after apologizing for various mistakes: **"And although statements that were made before Your Honor were with full knowledge of the Wolfe and Murray statements."** The truth finally came out during Mr. Prangle's closing argument. Incredulously, and odiferously, Mr. Prangle neither filed a motion to correct this statement nor has he offered an affidavit about being mistaken nor has he even told this Court that he was incorrect.[6] So, despite earlier protests and claims of being mistaken, in the heat of a closing argument, Mr. Prangle made clear that when the statements were made

[6] It's not like this admission by Mr. Prangle was hidden. On rebuttal close, Mr. Keach immediately stood up and told the Court exactly what Mr. Prangle said and invited Judge Scotti to look at it in the transcript. PA 1186.

to the District Court and the Supreme Court he had full knowledge of the Wolfe and Murray statements and has never told anyone that he made a mistake. The truth has a way of disclosing itself.

With that being said, Judge Scotti cannot be said to have abused his discretion. Judge Scotti had ample evidence before him that Hall Prangle mislead the Court. Substantial evidence supports Judge Scotti. Indeed, substantial evidence would have supported significantly more than a couple of lines in a District Court Order. Hall Prangle should count its stars that Judge Scotti only sanctioned Hall Prangle with words.

F. Where Was Mr. Ferrainolo?

So, Centennial knew about the issues related to Farmer with regard to Murray, Wolfe and Sumera before August 1, 2008. During that same time frame, Hall Prangle was meeting with Murray, Wolfe and Sumera. PA1054. Any lawyer who knows anything about the law in this area would know that foreseeability was not only important, but, the lynchpin for liability. As Mr. Bemis told Judge Scotti, Mr. Ferrainolo would have been the lawyer at Hall Prangle to speak with Murray, Wolfe and Sumera[7]. PA1054. One must wonder why, of all people, Hall Prangle did not produce Mr. Ferrainolo or even have him submit an Affidavit or

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[7] Dave Ferrainolo is an attorney at Hall Prangle who used to work in the Las Vegas office but now works in the Florida office of Hall Prangle (as the Managing Partner See http://www.hpslaw.com/david-ferrainolo. According to the State Bar of Nevada, Dave is still licensed here.

Declaration. If Hall Prangle did not have the statements, or did not know what Wolfe, Murray and /or Sumera would testify to after he interviewed them in the summer of 2008, Mr. Ferrainolo could have easily told such to Judge Scotti. But, Hall Prangle did not produce him as a witness nor did they even try to submit an affidavit from him. Though Judge Scotti did not mention this, he could have easily found an adverse inference from this. "When it would be natural under the circumstances for a party . . . to take the stand himself as a witness in a civil case, . . . and he fails to do so, tradition has allowed his adversary to use this failure as the basis for invoking an adverse inference." **E. Cleary, McCormick On Evidence** § 272, at 804-05 (3d ed. 1984) (footnotes omitted). This has been well stated before: "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." **Graves v. United States,** 150 U.S. 118, 121 (1893).

The point is, knowing that Plaintiffs were alleging the misleading nature of the statements, and, knowing that the Court was going to potentially strike the answer of the Valley entities, Hall Prangle did not call the one witness who could have helped not only the Valley entities, but, also, Hall Prangle. Judge Scotti could very well have found a presumption against Hall Prangle for not calling Mr. Ferrainolo.

It is very odd indeed that with everything on the line, Hall Prangle would not call the one witness who could help it and the Valley entities—or, possibly not.

VI. CONCLUSION

This has been a difficult brief for Plaintiff's counsel to author. The actual Plaintiff has finished its case. The case has been settled and all parties paid. Indeed, more likely than not, Plaintiff's counsel are the only people in this case right now who are not getting paid. Though that is petty (and unimportant), the fact is, neither Plaintiff nor its counsel has any real skin in this game. On the other hand, as Officers of the Court, the importance of this case is obvious—and, partly, some things about it are distressing. Hall Prangle could not leave well enough alone. They wait nine months to file the Writ without explanation. They complain that they had no notice about the alleged Rule 3.3 violation despite being placed on notice three times and arguing the misleading issue at the evidentiary hearing without any complaint of due process violation. Finally, they claim there was no violation but at the evidentiary hearing finally admit that they had the documents which negate their statements to the District Court and this Court, all along. So, what did Judge Scotti do wrong? Nothing. Judge Scotti merely figured out what Hall Prangle was doing.

The Rules of Professional Conduct are not the rules of how litigation is played; instead, they are Rules that govern our profession. It would be easy for

lawyers to hide witnesses, hide evidence, and mislead the Court as to the facts of a particular case. The Writ is basically telling this Court that Hall Prangle's conduct was within the bounds of zealous advocacy. And, that is scary because if lawyers think that misleading the Court falls within zealous advocacy, then how is the Court to make determinations? Indeed, how can opposing counsel find the truth? In the case at bar, Plaintiff sent out reams of discovery and took no less than 60 depositions. But, the truth only came out with a FOIA request. And that is a problem. Were it not for that *FOIA Request* (an oddity to be sure in a civil sexual assault case) Plaintiff would never have known about Nurse Murray, Nurse Wolfe and Nurse Sumera. Plaintiff would never have known about what Centennial knew about Farmer. Plaintiff and the Courts of the State of Nevada would never have known the truth. Were this Court to accept the Writ, it would be telling the Bar, yes, go ahead and hide evidence, and, while you're at it, mislead the Court. With incredible respect to this Court, Hall Prangle's conduct cannot be countenanced. Plaintiff's counsel believes that litigation is ultimately a search for the truth. But in this search, lawyers have rules. Hall Prangle violated those Rules.

This Court needs to put a stop to the sort of conduct that Judge Scotti found. Judge Scotti did not just give a one page Order--his was <u>38 pages of detailed findings</u>. The reason he did so was to create a record--but also to warn litigants in

his Courtroom that conduct such as Hall Prangle's will not be tolerated. The Order should be required reading for every Bar member and every Bar applicant.

Hall Prangle got off light. Hall Prangle was not monetarily sanctioned, and, Judge Scotti separated their conduct from the Valley entities conduct. PA1344-1345. Judge Scotti did not refer their conduct to the Bar. All that happened for Hall Prangle was that their conduct was described as violating Rule 3.3. But, that was it. Is that a serious finding? Absolutely. But, when one considers what Judge Scotti could have done, it is little more than a slap on the wrist.

This Court has an opportunity to tell the Bar that this sort of conduct is not proper for Officers of the Court. The Bar needs to be warned that conduct such as Hall Prangle's is not zealous advocacy--it is a violation of our Rules—and a violation of our Oath.

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Plaintiff suggests that this Court deny the Writ, but do so in a published opinion in order that every member of the Nevada State Bar understand that our Rules of Conduct are not some meaningless words, but, that we are guided by those Rules and that the Rules are going to be enforced.

Dated this 17th day of October, 2016.

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VII. 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 a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman Font 14; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[✓] Proportionately spaced, has a typeface of 14 points or more, and contains 8, 763 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, 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 this 17th day of October, 2016.

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VIII. CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016 I electronically filed and served the foregoing Real Party in Interest's Answering Brief using The Supreme Court's Web Based Electronic Filing System (EFlex) in accordance with the Master Service List as Follows:

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By US Mail to:

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In and For the County of Clark
Honorable Richard Scotti
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