IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER; AND UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation, Appellants, vs. ESTATE OF JANE DOE, by and through its Special Administrator, MISTY PETERSON, Respondents.	Supreme Court No. 70083 District Court No. A595780 **REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF (NO. 71045)**
HALL PRANGLE & SCHOONVELD, LLC; MICHAEL PRANGLE, ESQ.; KENNETH M. WEBSTER, ESQ.; AND JOHN F. BEMIS, ESQ., Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE, Respondents, And MISTY PETERSON, AS SPECIAL ADMNISTRATOR OF THE ESTATE	Supreme Court No. 71045 District Court No. A595780

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OF JOHN DOE,

Real Party in Interest.

Petitioners Hall Prangle & Schoonveld, LLC, Michael E. Prangle, Esq., Kenneth M. Webster, Esq., and John F. Bemis, Esq. (collectively, "Hall Prangle") hereby file their Reply in Support of their Petition for Extraordinary Writ Relief (the "Writ Petition").[1]

DATED this 15th day of December, 2016.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN
JOSHUA P. GILMORE

AND

HALL PRANGLE & SCHOONVELD, LLC
MICHAEL E. PRANGLE
KENNETH M. WEBSTER
JOHN F. BEMIS

Attorneys for Petitioners

[1] All capitalized terms, to the extent they are undefined in this Reply, have the meaning ascribed to them in the Writ Petition.

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I. INTRODUCTION

In its Answer to the Writ Petition, the District Court explains the basis for its determination that Hall Prangle committed two violations of Nevada Rule of Professional Conduct 3.3. That explanation, respectfully, fails as a matter of law.

First, the District Court never explains how it provided Hall Prangle with due process regarding these supposed Rule 3.3 violations. Specifically, it was unable to cite any type of notice ***coming from the District Court*** informing Hall Prangle that it faced potential sanctions. Instead, the District Court identified generic factors developed by this Court ***relating to potential sanctions against parties (not attorneys)***, as well as saber-rattling accusations from opposing counsel ***who had no authority to deem Hall Prangle culpable for any Rule 3.3 violations***. The District Court's inability to identify any adequate notice confirms that Hall Prangle was denied due process in conjunction with the Attorney Sanctions. And, Doe's Answering Brief does not provide any basis to change that conclusion.

Second, with respect to the actual findings of Rule 3.3 violations, the District Court devoted less than one page to its justification of why Hall

Prangle twice violated Rule 3.3. The reason for its tepid response is clear—it is unexplainable. Hall Prangle's supposedly violative statement was a textbook example of attorney argument relating to a mixed question of law and fact. Hall Prangle was fulfilling its duty of zealous advocacy by arguing that it was not reasonably foreseeable to Centennial that Farmer would commit a sexual assault. Based on the nature of this supposedly improper statement, there is no legal basis to find that Hall Prangle violated Rule 3.3. Thus, the District Court's unsupported and unexplained findings must be vacated.

II. ARGUMENT

A. The Writ Petition Presents a Justiciable Controversy, As Ample Legal Authority Confirms That a Court's Finding of Ethical Misconduct Results in a Cognizable Injury to an Attorney.

The District Court asserted two arguments which are essentially one and the same: (1) Hall Prangle did not identify a justiciable controversy; and (2) Hall Prangle was not sanctioned. (Answer to Petition for Extraordinary Writ Relief ("District Court Answer"), 11-15; 20-21.) Yet, legal authority from across the country—most of which the District Court ignored—confirms that any finding that an attorney violated a rule of professional conduct creates a justiciable controversy warranting judicial review.

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Specifically, the Tenth Circuit addressed this issue in *Butler v. Biocore Medical Technologies, Inc.*, 348 F.3d 1163 (10th Cir. 2003). The *Butler* court analyzed whether "an order … affecting an attorney's professional reputation imposes a legally sufficient injury to support appellate jurisdiction." *Id.* at 1167. After reviewing the relevant authority, the *Butler* court concluded that the majority of the federal circuits permit appellate jurisdiction in such an instance because of the effect that such a finding has on an attorney's reputation.[2] *Id.* at 1167-68. The *Butler* court followed the majority rule and held "that an order finding attorney misconduct but not imposing other sanctions is appealable … even if not labeled as a reprimand…." *Id.* at 1168. Its decision was based on the logical premise that "damage to an attorney's professional reputation is a cognizable and legally sufficient injury," and "neither the imposition of a monetary sanction nor an explicit label as a reprimand are prerequisites" to such an injury. *Id.* at 1168-69; *see also id.* ("Such damage is to the attorney's 'most important and valuable asset,' and 'may prove harmful in a myriad of ways [sic].'") (citations omitted).

[2] The Seventh Circuit is the only circuit that does not allow for such an appeal, ***although it did leave open the possibility for a writ of mandamus***. *Id.* at 1167 (citing *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 820 (7th Cir. 1992)).

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Other opinions, also cited in the Writ Petition and unheeded by the District Court, are in accord. *See Adams v. Ford Motor Co.*, 653 F.3d 299, 305-06 (3d Cir. 1999) (a finding that an attorney violated a rule of professional conduct—without any accompanying monetary penalty or formal reprimand—was appealable because "[i]t is all but inevitable that the magistrate judge's order has adversely impacted [the attorney's] reputation…."); *Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832-33 (5th Cir. 1997) ("We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.").[3]

Although it ignored the authority above, the District Court did attempt to address *U.S. v. Talao*, 22 F.3d 1133 (9th. Cir. 2000) by arguing that its logical and thorough analysis should not apply in Nevada because SCR 99(1) vests the Supreme Court, disciplinary boards, and hearing panels with "exclusive

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[3] *See also Westergren v. Jennings*, 441 S.W.3d 670, 677 (Tex. App. 2014) ("We follow the majority of the federal courts addressing the issue and hold that an order finding attorney misconduct, even without the imposition of sanctions, sufficiently presents a justiciable controversy to be addressed when challenged by the aggrieved attorney.").

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disciplinary jurisdiction." The District Court failed to mention that SCR 99(2) also confirms that "[n]othing contained in these rules denies any court the power to maintain control over proceedings conducted before it…."

Consistent with SCR 99(2), the Nevada Supreme Court recognized the power of a trial court to impose sanctions for professional misconduct. *Lioce v. Cohen*, 124 Nev. 1, 26, 174 P.3d 970, 986 (2008). The District Court's argument that it did not have the power to sanction or reprimand Hall Prangle for professional misconduct is wrong—it did just that by finding that Hall Prangle twice violated Rule 3.3. *See State v. Perez*, 885 A.2d 178, 187-88 (Conn. 2005) ("We conclude that the Appellate Court's finding that the plaintiff had violated rule 3.3(a) of the Rules of Professional Conduct constituted a disciplinary sanction tantamount to a reprimand."). Accordingly, the analysis followed by the majority of courts across the country (including the Ninth Circuit in *Talao*) provides a compelling basis for this Court to follow the majority rule, maintain its jurisdiction, and review the Writ Petition on its merits. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 139 , 206 P.3d 572, 576-77 (2009) (showing that when the Nevada Supreme Court is considering unsettled questions of Nevada law, the view of the majority of jurisdictions

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carries greater weight than that of the minority of jurisdictions).[4]

B. <u>The Writ Petition Was Timely.</u>

Doe, while conceding that it cannot support a *laches* defense and that there is no time limit associated with the filing of an extraordinary writ, nevertheless argues that Hall Prangle's Writ Petition is untimely. (Doe Answering Brief, 3-7); *see also Widdis v. Dist. Ct.*, 114 Nev. 1224, 1227–28, 968 P.2d 1165, 1167 (1998) ("[W]e note that there is no specific time limit delineating when a petition for a writ of mandamus must be filed."). Doe's position is curious not only for the reasons conceded, but also because the Writ Petition is progressing concurrently with Centennial's Appeal (Case No. 70083) (the "Appeal"), a matter this Court already determined is intertwined with the Writ Petition. (Order Granting Motion to Consolidate, filed Sep. 23, 2016.)

To the extent this Court does question the timeliness of the Writ Petition, the explanation is simple. Hall Prangle did not file an extraordinary writ during the pendency of the underlying case because it did not want to risk any chance of delay and prejudice to its clients. Hall Prangle's duties to its clients

[4] Notably, Doe agrees with Hall Prangle that this matter is properly before this Court. (Doe Answering Brief, 2, 3.)

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trumped any desire to immediately address the Attorney Sanctions with this Court.

Once the underlying case was formally dismissed on February 29, 2016, (PA, Vol. X, Tab 31, at 1848-1853), and Centennial filed the Appeal relating to the Party Sanctions, Hall Prangle filed its Writ Petition to coincide with Centennial's Opening Brief.[5] Centennial had already indicated that Hall Prangle would file the Writ Petition and move to consolidate it with the Appeal, so it certainly should not have been surprising to Doe and her counsel. (Appellants' Joint Docketing Statement, filed April 27, 2016, Case No. 70083, 4:9-16.) This timeline was logical and efficient due to Centennial's and Hall Prangle's intent to ultimately consolidate the two matters, as they are based on the same Sanction Order.[6] Thus, there is no basis to claim that Hall Prangle's Writ Petition is untimely. *Widdis*, 114 Nev. at 1227–28, 968 P.2d at 1167 (laches did not preclude writ relief where the petition was filed approximately seven months after entry of the underlying order).

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[5] Centennial's Opening Brief was filed on August 16, 2016, and the Writ Petition was filed on August 17, 2016.

[6] Hall Prangle explained this rationale in its Writ Petition. (Writ Petition, 18:9-19:5.) Yet, for some odd reason, Doe argued that "Hall Prangle did not tell this Court why it waited so long in the Writ…." (Doe Answering Brief, 5.)

C. Hall Prangle Was Deprived of Due Process.

1. *The Johnny Ribeiro Factors Are Irrelevant to the Notice Required to Satisfy Due Process.*

In an attempt to cure its lack of notice and due process violations, the District Court cited one of the generic factors from *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), to argue that Hall Prangle was aware that its conduct was at issue. (Dist. Ct. Answer, 15-16.) Specifically, the District Court argued that the following *Johnny Ribeiro* factor—"whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney," (*id.* at 93, 787 P.2d at 780)—adequately informed Hall Prangle that the District Court was considering Rule 3.3 violations for one particular sentence in a nine month old Summary Judgment Opposition and the April 29, 2015 Writ Petition.[7] That nebulous factor provided no such notice because it was not specific to Hall Prangle and was instead relevant to potential sanctions against Centennial. Further, based on that ambiguous language, the so-called misconduct could have related to any

[7] Notably, the District Court's Rule 3.3 findings against Hall Prangle were not even contained in the section of the Sanction Order addressing that particular *Johnny Ribeiro* factor—they were included with the "Degree of Willfulness" factor. (PA, Vol. VII, Tab 23, at 1333-34, 1344.)

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aspect of Hall Prangle's representation of Centennial over a six-year period.

As set forth in the Writ Petition, ***particularized notice*** is required to comport with due process. *See Adams*, 653 F.3d at 308; *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1114 (9th Cir. 2005) ("Due process required the district court to notify the parties of the types of sanctions that it was contemplating."). Thus, the District Court was required to inform Hall Prangle ***prior to the evidentiary hearing*** that it was considering sanctions for its statement in the Summary Judgment Opposition so that Hall Prangle had an opportunity to prepare and defend itself against those accusations. *See, e.g., Randolph v. State*, 117 Nev. 970, 982 n. 16, 36 P.3d 424, 432 n. 16 (2001) (issuing an order to show cause to the attorney so he could explain why sanctions should not be imposed). Hall Prangle's general understanding of the *Johnny Ribeiro* factors does not fulfill the Court's due process obligation any more than does Hall Prangle's general understanding of the requirements of Rule 3.3. *See Perez*, 885 A.2d at 188 n. 9 ("The issue is not whether the plaintiff was on notice of rule 3.3 of the Rules of Professional Conduct or whether the Appellate Court was aware of all the facts necessary to make a finding that the plaintiff had violated that rule. The issue, rather, is whether the plaintiff was afforded,

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inter alia, the opportunity to provide the court with his side of the story. Plainly, he was not.").

2. *Opposing Counsel's Accusations Do Not Satisfy Due Process.*

Unable to pinpoint any sort of notice it provided to Hall Prangle, the District Court cited various portions of Doe's briefs, which contained undifferentiated saber-rattling accusations against Centennial and Hall Prangle. Yet, there is a marked difference between the District Court (*i.e.*, the sanctioning body in this instance) providing particularized notice that it is considering a potential finding of ethical misconduct and opposing counsel gratuitously accusing its counterpart of the same. Adverse parties and opposing counsel have ulterior motives (*e.g.*, leveraging a settlement) when accusing their counterparts of misconduct, and thus, any such allegations are often taken with a grain of salt. *See, e.g.*, *In re Comfort*, 159 P.3d 1011, 1027-28 (Kan. 2007) (recognizing that a lawyer may, although improper, accuse an adversary of ethical misconduct "to obtain a legal advantage for his or her client."). These types of spurious claims also do not comport with due process because the adversary does not have the authority to determine whether any ethical misconduct actually occurred—let alone impose sanctions.

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This argument is even more precarious when the alleged instances of notice are analyzed. According to the District Court, Doe's counsel put Hall Prangle on notice of potential Rule 3.3 violations when it filed a Reply in Support of Plaintiff's Motion for NRCP 37 Sanctions. (Dist. Ct. Answer, 17.) Yet, a review of that Reply confirms that Doe's counsel took issue with Hall Prangle's representation of Wolfe at her deposition. (PA, Vol. III, Tab 15, 490-497). Indeed, Doe's counsel accused Hall Prangle of violating Rule 3.4—not Rule 3.3. (*Id.* at 495). Any fleeting accusations of Hall Prangle's so-called false statements ultimately did not make it into the District Court's Notice. (*Id.*, Vol IV, Tab 18, at 602-04.) Therefore, Hall Prangle had no reason to believe that Doe's counsel's blustering accusations were a subject of the evidentiary hearing.

Likewise, Doe's counsel's Rule 3.3 accusations in the Evidentiary Hearing Brief did not provide Hall Prangle with the requisite particularized notice. As mentioned above, Doe and her counsel are not the sanctioning body and thus cannot fulfill the District Court's duty of proving sufficient notice to comport with due process. Further, Doe's counsel filed the Evidentiary Hearing Brief less than two days before the hearing, leaving insufficient time

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for Hall Prangle to prepare a thorough response to any alleged Rule 3.3 violations. (*Id.*, Vol V, Tab 21, at 736.)

Finally, Doe pointed to accusations of Rule 3.3 violations made in her April 18, 2015 Motion for Summary Judgment. (Doe's Answering Brief, 8-9.) Yet, despite bringing these so-called Rule 3.3 violations to the District Court's attention and asking the District Court to "*sua sponte* take action regarding same," (PA, Vol. IX, Tab 26, at 1804), these accusations did not make their way into the District Court's August 4, 2015 Evidentiary Hearing Notice. (*Id.*, Vol IV, Tab 18, at 602-03.) Again, Hall Prangle had no reason to believe that Doe's counsel's blustering accusations were a subject of the evidentiary hearing.

3. *The Motion for Reconsideration Did Not Cure the Lack of Due Process.*

Again looking for an antidote to the lack of due process, the District Court cites the Motion for Reconsideration, arguing that the reconsideration process gave Hall Prangle the same opportunity and footing to defend against Rule 3.3 accusations as they would have had if the District Court had given them adequate notice to begin with. A review of the District Court's Order

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Denying the Motion for Reconsideration quickly dispels that argument.

Once the District Court found Hall Prangle guilty of two Rule 3.3 violations, the die had been cast. Even though it did not need to, *see Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975), the District Court applied a heightened standard of review to summarily deny the Motion for Reconsideration not only as to the Attorney Sanctions, but also as to the Party Sanctions. (PA, Vol. X, Tab 29, at 1839) ("There has been no change in the controlling law, nor is there any newly-discovered or previously unanalyzed evidence that justifies reconsideration of the underlying Order."). Thus, once Hall Prangle was finally permitted to argue ***for the first time*** that it did not violate Rule 3.3, it was clearly swimming against the current because the District Court had already made its decision. The District Court was not going to backtrack absent a change in controlling law or newly-discovered evidence.

The District Court's cited authority does not help its argument. In *Sun River Energy, Inc. v. Nelson*, the court indicated that its holding that the motion for reconsideration cured the due process violations would not have been the same if the trial court had applied a heightened standard of review, as the District Court did to Hall Prangle in this instance. *See id.*, 800 F.3d 1219,

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1230-31 n. 13 (10th Cir. 2015).

Finally, the Order Denying the Motion for Reconsiderations also shows that the District Court focused on the Party Sanctions, and downplayed the gravity of the Rule 3.3 findings against Hall Prangle. The only mention of the Attorney Sanctions was in the following sentence: "Though the Court addressed instances of professional misconduct in its findings, the sanctions imposed upon Defendant Centennial are for Centennial's own actions." (PA, Vol. X, Tab 29, at 1840.) Thus, in reconsidering the Attorney Sanctions, the District Court never analyzed its findings of ethical misconduct as it would have done before the findings had been made. It focused on the Party Sanctions, which certainly did not cure any due process violations.

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D. <u>Hall Prangle Did Not Violate Rule 3.3.</u>

1. *<u>The Supposedly Offending Statement Was Reasonable Attorney Argument Regarding a Mixed Question of Law and Fact.</u>*

This, and this alone, is the statement that sparked this Writ Petition and all the arguments contained therein: "There were absolutely no known prior acts by Farmer that could potentially put Centennial Hills on notice that Farmer would assault a patient." (*Id.*, Vol. VII, Tab 23, at 1333-34.) When

read in conjunction with the remainder of that section of the Summary Judgment Opposition (*i.e.*, the "Argument" section), Hall Prangle clearly made this ***argument*** with reference to *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), a factually analogous case which also involved an employee who committed a sexual assault. (PA, Vol. I, Tab 6, at 107-08.)

In *Wood*, the Court cited the absence of certain evidence (*e.g.*, no prior criminal record, no prior complaints for sexual harassment) in determining that it was not reasonable for the employer to foresee that the employee would commit a sexual assault. *Id.*, 121 Nev. at 740, 121 P.3d at 1037. ***As a result of this binding authority***, Hall Prangle analogized its clients' reasonable foreseeability to that of the employer in *Wood,* and pointed out the similarities (*e.g.*, no prior criminal record, no reports of ill character). (PA, Vol. I, Tab 6, at 107-08.) ***Based on that***, Hall Prangle ***argued*** "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." (*Id.* at 107.)

Hall Prangle's ***argument*** related to reasonable foreseeability, a pivotal issue in the underlying case and ***a mixed question of law and fact***. *Neely v. Belk*, 668 S.E.2d 189, 198 (W. Va. 2008); *Barker v. Wah Low*, 97 Cal.Rptr. 85,

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93 (Cal. Ct. App. 1971); *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 832, 221 P.3d 1276, 1286 (2009) (dissent). As explained in the Writ Petition, Rule 3.3 violations typically do not apply to mixed questions of law and fact because they are inherently attorney argument. *See HK Systems, Inc. v. Eaton Corp.*, No. 02-C-1103, 2009 WL 742676, *4 (E.D. Wisc. March 18, 2009) (recognizing that counsel's characterization of "mixed questions of fact and law," as opposed to "pure fact," could not be said to breach counsel's duty of candor.); *cf. Jackson v. Scott*, 667 A.2d 1365, 1370 (D.C. Ct. App. 1995) (finding that it was not a violation of Rule 3.3 to argue "nonnegligence" to the jury even if there was inadmissible documentation to the contrary). While Doe and her counsel may disagree that the Murray Metro statement (the evidence shows that Hall Prangle did not have the Wolfe Metro statement at that time) includes facts that support reasonable foreseeability, Hall Prangle obviously disagreed.[8] Merely because a patient with psychiatric issues starts yelling at a CNA does not mean it is reasonable to foresee that the CNA is going to commit a heinous sexual assault. These disagreements are the precise reason

[8] To be sure, even Doe admits that the information contained in the Murray Metro statement was not that probative of foreseeability. (Doe Answering Brief, 18.)

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there is an adversarial system. If every disagreement led to a Rule 3.3 violation, there would be no lawyers left to practice.

2. *The District Court's Argument in Support of its Rule 3.3 Findings Confirms That No Such Violations Occurred.*

Even though the District Court issued a 39-page Sanction Order, the portion addressing the Attorney Sanctions was fleeting and without significant explanation. (PA, Vol. VII, Tab 23, at 1333-34.) As discussed above, the District Court did not provide any additional support or rationale for the Attorney Sanctions in its Order Denying the Motion for Reconsideration. (*Id.*, Vol. X, Tab 29, at 1839-40.)

This Court's instruction to the District Court to respond to the Writ Petition required it to justify its Rule 3.3 findings with factual and legal support. (Order Directing Answers, filed Sep. 16, 2016 ("We conclude that answers from the respondent district court judge … would be of assistance in resolving the petition.").) Yet, the District Court only devoted four paragraphs and less than one page to support its finding that Hall Prangle twice violated Rule 3.3.[9]

[9] The District Court certainly did not explain—nor could it—how it found that Hall Prangle violated Rule 3.3 for a statement made to this Court and not to the District Court.

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In this brief snippet, the District Court cited five assertions from Murray's and Wolfe's Metro statements and claimed that Hall Prangle was hiding these assertions when it made the statement at issue in the Summary Judgment Opposition. (Dist. Ct. Answer, 21-22.) Interestingly, the District Court implied there was nothing false about the actual statement—instead, the statement was improper because Hall Prangle was purportedly hiding the Metro statements at that time. (*Id.* at 22 ("It would have been one thing for Hall Prangle to identify these facts and then argue that none of them could have even potentially put Centennial on notice that Farmer might assault a patient. It is another thing entirely for Hall Prangle to hide those facts and then claim there were no facts that could potentially trigger notice.").)

The problem with the District Court's argument, and its findings of Rule 3.3 violations, is that the undisputed evidence confirms that Hall Prangle did not hide these Metro statements from Doe's counsel. With respect to the Murray Metro statement, ***Hall Prangle produced it a mere 13 days after the Summary Judgment Opposition was filed***. The Summary Judgment Opposition was filed on October 14, 2014, (PA, Vol. 1, Tab 6, at 99), and the Metro file, ***which included the Murray Metro statement***, was produced on

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October 27, 2014, after the Discovery Commissioner lifted the Protective Order. (*Id.*, Vol. VI, Tab 22, at 1061-64; Vol. XII, Tab 45, at 2303; Vol. XVI, Tab 77, at 3162-77.) Doe filed her Reply in Support of her Motion for Summary Judgment on November 21, 2014, ***and specifically referenced Murray's Metro statement, which had evidently been reviewed and analyzed by one of her experts***. (*Id.*, Vol. II, Tab 8, at 117, 138.) Accordingly, in conjunction with this Summary Judgment briefing, Doe's counsel and the District Court were well aware of the Murray Metro statement; thus, its supposed absence could not have made Hall Prangle's statement misleading.

With respect to the Wolfe Metro statement, the undisputed evidence confirms that although Hall Prangle was initially mistaken at the outset of the evidentiary hearing, ***it did not receive the Wolfe Metro statement until March of 2015***. (*Id.*, Vol. VI, Tab 22, at 1085-92; Vol VIII, Tab 25, at 1565.) Thus, Hall Prangle was not hiding it from Doe's counsel when it filed the Summary Judgment Opposition. To be clear, while there was a disclosure obligation under NRCP 16.1 if Hall Prangle and/or Centennial had possession of the Metro statements, ***there was no obligation for Hall Prangle to proffer evidence in its Summary Judgment Opposition that would assist its***

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adversary. *See Sierra Glass & Mirror v. Viking Industries, Inc.*, 107 Nev. 119, 126, 808 P.2d 512, 516 (1991) ("An attorney has no obligation to proffer evidence that helps the opponent."). Accordingly, the District Court cannot fault Hall Prangle for not identifying various portions of the Metro statements in its Summary Judgment Opposition.

3. *The Statement in the April 29, 2015 Writ Petition Could Not Have Violated Rule 3.3.*

The ***entire portion*** of the allegedly offending statement to this Court—which the District Court somehow used to find a Rule 3.3 violation—was as follows:

> Specifically, Centennial Hills and UHS relied upon this Court's decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and 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.

(PA, Vol. III, Tab 11, at 386-87.) This language is contained in the "Procedural History" section of the April 29, 2015 Writ Petition, as Hall Prangle was simply summarizing the underlying briefing for this Court. (*Id.*)

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Although, as explained above, there is nothing violative about the latter portion of the sentence because it is attorney argument and opinion (*i.e.*, mixed question of law and fact), ***the sentence as a whole is entirely factual and true because it is simply a summary of the underlying briefing***. As a result, it cannot amount to a Rule 3.3 violation.

E. <u>Red Herrings and Unsupported Assumptions.</u>

1. *<u>Doe Failed to Prove That Hall Prangle Was Aware of the Contents of the Wolfe and Murray Metro Statements Through the 2008 Interviews.</u>*

Knowing that the so-called violative statements are neither false nor misleading on their face, Doe—similar to the District Court—claims they are false because Hall Prangle was simultaneously withholding relevant information regarding foreseeability. In making this quantum leap, Doe asks this Court to assume that Hall Prangle's interviews with Murray, Wolfe, and Sumera in 2008—***approximately one year before the Doe case was filed***—yielded the same information as that contained in the Wolfe and Murray Metro statements. (Doe Answering Brief, 16.) There is absolutely no admissible evidence to support that assumption. Without proof that Hall Prangle was aware of this information through the witness interviews in 2008, it cannot be

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used as a basis for an alleged Rule 3.3 violation, ***especially considering the undisputed fact that Murray and Wolfe left the employ of Centennial before the Doe case was even filed***. (PA, Vol. III, Tab 25, at 1504.)

2. *<u>In Any Event, Hall Prangle's Non-Disclosure of Murray, Wolfe, and Sumera as Potential Witnesses Is Immaterial to Rule 3.3.</u>*

Doe spent the better part of her Answering Brief rehashing her version of the events relating to the non-disclosure of Wolfe, Murray, and Sumera as potential witnesses. (Doe Answering Brief, 21- 27.) Hall Prangle already admitted that its investigation of the potential witnesses in this matter was subpar and that Wolfe, Murray, and Sumera should have been disclosed under Rule 16.1. (PA, Vol. VIII, Tab 25, at 1405.) Yet, there was no intent to conceal that information, as evidenced by the fact that all three were disclosed as potential witnesses in the related Cagnina Matter. (*Id.* at 1507-08.)

That being said, Hall Prangle was not sanctioned for its non-disclosure of Wolfe, Murray, or Sumera as potential witnesses—Centennial was. Accordingly, that is the primary issue of the Appeal, and is irrelevant to the scope of this Writ Petition—*i.e.*, whether Hall Prangle twice violated Rule 3.3. As shown above, Hall Prangle's argument regarding foreseeability did not

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violate Rule 3.3.

3. *<u>If Doe Believed That Dave Ferrainolo Should Have Testified at the Evidentiary Hearing, it was Her Counsel's Job to Secure That Testimony.</u>*

Doe had the burden of proof with respect to any sanctions she was seeking. *Cf.* 35B C.J.S. Federal Civil Procedure, § 1417 ("In general, the burden of proof is on the party seeking the sanction."); *Christian v. City of New York*, 269 A.D.2d 135, 137 (N.Y. App. Div. 2000) ("The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith, a burden borne by the movant.") (citation omitted). The District Court informed both sides that it needed to determine which witnesses it intended to call at the evidentiary hearing. (PA, Vol. IV, Tab 18, at 602.) To the extent Doe's counsel believed that Dave Ferrainolo had relevant testimony that was relevant to the potential sanctions, Doe's counsel could have subpoenaed Mr. Ferrainolo. Alternatively, Doe's counsel could have deposed Mr. Ferrainolo and presented his testimony at the evidentiary hearing. Doe's counsel did neither, and is now trying to use the absence of Mr. Ferrainolo's testimony as a basis to deny the Writ Petition. Obviously this is just a red herring and an

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attempt to distract this Court from the fact that Doe did not prove any Rule 3.3 violations.

III. CONCLUSION

The District Court deprived Hall Prangle of due process by not providing sufficient notice that it was considering Rule 3.3 violations. The District Court also manifestly abused its discretion by finding that Hall Prangle's argument regarding reasonable foreseeability violated Rule 3.3. Accordingly, the Attorney Sanctions must be vacated.

DATED this 15th day of December, 2016.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply complies with the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), 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:

[x] This petition has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font 14.

2. Finally, I hereby certify that I have read this Reply, 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 Reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion 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.

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I understand that I may be subject to sanctions in the event that the accompanying Reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of December, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 15th day of December, 2016, service of the foregoing **REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF (NO. 71045)** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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