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IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KOGOD,

Appellant,

vs.

GABRIELLE CIOFFI-KOGOD,

Respondent.
_____/

Case No. 71147
71994

Appeal from the Eighth Judicial District Court- Family Division

APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Parent Corporations and/or any publically-held company that owns 10% or more of the party's stock

   NONE

2. Law Firms that have represented Appellant Dennis Kogod (hereinafter "Dennis")

   a. Jimmerson Law Firm, P.C., James J. Jimmerson, Esq., and Michael C. Flaxman, Esq.

   b. Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole M. Young, Esq.

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IV. JURISDICTIONAL STATEMENT

A. Basis of Jurisdiction

There are two appeals consolidated. Case 71147 is an appeal from a trial and original decree of divorce, which is appealed pursuant to NRAP 3A(b)(1). (Appellant's Appendix (hereinafter "AA") 44:8474-8587 & 44:8588-8589.) Case 71994 is an appeal from an order granting post-judgment expert witness fees and is appealed pursuant to NRAP 3A(b)(1) and/or NRAP 3A(b)(8). (AA 47:9276-9279 & 47:9280-9287.)

B. Timeliness of Appeal

The appeal in case 71147 was filed August 23, 2016, appealing an order entered on August 22, 2016. (AA 44:8474-8589.) The appeal in case 71994 was appealed December 13, 2016, from an order entered on December 5, 2016. (AA 47:9276-9287.)

C. Appeal from Final Order or Judgment

Case 71147 is an appeal from a final order containing Findings of Fact, Conclusions of Law and Decree of Divorce. (AA 44:8474-8589.) Case 71994 is an appeal from a post-judgment order awarding expert witness fees in the amount of $75,650.00. (AA 47:9276-9287.)

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V. SUMMARY OF THE ARGUMENT

A. Unequal Division of Community Property

The district court committed legal error when it awarded $4,087,663 in waste because the "compelling reason" language of NRS 125.150(1)b) is ambiguous, and the court improperly applied the "clear and convincing" standard to Dennis' rebuttal of waste allegations that were not even supported under the substantial evidence standard. No additional award of waste may be applied to this case because Nevada law and the evidence does not support an increased amount of waste.

B. Alimony

The district court committed legal error when it awarded alimony to Gabrielle when she received over $23 million of community property, not including the unequal division. Gabrielle's cross-appeal for additional alimony should be denied because Nevada law and the evidence do not support a higher alimony award.

C. Sanctions, Costs, and Attorney's Fees

When the district court found that Gabrielle failed to submit an affidavit in support of a contempt finding, it should not have awarded sanctions.

The district court committed legal error when it awarded Gabrielle expert witness costs outside of the NRS 18.110(1) deadline to file a Memorandum of Fees

and Costs and without an analysis of the *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365 (2015), factors to support an award over $1,500. It further failed to make the requisite findings under *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81 (2016), to support an award of $75,650.

The district court's decision to not award Gabrielle attorney's fees and costs is supported by substantial evidence because there was no legal authority to support such an award, and Gabrielle received over $23 million of community property, not including the unequal division and alimony.

VI. LEGAL ARGUMENT

A. The district court committed legal error when it unequally divided over $47 million in assets, most of which were acquired during the parties' separation.

The district court ruled that Dennis wasted $4,087,663, from March 2008 to February 2016, despite the fact the parties were separated and lived separate lives during six (6) of those years. (AA 44:8489.) Dennis' efforts exponentially increased the community from $4 million to over $47 million during that period. (AA 44:8489.) The district court acknowledged "there was no diminution in the value of the marital estate." (AA 44:8553.) Dennis did not contest that community property was acquired during the parties' separation. However, there was no "compelling reason" to make an unequal disposition of community property under the unique facts of this case.

Because the district court improperly applied Nevada law, this Court should review, *de novo*, the legal decisions of the district court. *Jones v. Nev. St. Bd. of Med. Exam'rs*, 131 Nev. Adv. Op. 4, 342 P.3d 50, 52 (2015). The court improperly took into account marital fault, i.e., Dennis' adultery, in its decision even though the totality of Dennis' actions enhanced the community. The decision would return Nevada to the days of a fault-based system.

Gabrielle reaped a financial windfall because Dennis earned and saved over $36 million during their separation. Only through the retrospective lens of accountants, who required Dennis to justify every expenditure down to $1.00 parking meter charges over an eight (8) year period, could someone conclude a ten-fold increase in the net worth of the community amounted to community waste.

The court's analysis ignored this $36 million increase in the net worth of the community during the separation period. It reached its decision by infusing "fault" into divorce jurisprudence, which resulted in the legal errors at issue.

The first error arises out of the definition of "compelling reasons." Since statutory interpretation is a question of law, a *de novo* review is required. *Jones*, 342 P.3d at 52. The second error involves the standard of proof the district court placed on each party. The district court required Dennis to rebut allegations of waste by clear and convincing evidence, but awarded waste on only substantial evidence. (AA 44:8552.)

Third, the district court allowed Gabrielle to do a retrospective analysis of expenditures of the parties over an eight (8) year period. Such a retrospective analysis is barred by Nevada law. *Cord v. Neuhoff*, 94 Nev. 21, 27, 573 P.2d 1170, 1174 (1978).

Despite the fact the district court committed legal error when it awarded $4,087,663 in waste against Dennis, Gabrielle cross-appeals that award on the basis the district court did not award her more money. (Respondent/Cross-Appellant's Amended Answering Brief and Amended Opening Brief on Cross-Appeal, filed on August 23, 2017 (hereinafter "RAOB"), pp.2-3.)

Each of these issues are discussed below.

1. *The district court committed legal error in its unequal division analysis.*

Because the district court erred in its unequal division of property, and the statutory interpretation of NRS 125.150(1)(b) is at issue, a *de novo* review is required by this Court. *Jones*, 342 P.3d at 52. The ambiguity of NRS 125.150(1)(b), the standard of proof applied by the district court, and the erroneous finding of $4,087,663 in community waste are discussed below.

a. **The unique facts of this case directly put the ambiguity of NRS 125.150(1)(b)'s "compelling reason" language at issue.**

When a statute is not facially clear, this Court must go beyond the plain language of the statute and review the legislative history. *Bacher v. Off. of St.*

Engr. of St. of Nev., 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). A statute is ambiguous because the language of the statute is subject to more than one reasonable interpretation. *Id.* at 1117-18. NRS 125.150(1)(b) requires the court to make an equal division of community property with one (1) limited exception:

> the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

The term "compelling reason" has not been defined by the Nevada Legislature or this Court.

Gabrielle argues NRS 125.150(1)(b) is facially clear. (RAOB, p.44.) However, her definitions actually show the statute is ambiguous. Gabrielle cites the Collins English Dictionary definition of "compelling," which states, "irresistibly or keenly interesting, attractive, etc.; captivating." (RAOB, p.44.) She also cites the Merriam-Webster Dictionary, which defines "compelling" as "Forceful, demanding attention, convincing." (RAOB, p.44.)

Those dictionary definitions do not explain what constitutes a "compelling reason" for an unequal division of property. "Demanding attention", "forceful", "keenly interesting", and "attractive" certainly do not illustrate the type of circumstances that necessitate an unequal division. Such broad terms are ambiguous.

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Gabrielle's interpretation would bombard the family court with waste claims requiring thousands of dollars of accounting and attorney's fees to rebut. Every expenditure would be contested. This is certainly not what the Legislature intended when Nevada became a "no-fault," equal division state.

Gabrielle cites examples of non-ambiguous broad language, but those are distinguishable. (RAOB, pp.44-45.) "Best interests," as contained in NRS 125C.0035, is defined by twelve (12) factors. "Financial condition of each spouse," from NRS 125.150(9), is a factor the courts consider when making an alimony determination. That language clearly states what the Legislature wants the court to consider. The "just and equitable" language used in NRS 125.150 is not contained in NRS 125.150(7). It is contained in sections (1)(a), (2)(c), and (5). There is a significant body of case law interpreting the "just and equitable" language going back to when Nevada was an equitable jurisdiction.

While the term, "compelling," has not been defined, there is a historic record of Nevada abandoning "equitable" division and becoming an "equal" division state. After the *McNabney v. McNabney*, 105 Nev. 652, 782 P.2d 1291 (1989), decision, "fault" reappeared in family law.

In *McNabney*, this Court affirmed the unequal division of property. *Id.* at 661. The marriage lasted three (3) years and the parties had been separated for two (2) of those years. *Id.* This Court found that since the wife was financially

independent from the husband, 80% of the contingent legal fee should be awarded to the husband because it was a substantial portion of his monthly income. *Id.* at 655. The *McNabney* court went further than simply affirming an equitable division. It held that Nevada law did not mandate a 50-50 division of community property. *Id.* at 660. *McNabney* held Nevada law required an equitable distribution of community property. *Id.*

In response to the holding in *McNabney*, NRS 125.150(1) was amended in 1993 by Assembly Bill 347. Ass. Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, 67th Sess. (hereinafter "*A.B. Bill 347*") (April 7, 1993). Thomas Standish, of the Nevada Trial Lawyers Association, argued why the amendment was necessary:

> In *McNabney* the trial court found for basically good reasons that a major asset of the marriage should not be divided equally; the judge divided it unequally. When the Supreme Court brought down their opinion in *McNabney*, they went much further than just saying these seem to be solid reasons from the trial court and it will affirm an unequal division. . . . They went on to make a very strong case for the fact that Nevada's an equitable distribution state, meaning the judge can divide the property any way the judge sees fit. . . . What we would like to do is bring some sanity back to this statute.

A.B. Bill 347, at 1976.

The Legislature brought "some sanity back into this statute" when it removed the "just and equitable" and "respective merits of the parties" language from the property division portion of the statute. *A.B. Bill 347*, at 1976. Mr.

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Standish argued that language be removed because it injects "fault" into the court's inquiry relating to the division of property.

> Nevada has always been a no-fault divorce state, meaning that you can file for divorce on the grounds of incompatibility. You do not have to allege cruelty, adultery, mental cruelty, desertion or any of the old common law things that people can endlessly fight over. . . . For fifty years in Nevada we've been doing just fine in community property law being a no-fault state keeping all of those personal things out of the courts, and now the Supreme Court has said in the *Heim* decision people thought they said fault was an issue.

A.B. Bill 347, at 1977. He argued that a drastic amendment was necessary because

> domestic lawyers are already assuming that the Supreme Court has brought the fault concept back into Nevada law. I've had depositions where I've had lawyers go on for an hour asking, 'Why did you leave? Why did you do this? What did you do wrong in the marriage? Did you attempt to reconcile? **Did you see a marriage counselor?' I mean this is a black cloud on the horizon**, I feel. I think it will be an extraordinary change in domestic litigation if this comes. Just the effect on children to have people fight that much more over the fault concept and **the millions of dollars in attorney's fees and the thousands of hours of court time and expense. It's not the direction that I think we want to go in.**

A.B. Bill 347, at 1977 (emphasis added). The Nevada Legislature removed the phrase "respective merits of the parties" to make sure that divorce courts would not "be a forum for every single recrimination in the breakdown of a relationship."

A.B. Bill 347, at 1977.

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Assemblyman Porter equated the word "compelling" in terms of the burden a state would have in facing a constitutional challenge to fundamental rights. *A.B. Bill 347*, at 1981. Obviously the Legislature meant "compelling reason" to be a very high burden for the moving party to meet.

Gabrielle's argument relating to the legislative history of NRS 125.150 (1)(b) completely misses why the statute was amended in the first place. *McNabney* involved a couple who had been separated for two (2) of the three (3) years they were married. 105 Nev. at 654. In *McNabney*, the wife did not have to rely on the husband for financial support. *Id.* at 655. Here, it is undisputed that the minimum Gabrielle would receive in this divorce was $23 million. (AA 44:8581.) Gabrielle does not rely on Dennis for financial support. The district court unequally divided the money earned solely by Dennis during the separation period and favored Gabrielle with more than $2 million from Dennis' share of community property. (AA 6:1144-45 & 44:8552.) This creates a $4 million imbalance in the property division. (AA 44:8554.)

The purpose of the 1993 amendment was to take away the discretion of the district court authorized in *McNabney*. *A.B. Bill 347*, at 1976. Gabrielle states, "the standard was designed to 'provide for the judge's discretion to make equitable considerations and not to make an exact 50/50 division." (RAOB, p.47.) That is not the NRS 125.150(1)(b) standard. That is the *McNabney* standard that was

abrogated by the 1993 amendment. *A.B. Bill 347*, at 1976. The Legislature realized that the district court had been afforded too much discretion, which is why it amended NRS 125.150(1) in 1993. *A.B. Bill 347*, at 1976.

The "compelling reason" language in NRS 125.150(1) is ambiguous because the Legislature did not provide any guidelines as to when it is appropriate to divide community property equally or unequally. Clearly, the dissipation of assets, meaning the loss of assets such that a party would not receive 50% of the estate, has been considered a "compelling reason." *Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296 (1996). This dissipation must be contrasted with over-spending. *See Putterman v. Putterman*, 113 Nev. 606, 609, 939 P.2d 1047 (1997). This Court has held that over-spending or unequal consumption is not a "compelling reason." *Id.* The issue presented in this case is whether over-spending coupled with a girlfriend becomes an automatic "compelling reason" under NRS 125.150(1).

If this Court does not find the term "compelling reasons" ambiguous, then the Court must utilize the "compelling reason" standard as it is used in the constitutional analysis of the deprivation of fundamental rights under the Fourteenth Amendment to the United States Constitution (hereinafter "14th Amendment"), as suggested by Assemblyman Porter in the debate on the bill. *A.B. Bill 347*, at 1981.

Other Nevada statutes referring to "compelling reason" have limited it to rare situations that impose a very high burden based on the 14th Amendment. The "compelling reason" standard is used in termination of parental rights cases and in cases deciding whether the victim of a sexual assault must undergo a psychological evaluation. *See* NRS 432B.553; *see* NAC 432B.261; *see* NAC 432B.262; and *see Koerschner v. State*, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000). These limited circumstances show that the term "compelling reason" is used rarely in Nevada law and requires an extremely high burden of proof and production of evidence. The Legislature was rightly concerned about allowing the injection of "fault" into the decision to award property and limited its application to rare situations.

b. The district court committed legal error when it required Dennis to rebut the allegations of waste by clear and convincing evidence.

Substantial evidence did not support the district court's finding of community waste. All Gabrielle's expert, Anthem Forensics (hereinafter "Anthem"), did was audit over 27,000 transactions during eight (8) years of marriage down to the $1.00 parking. (AA 17:3233-63 & 36:6707-6907.) If Gabrielle did not cause the expenditure, then Anthem presumed the expenditure was waste or potential waste. (AA 17:3247-48.) The very fact that the district court awarded $2,162,451 of "potential community waste" shows that the district court applied the wrong evidentiary standard to this case. By its very nature, potential

community waste "is more likely to be incorrect than it is to be correct," which is the substantial evidence standard. *See Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487, fn 3 (2014). Because this is a civil case, and Dennis' property rights are directly at issue, the district court should have used the preponderance of the evidence standard to support a finding of waste.

The "substantial evidence" standard is less than the preponderance of the evidence standard. *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808 (1979). In *Nassiri*, this Court held that the preponderance of the evidence standard was the **minimum** acceptable standard consistent with the Due Process Clause. 327 P.3d at 491. *Nassiri* further highlights that permitting the government to deprive a person of a property interest under a lesser standard, such as the substantial evidence, "would be nonsensical . . . [and] would allow a tribunal to reach a conclusion even after reasoning that the conclusion is more likely to be incorrect than it is to be correct." *Id.* at fn 3. In this case, the district court was required to find waste by a preponderance of the evidence, not substantial evidence.

Both the district court and Gabrielle concede that Gabrielle first was required to make a *prima facie* case that community property was dissipated. (RAOB, p.52 & AA 44:8526.) This is where the court's error begins. Gabrielle was required to show more than the fact that Dennis spent money. She was required to

show that Dennis dissipated assets by a preponderance of the evidence. *Brosick v. Brosick*, 974 S.W.2d 498, 502 (1998). The district court did not require such a showing. (AA 44:8526.) Instead, it allowed the burden to shift with only substantial evidence, including the $2 million plus category of "potential community waste," meaning it was more likely Dennis did not dissipate the assets in question. (AA 44:8526-29.) This legal error is fatal to Gabrielle's case. By not requiring the evidence to be more correct than incorrect under the preponderance of the evidence standard, the court let "fault" cloud its judgment.

The district court held Dennis to an impossible standard of proof by requiring him to rebut Gabrielle's allegations of spending, not dissipation, by clear and convincing evidence. (AA 44:8526-27.) The clear and convincing evidence standard is only allowed in rare instances in civil cases, such as when the government is taking away a professional license. *In re Disc. of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709 (1995). It is usually utilized when there is government action against an individual on a matter of extreme concern and has stigmatizing consequences. The use of the clear and convincing evidence requirement for Dennis to rebut allegations places the burden of proof on the non-moving party on an issue rather than on the moving party. The district court had no authority under Nevada law for this reversal of the burden of proof.

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The district court then injected "fault" in the division of community property by saying, "Just as he had given Gabrielle false hope that, through marital counseling, their marriage could be saved, he gave this Court false hope that he would provide an estimate and an offer that will be more than the dollars spent, so that one-half of which will be awarded to Mrs. Kogod to at least remove the financial sting or insult of Dennis' having this relationship." (AA 44:08527-28.) This statement was made in support of placing the clear and convincing evidence standard on Dennis.

The comments by the court are illustrative of the court's obsession with "fault" and why it improperly applied the clear and convincing standard. The issue of marriage counseling should not be part of the court's decision-making process when dividing property in a "no-fault" divorce state. (AA 44:827-28.) Litigants do not receive larger property settlements because they go or do not go to counseling. Even the legislative history comments that whether parties go to counseling should not be part of the district court's considerations when dividing property. *A.B. Bill 347*, at 1977.

The court then equated Gabrielle's false hope of marriage counseling with the court's false hope that Dennis would do an accounting and provide an offer that would be more than the dollars spent. (AA 44:8527-28.) First, this directly contradicts both the district court's and Gabrielle's acknowledgement that she is

first required to make a *prima facie* case of dissipation. (AA 44:8526 & RAOB, p.52.) This shows the court's decision-making was clouded by "fault." Second, Dennis did not legally have the burden of proving waste. Gabrielle had the initial burden and only if she fulfilled her *prima facie* case could the burden shift to Dennis to rebut by a preponderance of the evidence.

Third, the court would not see offers of judgment until the case was over and the court's decision was made. *See* NRS 125.141. Neither party made an offer of judgment in this case. (AA 44:8506.) The court should not be concerned with offers made or not made by a party. That should never have been part of the court's decision in dividing community property. The court used Dennis' alleged failure to do a separate accounting from Gabrielle's required *prima facie* accounting and failure to do an offer of judgment as a basis for applying the higher standard of proof. (AA 44:8506 & 8526-29.) Presenting settlement offers would have violated the Nevada Rules of Evidence. NRS 48.105.

In an attempt to rationalize the court's improper placement of proof in this case, Gabrielle cites breach of fiduciary duty cases to justify the court's error. (RAOB, pp.53-54.) Aside from the obvious problems of disproving a negative, those cases are inapposite to the unique factual situation in this divorce.

In *Applebaum v. Applebaum*, 93 Nev. 382, 384-85, 566 P.2d 85 (1977), this Court held that no fiduciary duty exists between husband and wife once a party

announces his or her intention to seek a divorce. By making such an announcement, the other spouse is on notice that their interests are adverse. *Id.* Dennis made such an announcement in July 2010 when Gabrielle found out he wanted a divorce and received paperwork about a divorce. (AA 44:8485.) After that announcement, Gabrielle consulted legal counsel and obtained financial records. (AA 8:1446, 8:1508-09, & 8:1536-37.) Therefore, no fiduciary duty existed.

In *Williams v. Waldman*, the husband who was a practicing Nevada attorney told his wife he would be fair to her in the divorce and that she did not need an attorney. 108 Nev. 466, 469, 836 P.2d 614 (1992). He then proceeded to prepare divorce paperwork that omitted his law practice, which was a substantial asset of the community. *Id.* The issue in that case was whether the wife could recover the value of the omitted asset, i.e., the law practice, even though seven (7) years had passed. *Id.* at 469-70. *Waldman* did not make any holding the "clear and convincing" standard applied to the relationship between a husband and wife, nor does it involve waste. *In re Blanchard* is an unpublished Court of Appeals case that has no legal authority and is factually inapposite to this case. 2016 WL 3584702 (June 16, 2016); NRAP 36(c)(3).

Gabrielle also cites *Foley v. Morse & Mowbray*, 109 Nev. 116, 120-21, 848 P.2d 519 (1993), which is a law firm break up. *Id.* The language cited by Gabrielle

is from a California case regarding a law firm dissolution between partners at that firm. *Id.* In *Foley*, the attorneys in the law firm break-up were not forthcoming and engaged in acts aimed at sabotaging the other for financial advantage. *Id.*

Dennis was not the beneficiary of any transfers between the parties. He did not omit assets. Compared to the size of their estate, Dennis' spending on other people was *de minimus*. (AA 33:6200.) Dennis met his fiduciary duty by saving and investing over 90% of his net disposable income during the six (6) year separation period. (AA 33:6200.) While *Waldman* involved an omission by an attorney-husband who drafted the decree, this case involved identifying expenditures and trying to shift the burden of proof to explain the specific circumstances of over 27,000 transactions. No human could adequately explain over 27,000 transactions over an eight (8) year period. The failure to adequately explain each transaction, line by line, dollar for dollar, regarding what was spent should not give rise to an unequal division of community property. The mere presence of a girlfriend should not trigger a presumption of waste or require a party to provide an item by item accounting of every expense incurred down to parking meter and dry-cleaning charges over eight (8) years.

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c. The district court erroneously found Dennis wasted $4,087,663 by not applying the legal standard.

The district court held waste is calculated by "deem[ing] the wrongfully dissipated assets to have been received by the offending party prior to the distribution." *Brosick*, 974 S.W.2d at 501. (AA 44:8529.) Gabrielle argues this approach places her in the same position she would have been in if Dennis did not waste assets. (RAOB, p.50.) This approach works in cases like *Lofgren* if a spouse liquidates an account, transfers a house, or substantially lessens the assets divided upon divorce. 112 Nev. at 1283-84. The alleged wasted property is then credited to the wasting party so that the non-wasting party still gets 50% of the original estate. *Id.* That approach does not work in the instant case because Dennis did not liquidate an account, transfer a house, or substantially lessen the assets divided upon divorce. Instead, he exponentially increased the assets from $4 million to $47 million during the separation. (AA 6:1144, 1149 & 44:8580.)

Gabrielle argues that Dennis violated NRS 123.220(2) regarding the gift of community property without the express or implied consent of the other spouse. This provision does not apply to the facts of the instant case because Dennis credited any cars or houses that were allegedly gifted to his family or girlfriend to his own share of the community property. (AA 6:1156.) Gabrielle argues each and every "gift," including lunch, dinner, or parking, must be pre-approved. (RAOB, p. 48.) However, at trial Dennis did not seek an unequal division based on gifts of

community property Gabrielle gave to her family. The hypocrisy of Gabrielle's argument is that she is seeking waste for gifts Dennis gave to his mother, father, and brother. (AA 44:8543-8547.)

The issue is not gifts, but whether the expenditures relating to everyday living expenses made by Dennis over an extended period of time should be reimbursed to Gabrielle. She does not think those charges benefitted her and believes Dennis exceeded an arbitrary budget placed on him by her expert, Anthem.

The $4 million waste claim is based on an accumulation of Dennis' expenditures over an eight (8) year period. (AA 44:8489.) In other words, Gabrielle argues that Dennis spent too much money during their separation when he increased the community estate because he was involved with another woman.

In adopting the analysis of Anthem, the court improperly commingled expenses with asset dissipation. The assets grew by over $36 million, but Gabrielle contests how many cars he should own and what he should have retroactively spent on a monthly basis, questioning even his dry-cleaning bills. (AA 17:3369-3402.) Gabrielle spent $1.5 million over those eight (8) years without restriction. (AA 7:1258.) The district court ignored Gabrielle's spending and focused solely on Dennis' spending with microscopic intensity, even though the parties knowlingly lived in different households and in different states for six (6) years.

If Nevada is truly a "no-fault" state, then the court must look at the totality of the circumstances when it determines whether a "compelling reason" exists to justify an unequal division. *See Kittredge v. Kittredge*, 441 Mass. 28, 39, 803 N.E.2d 306 (2004). The district court penalized Dennis for having a girlfriend even though the parties were separated and living separate lives. (AA 44:8490-96.) He spent money on a girlfriend and children, among other things, during a long separation period. Gabrielle spent substantial money herself. (AA 7:1258.) Dennis could have pursued the 2010 divorce, which would have resulted in Gabrielle receiving only $2 million rather than over $23 million. Dennis stayed married, even though they no longer lived together, and allowed Gabrielle to reap the benefit of the most lucrative years of his career. (AA 44:8488-89.) By staying married to her during those six (6) years, Gabrielle received a $20 million windfall.

Anthem created an accounting of over 27,000 transactions over an eight (8) year period and then criticized Dennis for not doing his own accounting. (AA 44:8526 & 8532.) This concept of "accounting," regurgitated throughout the proceedings, was a smokescreen created by Anthem to maximize the alleged community waste and their own importance to the case. Instead of focusing on whether the assets were actually missing, the analysis focused on what Dennis spent and whether he spent excessively. (AA 44:8526.) During discovery Gabrielle had Dennis give a line-by-line explanation of over 27,000 transactions over an

eight (8) year period. (AA 17:3233-68 & 36:6707-6906.) There was no analysis other than whether Gabrielle believed she benefitted from the expense. (AA 9:1604.) If Dennis did not remember a given transaction, Anthem placed that transaction into the "potential community waste" category. (AA 17:3247-48.) Their analysis placed the burden of proof on Dennis to prove that the transaction benefitted the community, meaning Gabrielle. (AA 9:1604.) If he did not remember or did not have receipts, then it was considered "potential community waste." (AA 17:3247-48.)

The district court's acceptance of this type of evidence directly contradicts its own statements made in the decision. The court states, "it did not intend to scrutinize 'lifestyle' issues (i.e., comparing the parties' spending practices) and that the court was not inclined to micro-manage the spending of the parties." (AA 44:8500.) It also states, "I expect . . . a refined list of . . . and I don't even see it being, you know, 'what did you spend this $150 or 500,' that's not what we're getting into." (AA 44:8501.) Despite making those comments in the decision, that is exactly what the court ended up doing.

This type of retrospective analysis is exactly what the Legislature was trying to avoid when it amended NRS 125.150(1). *A.B. Bill 347*. This type of analysis violates the very tenets of community property law. Each expenditure does not have to benefit both parties. *Putterman*, 113 Nev. at 609. Each expenditure can

benefit an individual party, especially during a long separation period. *Id.*

Since NRS 125.150(1)(b) was amended in 1993 and "fault" was explicitly eliminated in making decisions regarding alimony and/or property, this Court has upheld unequal divisions of community property in only a handful of cases. In *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 1190, 946 P.2d 200 (1997), this Court ruled that marital misconduct does not amount to a compelling reason to unequally divide community property. An unequal division can only occur if the spouse created an "adverse economic impact" on the other party. *Id.* No Nevada case has ever supported an unequal division of community property when the marital estate has grown and not been dissipated by a spouse.

In *Lofgren*, the Court found the husband had not merely overspent but had transferred a substantial portion of the family's community property estate out of the community for his own personal use. 112 Nev. at 1284. In total, that husband transferred $96,000 out of the community. *Id.*

In *Putterman*, the Court distinguished between "overconsuming," which is over-spending community income with the financial misconduct that dissipates the accumulated net worth of the parties at the time of divorce. 113 Nev. at 609. In order to divide community property unequally, a party must engage in "financial misconduct." *Id.* The *Lofgren* court understood community waste comes into play when assets are dissipated to the point where a spouse is deprived of his or her

50% share of community property. 112 Nev. at 1283-84.

In *Wheeler*, *Lofgren*, and *Putterman*, the assets divided by the court were adversely affected by one spouse, meaning the assets were gone, and dividing the remaining assets 50-50 would have been a windfall to the alleged wasting spouse. In cases regarding community waste, the offending spouse took money or property that had been saved or accumulated, and dissipated that property on the eve of the divorce or after filing the divorce, so a spouse would not receive 50% of the estate. This is in stark contrast to what the district court did in this case.

No case in Nevada has allowed a retrospective, eight (8) year review of every expenditure made by the parties and forced a spouse to justify each expenditure. That requirement by the district court is contrary to the policy and purpose of marriage and violates the plain, statutory meaning and legislative intent of NRS 125.150(1)(b). The type of waste that occurred in *Lofgren*, *Putterman*, and *Wheeler* did not occur in this case. Unlike those cases, the community estate, here, increased during the period of the parties' separation.

If the rule promulgated by the district court was followed in every case it would be a backdoor return to the days of marital fault. Would every dinner not pre-approved by a spouse be revisited eight (8) years later in the divorce for reimbursement? Would you have to prove a spouse was having an affair for it to be waste? Would waste be limited to the time the marriage is breaking down or would

there be a potential for community waste from the date of marriage going forward?

The rule invented by the district court, if applied to every divorce, would cause chaos in the family court system. It would require couples to keep diaries and receipt books for the complete length of their marriage regarding each and every expense incurred per day, including all individuals the community may have spent money on for every transaction. No court wants to do a retrospective analysis of all expenses incurred during the years of the marriage, yet that was the type of evidence condoned and encouraged by the district court. (AA 44:8502.)

The district court required Dennis to do an eight (8) year, retrospective analysis of everything he spent. The district court expected Dennis to know the circumstances of every transaction, including what was purchased and who it was purchased for. This is an impossible task when most people can not even remember what they ate for dinner last week, let alone what Dennis ate for dinner three (3) years ago. This was in spite of the fact he was growing, not dissipating, the assets. The district court, instead of looking for potential dissipating assets or any adverse consequences inflicted on Gabrielle, allowed a receipt by receipt analysis to justify a finding of $4,087,863 in community waste.

In *Cord,* the Court rejected the idea that the community's total expenses, through the duration of the marriage, be balanced against the total income during the marriage. 94 Nev. at 27. This is exactly what Gabrielle and her experts did in

this case. Even while Dennis was earning and investing tens of millions of dollars during the parties' separation, Gabrielle's response is, "Why is there not another $4 million? If you did not spend so much or have a girlfriend, I would have $2 million more."

The absurdity of this case is that Gabrielle did everything this Court said not to do in *Cord*. In *Cord*, this Court held that community property, as it exists upon divorce, is divided. 94 Nev. at 27. Divorce is not an opportunity to replay the marriage and equalize each party's consumption during the marriage. *Id.* at 27. The total income and expenditures during the marriage are not added up and then subtracted against the other. *Id.* It is not income minus expenditures. *Id.* It is the equal division of community property unless there are assets dissipated based on financial misconduct, not marital misconduct. *Lofgren*, 112 Nev. at 1283.

What is most revealing about Gabrielle's argument is that on one hand she argues the district court has unbridled discretion to do an unequal division of community property, but on the other she argues that the court should not look to equitable division jurisdictions for guidance relating to the equitable relief she requests. (RAOB, pp.48-51.) She argues that a court should not consider the husband's contributions to the size of the community estate and balance that against the husband's expenditures. (RAOB, pp.48-51.) She wants the court to look at his expenditures in a vacuum. For equitable relief a court must take all facts into

account. *See Kittredge*, 441 Mass. at 39. In any analysis of expenditures, contributions and asset creation has to be taken into account. *Id.*

Even though Dennis expanded the net worth of the community estate ten-fold during the period in question, Gabrielle argues Dennis committed financial misconduct when it is the alleged "financial conduct" that caused such exponential growth. Gabrielle goes so far as to argue that a spouse who gambles away money, as in *Kitteredge*, has not committed community waste, but Dennis who exponentially increased the marital estate did commit community waste. 441 Mass. at 38-39. (RAOB, p.48.)

Gabrielle tries to distinguish *Kitteredge*, *In Re Marriage of Williams*, and *Anstuz* claiming these cases arise out of equitable distribution states. (RAOB, p.48-49.) However, the same principles that apply in equitable distribution states would apply to a court using its discretion to make an unequal division under the "compelling reasons" standard, which is an equitable remedy.

Equitable division courts look at "each parties' responsibility for creating or dissipating marital assets" as relevant to a division of property upon divorce. *See Kittredge*, 441 Mass. at 39; *In re Marriage of Williams*, 84 Wash. App. 263, 270, 927 P.2d 679, 683 (Wash. App. 1996); and *see Anstutz v. Anstutz*, 112 Wis.2d 10, 12, 331 N.W.2d 844, 846 (Wis. 1983). Even the *McNabney* court looked at who the contributing spouse was. 105 Nev. at 661. Gabrielle cannot have the law both

ways. Either there is an equal division of community property absent a "compelling reason" akin to the government's burden when depriving someone of their rights under the 14th Amendment, or the court should take into account the totality of the circumstances, including the contributions of the parties, the spending and saving rate, and the economic situations the parties would be in following the divorce.

Dennis' contribution to the community estate during the parties' six (6) year separation, and that separation after the initial divorce filing should have been considered by the district court. A divorce court cannot be a one-way street where one party single-handedly increases the community's net worth to over $47 million, but then also must account for each and every penny spent over an eight (8) year period to avoid a finding of community waste.

While Dennis spent numerous pages in his Opening Brief attacking the $4 million waste calculation, Gabrielle is silent. She never rebuts the analysis contained at pages 43 to 52 of Dennis' Opening Brief discussing and rebutting the mathematical calculations of the district court. Gabrielle never deals with any of the amounts of alleged waste. She relies on blatant assertions and conclusions by the court. This Court should treat Gabrielle's failure to respond to Dennis'

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argument as an admission that his argument has merit because Dennis is not only attacking the decision of the district court in finding waste but the individual categories of waste.

2. *On cross-appeal, Gabrielle requests this Court increase the unequal division of property.*

On cross-appeal, Gabrielle raises four (4) issues that highlight her single-minded motive throughout this litigation—to punish Dennis for cheating on her. (RAOB, pp.58-67.) First, she requests this Court find the district court erred when it ended community property on February 26, 2016, instead of August 22, 2016. (RAOB, pp.58-60.) Second, she wants this Court to expand the period of alleged waste by adding an additional three (3) years to the court's review for a total of eleven (11) years. (RAOB, pp.60-63.) Third, she seeks waste for the purchase, maintenance, and sale of a yacht. (RAOB, pp.65-67.) Finally, she seeks interest as a lost opportunity cost. (RAOB, pp.63-65.) All of these issues have no merit and are discussed below.

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a. The district court ended community property on February 26, 2016, because that was the day the matter was submitted.

On appeal, a district court's decisions made in a divorce decree are reviewed for an abuse of discretion. *Devries v. Gallio*, 128 Nev. Adv. Op. 63, 290 P.3d 260, 263 (2012). A district court's findings of fact may only be disturbed if they are not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699 (2009).

The district court exercised its discretion in finding community property ended on February 26, 2016, when the court closed the evidence portion of this case. (AA 44:8508.) Gabrielle now requests that this Court use the decision date. (RAOB, p.58.)

If Gabrielle did not agree with the district court's decision to end community property on February 26, 2016, then she should have clearly objected. *See Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970 (2008). Instead, a review of the record shows that Gabrielle did not unequivocally object. In fact, after Dennis' counsel requested an absolute decree of divorce to end the accrual of community property, Gabrielle's counsel responded, "we're actually saying the same thing." (RA000183-84.) Gabrielle cannot now raise this issue when she failed to properly object at trial to this decision. *See Lioce*, 124 Nev. at 19.

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Since the record is voluminous, both parties made it clear to the district court that an appeal of this case was probable. The court knew it had to write an opinion. Upon submission of the evidence, the court pronounced the parties divorced and ended community property so it could evaluate the numbers and make a decision. (AA 44:8508.) However, both parties submitted updated schedules and marital balance sheets with their closing briefs. (AA 43:8242-8473.) Gabrielle wants this Court to allow her to claim waste from February 27, 2016, through August 22, 2016, when the court's decision was filed. (RAOB, pp.58-60.) She wants this Court to require further discovery and an additional evidentiary hearing so that she can force Dennis to explain every expenditure during that period. The court has to be allowed adequate time to write an opinion without reopening discovery and holding another evidentiary hearing.

The district court ended community property on February 26, 2016, because the trial had ended. (AA 44:8508.) The court ended its inquiry regarding waste on that day. (AA 44:8508.) To require the court to then re-open discovery and conduct another trial for the time period during which the parties were writing their closing briefs and the court was writing its decision is unworkable.

The interim period between the end of the trial and the court's decision was continued because Gabrielle filed a motion to compel right before the closing briefs were due. (AA 42:8086-89.) As a result, the closing brief deadline, and the

court's decision, was delayed. (AA 42:8086-89.) That motion was ultimately denied. (AA 42:8202-03 & 8217-21.)

Gabrielle cites *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983), in support of her position that community property could not stop accruing until August 22, 2016. However, in that case the district court used the separation date, eight (8) years earlier, as the cut-off for community property. *Id.* at 606. The separation date was not used in the instant case. Further, the district court considered *Forrest* relating to this issue. (AA 42:8203.)

If the district court was not permitted to utilize its discretion to end the accrual of community property after it closed the evidence portion of this case, then it would be left in the absurd position of having to conduct another evidentiary hearing after it filed its decision on August 22, 2016. This is not economical for the court and would be a waste of its resources. There was no evidence any significant values changed while the court was writing its decision, and the court allowed the parties to update their marital balance sheets with the filing of the closing briefs on June 30, 2016. (AA 43:8242-8473.)

For purposes of judicial economy, this Court should affirm the February 26, 2016, end date of community property in this case. Any other result would require multiple evidentiary hearings or trials every time a family court judge took a matter under advisement.

b. Nevada law does not support going back eleven (11) years to calculate waste.

This decision by the district court is also reviewed for an abuse of discretion. *Devries,* 290 P.3d at 263. There is no Nevada law on point. Dennis and the court looked to other jurisdictions. (AA 44:8520.) The court agreed with Dennis that the time frame is measured beginning "when the marriage is **undergoing** an irreconcilable breakdown." *Herron v. Johnson*, 714 A.2d 783 (D.C. App. 1998) (emphasis added); *see Clements v. Clements*, 10 Va.App. 580, 586, 397 S.E.2d 257, 261 (Va.App. 1990). This breakdown may coincide with the parties' separation. *Id.*

During discovery, the parties were unable to obtain banking records prior to March 2008. (AA 44:8533.) Gabrielle requests that this Court expand the "waste period" to include 2005 to February 2008 when there were were no bank records for the court to rely on.

Gabrielle could have gone forward with the 2010 divorce when the parties stopped living together and Dennis filed. If she had, she would have been able to obtain the banking records from 2005 to 2008. She did not. Instead, she stayed married because she knew that was the best financial decision for her. She knew that Dennis had just entered the most lucrative years of his career. She knew that if she stayed married to him that she would receive half of those earnings. Obviously her strategy worked. By staying married, she tacitly agreed to Dennis' spending

and living situation. If this Court allowed waste during the 2005-2008 period, discovery would have to be re-opened and another evidentiary hearing would take place.

Gabrielle does not cite any legal authority to support her position that the district court should have started its calculation of dissipation in 2005, even though no dissipation occurred, and the marital estate expanded. She merely provides the conclusory statement that the "irretrievably broken" standard is inconsistent with Nevada law based on a law review article. (RAOB, pp.61-63.) The lack of valid legal citation shows the decision by the district court was not an abuse of discretion.

As such, this Court should deny the extension of the waste period.

c. The district court did not abuse its discretion when it found no waste relating to Dennis' boating hobby.

During the marriage, Dennis purchased and sold two (2) yachts. (AA 44:8542.) After the purchase and sale of the two (2) yachts, $990,000 was deposited into a joint account that was equally divided between the parties. (AA 1:202-03 & 44:8578.) Dennis testified that his pursuit of boating began when he could no longer golf or do martial arts because of injuries. (AA 10:1843.) Dennis purchased and sold the yachts in the 2012-2015 period. (AA 44:8542.) He earned millions of dollars, which benefitted the community. (AA 44:8534.) The parties did not live together and led separate lives. (AA 6:1163 & 44:8488-89.) The court

found the purchase, maintenance, and sale of yachts did not constitute community waste. (AA 44:8543.) This is a factual finding of the court, which is subject to abuse of discretion review. *Devries,* 290 P.3d at 263.

The court found no compelling reason for an unequal division of community property. (AA 44:8543.) It took into account the tens of millions of dollars Dennis earned for the community. (AA 44:8543.) He utilized boating to relieve tension relating to his job. (AA 10:1843.)

Under *Putterman*, 113 Nev. at 609, this Court distinguished between overconsumption of income during a marriage and community waste. The district court found the purchase, maintenance, and sale of a yacht by a party earning millions of dollars a year did not constitute dissipation. (AA 44:8543.) The district court found there was no compelling reason to award waste on this issue because "this type of expenditure is not necessarily inimical to the maintenance of a harmonious marital relationship." (AA 44:8543.) These findings could also be applied to the other categories of waste. The decision of the district court on this issue should, thus, be affirmed.

d. The district court did not abuse its discretion when it denied Gabrielle's claim for lost opportunity costs.

Gabrielle contends the district court erred by failing to award her the lost opportunity cost of interest on money and property she contends was wasted. (RAOB, pp.63-65.) The district court determined that any attempt to consider the

lost opportunity cost by Gabrielle was speculative. (AA 44:8553.) The district court took into account "the precipitous increase in the value of the marital estate during a period of time in which the marital relationship was irretrievably broken," which was over $36 million. (AA 44:8553.) The court concluded "there was no diminution in the value of the marital estate." (AA 44:8553.) That decision of the district court should be affirmed because the district court did not abuse its discretion. *Devries,* 290 P.3d at 263.

The evidence showed, and Gabrielle did not contest, that Dennis added tens of millions of dollars to the community estate while he spent money on a girlfriend. (AA 44:8534.) He did not gift or dissipate assets because any assets allegedly gifted or transferred were placed on Dennis' side of the community property equation and are not contested on appeal. (AA 6:1156.) The issue of waste was one of spending and potential over-consumption.

Even though Dennis deposited millions of dollars into the UBS account during the time the parties were separated, the court did a retrospective accounting finding that $4 million of the $47 million estate earned, saved, and invested during the separation did not benefit the community. (AA 44:8554.) To claim that money would not have been spent on other matters is total speculation. Gabrielle did not

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prove by a preponderance of the evidence any money the court considered community waste would have been saved and earned interest, and/or the interest rate.

Gabrielle cites *M.C. Multi-Family Dev., LLC v. Crestdale Assoc.. LTD.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008), in support of her argument for "lost opportunity cost," but that case is not on point. *Crestdale* deals with whether a corporation, who obtained a contractor's license, could sue for the unauthorized use of that contractor's license by another when that "other" person took and earned payments by misusing the contractor's license. *Id.* at 905. It has nothing to do with family law or alleged community waste.

In the instant case, Gabrielle received more than one-half of the community estate. (AA 44:8554.) The court found it would be pure speculation to calculate a "lost opportunity cost." (AA 44:8553.) This factual finding should be affirmed under the abuse of discretion standard.

B. Nevada law does not permit a lump sum alimony award of $1,630.292 to a spouse that receives over $23 million of community property.

Gabrielle attempts to place herself in the same boat as women needing alimony for food or shelter. She calls herself a "hapless victim" and a "casualt[y] of marriage." (RAOB, p.29) She calls the argument that over $23 million in property disqualifies her from alimony as a "myopic view of lifestyle." (RAOB,

p.33.) The lifestyle with over $23 million does not equate to "myopic." Over $23 million in assets, plus the $500,000 to $800,000 in passive income those assets earn yearly, affords Gabrielle the opportunity to live as lavish of a lifestyle as she desires, and one equal to or better than she enjoyed during the marriage. (AA 44:8566-67.)

The alimony award is contested by both Dennis and Gabrielle in the appeal and cross-appeal of this case. Dennis argues no award of alimony, neither periodic or lump sum should have been awarded. Gabrielle seeks a larger award of alimony. (RAOB, pp.32-37.)

1. *The district court committed legal error when it found Dennis should pay Gabrielle $18,000 per month for nine (9) years, despite also finding Gabrielle had no financial need.*

The district court departed from 100 years of Nevada law. "Need" is a fundamental requirement for alimony. *Lake v. Bender*, 18 Nev. 361, 7 P. 74 (1885). This Court has held an alimony award must be "just and equitable, having regard to the condition in which the parties will be left by the divorce." *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284 (1994). Alimony is a creature of statute. NRS 125.150(5) sets forth the factors a court must consider when awarding alimony. While the district court quoted those factors, it failed to properly apply

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and analyze those factors to the unique facts of this case. An analysis of those factors should have led the district court to the conclusion that no alimony was warranted.

Both Gabrielle and the district court rely on a law review article that acknowledges only the Nevada Legislature may modify the alimony standard. David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 Nev. L.J. 325 (Winter 2009). That article urges the Legislature, not this Court, to change the standard. Hardy, 9 Nev. L.J. at 347. In her cross-appeal, Gabrielle encourages this Court to engage in judicial activism to modify the standard to not include "need." (RAOB, p.17.) She requests $100,000 per month in permanent alimony, on top of the over $23 million of community property she received, acknowledging she has no "need." (AA 43:8261.)

Gabrielle believes such judicial activism is appropriate to accommodate super wealthy individuals who, in spite of their tens of millions of dollars, think they are inadequately compensated for their divorce. In doing so, Gabrielle argues for a quasi-damage based alimony award, i.e., what have I lost because the marriage is breaking up. (RAOB, pp.20-31.) The theories Gabrielle proposes are fault-based. This is simply a back door return to the "respective merits of the

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parties" argument for alimony promulgated in *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988), and rejected twelve (12) years later in *Rodriguez v. Rodriguez*, 116 Nev. 993, 995, 13 P.3d 415, 416 (2000).

When the Legislature amended NRS 125.150 after the *Heim* decision, it rejected "fault" as a basis to award alimony under Nevada law. *A.B. Bill 347*, at 1977. After those legislative changes, this Court held not only is "fault" not an alimony issue, but neither is domestic violence or other bad acts. *Rodriguez*, 116 Nev. at 998. Despite the Legislature's clear response to the *Heim* decision, Gabrielle argues the district court should have considered what Gabrielle was losing because of the divorce, not her financial condition post-divorce. (RAOB, pp.26-31.)

What is clear from Gabrielle's argument is that she believes a higher award of alimony is necessary because Dennis cheated on her. She argues, "Gabrielle attended counseling to save their marriage, remained faithful, and did nothing to violate their marriage partnership." (RAOB, p.30) This argument is reminiscent of the "but for" causation standard used in tort cases, i.e., "fault." That argument is as follows: But for Dennis cheating on Gabrielle, the parties would not be getting divorced, and Gabrielle would have received her share of his income in the future. She argues alimony as a form of damages. This is not the standard for alimony in Nevada because it improperly injects "fault" into the court's analysis. These

theories focus virtually 100% on the payor, rather than the "need" and abilities of the payee. By focusing virtually 100% on the payor, these theories violate Nevada statutory and case law.

She also argues *Shydler v. Shydler* and *Gardner v. Gardner* support her position. (RAOB, pp.23-27.) Her feeble attempt to draw an analogy between those cases and this case is without merit. As this Court is aware, *Shydler* reversed the district court for confusing property settlement payments with alimony. 114 Nev. 192, 954 P.2d 37 (1998). It found:

> [T]he district court awarded [husband] the portion of the community property which was producing an annual income in excess of $100,000, while [wife's] share of the community property was to be dissipated in the immediate future to provide for [wife's] living expenses so that [husband] would not have to pay spousal support.

Id. at 197. The community property that the wife would have to dissipate to care for herself totaled $215,798. *Id.* at 195. This Court reversed that decision because the wife was actually "receiv[ing] a lesser share of the community property than [husband]." *Id.* at 198. But, *Shydler* also held alimony should not be utilized to equalize post-divorce earnings. *Id.* at 199.

Shydler is not comparable to the instant case. Unlike the wife in *Shydler*, Gabrielle received income producing community property. (AA 44:8560.) The district court even acknowledged that Gabrielle would earn $500,000 to $800,000 per year in passive income from the over $23 million she received in community

property. (AA 44:8566-67.) Because the bulk of community property Dennis received is real estate, his share is not income producing. (AA 44:8578-81.) Gabrielle could live solely on the passive income from her share of the community property without ever touching the over $23 million she was awarded.

Gardner is also not like this case. 110 Nev. 1053, 881 P.2d 645 (1994). In *Gardner*, the husband earned $75,000 per year, while the wife earned $43,000. *Id.* at 1055. There was also evidence that the wife supported the community, while the husband did not work and pursued his education. *Id.* Gardner does not specify how much community property each party was awarded, but based on the annual incomes, it is clear that Gardner did not have multi-millions of dollars at issue. *Id.* A wife who helps her husband go to school and foregoes other economic opportunities for her husband so he can earn $75,000 per year is not like a woman who is awarded over $23 million in community property. *Gardner* is an issue of a wife's future ability to support herself. *Id.* There is no question of whether Gabrielle will be able to support herself in the future because she has over $23 million at her disposal.

In *Devries*, this Court reversed the district court because it failed to hold an evidentiary hearing or expressly analyze the spousal support factors to support a finding of no alimony to the husband. 290 P.3d at 262. *Devries* does not change the

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alimony standard. The Court essentially affirmed the law, as stated in *Shydler* and *Sprenger*. *Id.* at 264.

Gabrielle argues this Court should increase the alimony award using an average of Dennis' total income during the parties' separation. (RAOB, pp.35-37.) The evidence at trial does not support this conclusion. This case is not about someone who had a long-term employment contract. (AA 6:1198.) There was no evidence his pretrial earnings would continue. (AA 6:1198.) Dennis was an at-will employee. (AA 6:1198.) At the time of trial, he was 56-years-old. (AA 10:1913.) He also testified he was at the end of his executive career. (AA 6:1198.) In fact, his employment ended on November 30, 2016, approximately eight (8) months after the trial in this case. (See DaVita Inc., Current Report (Form 8-K) (Oct. 17, 2016).) There was no evidence that Dennis' best years were ahead of him or that his post-trial earnings would be anywhere near his earnings during the parties' separation. There was no evidence Dennis' pretrial earnings would continue post-trial or he had a career asset that would continue to generate money in the future. Based on the nature and quantity of the assets received by Gabrielle, she will be able to live at least as well as she did with Dennis during the marriage. This analysis is without regard to the court's ultimate decision on the unequal division of community property where she received an additional $2 million. (AA 44:8554.)

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The district court set alimony based on Dennis' base income during the separation, even though Gabrielle received over $23 million in the division of property. (AA 44:8565-66.) Gabrielle received the full benefit of Dennis' income during the separation period in the court's division of property.

This case is not about someone who was divorcing on the eve of a huge promotion or other career opportunity. This is a man who stayed married during a six (6) year separation period that coincided with the most lucrative years of his career. (AA 44:8488-89.) The marital estate grew from $4 million to $47 million, with virtually no debt. (AA 44:8489.) Gabrielle fully shared in the increase of the estate.

Gabrielle argues that "need" is not a consideration of the court. (RAOB, p.22.) However, the requirement that "need" be balanced against the other spouse's ability to pay and condition in life set forth in *Lake*, which was decided over 100 years ago, has never been overruled or abrogated by statute. 7 P. at 80. Further, if the Legislature did not want the district court to consider "need," then "the financial condition of each spouse" would not be the first factor the court should consider under NRS 125.150(9)(a).

Gabrielle was awarded over $23 million in community property, not including the unequal division. (AA 44:8581.) As a result, she owns a multi-million-dollar home in Southern Highlands, free and clear of any encumbrances.

(AA 8:1471.) She works part-time for Dignity Health and earns $60,000 per year simply because she wants to work. (AA 44:8566.) At the time of trial, her needs were $15,000 per month, based on an FDF that was considerably higher than her spending during the marriage which averaged $12,000 per month. (AA 44:8566.) Her passive income, based on the property award, provides $500,000 to $800,000 per year. (AA 44:8566.) The court ignored those factors and awarded $18,000 per month for nine (9) years, without thorough analysis. (AA 44:8569.) This monthly figure is more per month than Gabrielle's stated need. (AA 4:819-35.)

This was a legal error because the court failed to correctly apply the law to the facts of this case. *See Jones*, 342 P.3d at 52. As such, this Court should reverse the district court's award of periodic alimony and hold a showing of "need" is necessary to support an award of alimony.

2. *The district court committed legal error when it ordered a present value lump sum payment of periodic alimony of $1,630,292.*

The district court awarded Gabrielle $1,630,292 in lump sum alimony based upon a present value calculation of a periodic award of alimony of $18,000 per month for nine (9) years. (AA 44:8569.) The district court discounted the periodic award by 4% to reach a present day value. (AA 44:8569.)

Until 2017, there were only a handful of Nevada Supreme Court cases approving lump sum alimony awards. *See Schwartz v. Schwartz*, 126 Nev. 87, 225

P.3d 1273 (2010); *see Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); and *see Sargeant v. Sargeant*, 88 Nev. 223, 226, 495 P.2d 618 (1972). In those cases, the person against whom alimony was awarded was elderly and/or sick. *Schwartz*, 126 Nev. at 91-92; *Daniel*, 106 Nev. at 413; and *Sargeant*, 88 Nev. at 226. The basis of the lump sum alimony award in those cases was the probability that the payor would die before the periodic payments were completed. *Id.* In those cases, there was a huge disparity in assets between the payor and payee spouses. *Id.* The district court made no findings that Dennis would not live to make periodic payments or would not pay those payments.

Gabrielle relies exclusively on *Klabacka v. Nelson*, 133 Nev. Adv. Op. 34, 394 P.3d 940 (2017), for the proposition the district court has unfettered discretion to award lump sum alimony. (RAOB, p.32.) *Klabacka* cites *Sargeant* for the proposition that lump sum spousal support can be awarded where the husband's conduct shows the possibility he might liquidate or interfere with his assets to avoid spousal support. 394 P.3d at 952. That is not actually the holding in *Sargeant*. In *Sargeant*, like both *Daniel* and *Schwartz*, the husband was elderly. 88 Nev. at 226. In affirming the lump sum award, the Court specifically discusses the fact he only had a life expectancy of 4.9 years, while the wife was expected to live

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another 23 years. *Id.* at 228. The Court affirmed the award because of the age difference and the husband's "dour attitude" and "litigious harassment." *Id.* at 228-29.

There is little analysis in *Klabacka* regarding the reasoning behind the award of lump sum alimony because the validity of a separate property agreement, the nature of the property contained in the spendthrift trusts, and the subsequent division of community property were the main contested issues in that case. 394 P.3d at 943. The award of lump sum alimony was actually reversed in that case because it was awarded against the trust, not the individual. *Id.* Therefore, the lump sum award was illusory because the opinion does not detail what assets and/or income the husband retained individually. Additionally, the trust awarded to the wife contained less than $8 million, not the over $23 million Gabrielle received in this case. *Id.* at 945. The value of the assets awarded to the parties or the income potentially generated from that income is unknown. In addition, the extent of the husband's non-compliance with court orders or his attempts to interfere with assets is unknown. It is known that the spendthrift trusts at issue were created to provide the community maximum protection from creditors. *Id.* at 944.

Unlike the parties in *Klabacka*, Dennis and Gabrielle have no issues with creditors. The debt in this case was *de minimus*. (AA 44:8581.) The district court made no findings that Dennis would shirk periodic alimony payments. (AA

44:8569.) In addition, unlike the husband in *Klabacka*, Dennis increased the size of the community ten-fold during the separation period. (AA 44:8489.) There is no evidence that Dennis would violate a court order for periodic payments of alimony if ordered by the court. Dennis paid the community bills during the temporary orders and there is no evidence there were any unpaid bills. (AA 7:1259-60.)

Unlike the district courts in *Sargeant*, *Daniel*, *Schwartz*, and *Klabacka*, the district court in this case justified its lump sum award simply to "disentangle the parties" because "the support is not need based" and because of the length of the parties' separation. (AA 44:8569.) This rationale is not supported by Nevada law, especially since periodic alimony awards are modifiable by statute. *See* NRS 125.150(8) & (12). By awarding Gabrielle lump sum alimony, the district court renders Dennis' rights under NRS 125.150(8) & (12) meaningless.

With no "need" there is no basis for awarding monthly alimony, certainly not lump sum alimony. Since the district court engaged in no legal analysis in awarding $1.6 million in lump sum alimony that award should be reversed.

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C. Any award of sanctions, costs, and/or attorney's fees is not supported by Nevada law.

1. *The district court lacked jurisdiction to find Dennis in contempt.*

NRS 22.030(2) provides:

> If a contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit must be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the masters or arbitrators.

Because no affidavit was submitted to the court, the court recognized it could not hold Dennis in contempt. (AA 44:8554.) This affidavit must contain "sufficient facts . . . to set the power of the court in motion." *Strait v. Williams*, 18 Nev. 430, 431, 4 P. 1083 (1884). *Awad v. Wright* holds that this requirement is necessary to state a *prima facie* case against the contemnor. 106 Nev. 407, 409, 794 P.2d 713, 715 (1990), abrogated on other grounds by *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 5 P.3d 569 (2000).

In this case, the district court specifically found: "Gabrielle's Contempt Motion does indeed fail to include a sufficient affidavit from Gabrielle pursuant to *Awad*." (AA 44:8554.) This failing is jurisdictional. *Awad*, 106 Nev. at 409. As such, the district court should have ended its inquiry. Instead, the district court acknowledged this jurisdictional failing and continued to award sanctions under another name. (AA 44:8554.)

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The court *sua sponte*, even though it denied Gabrielle's contempt motion, awarded $19,500 in sanctions pursuant to EDCR 7.60. (AA 44:8554.) The court made no specific findings as to how Dennis violated EDCR 7.60.

The district court relied on EDCR 5.85, which has since been repealed. Under that now repealed rule, the clerk of the district court issued a JPI prohibiting:

> Transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property of the parties or any property which is the subject of a claim of community interest, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court.

EDCR 5.85 (a)(1).

The JPI was never signed by the district court judge. (AA 1:15-16.) It was not a court order. This rule has since been repealed and replaced. The JPI, at issue in this case, provided for no penalty or remedy for its breach. (AA 1:15-16.) It was far from a clear and unambiguous court order. It further does not define "necessities of life" or "usual course of business." (AA 1:15-16.)

The court made limited findings regarding why the court awarded $500 for each alleged violation. (AA 44:8554-56.) The issue before the district court revolved around whether contempt was at issue, nothing else. (AA 44:8554-56.) The court erred because it found that the jurisdictional affidavit requirement was not met yet awarded sanctions.

Gabrielle argues contempt sanctions, although denied by the court, should have been greater. (RAOB, pp.67-70.) Gabrielle ignores her procedural failings, for which the district court rightfully denied contempt in its entirety. Gabrielle argues, without any citation to Nevada law, that the $500 statutory sanctions for contempt was too little because of Dennis wealth. (RAOB, p.70.) NRS 22.100(2) limits the fine imposed for a contempt penalty to $500. Gabrielle cites no authority that contempt sanctions, which are statutorily decided by the Legislature, are on a sliding scale based on wealth. (RAOB, p.70.)

The action of the district court in denying contempt but imposing sanctions was erroneous. After deciding there was no contempt the matter should have been over. The court cannot *sua sponte* ignore Gabrielle's procedural failings and still award $500 for "contempt" but call it "sanctions" under EDCR 7.60 when the rule was not cited or argued by Gabrielle. Either there was a valid contempt motion or not.

When the court ordered $19,500 in sanctions, the court stated that "[a]lthough those expenditures have been captured in the Anthem Report and included as part of this Court's analysis of community waste, each transaction violated the terms of the JPI." (AA 44:8555-56.) Gabrielle was already compensated for any expenditure that violated the JPI through the unequal division of community property. (AA 44:8555-56.) NRS 125.150(1)(b) requires a

"compelling reason" for an unequal division of community property. The statute does not allow the district court to further sanction or penalize the alleged wasting spouse twice for the same action.

Dennis did not violate the actual terms of the JPI because he was earning, saving, and investing millions of dollars at the time he made the expenditures at issue. Any expenditure Dennis made was in his usual course of business and lifestyle. There were no pretrial motions putting either party on a budget. The parties remained separated as they had been for six (6) years. The district court specifically found "there was no diminution in the value of the marital estate." (AA 44:8553.) Through Dennis' efforts alone, the net worth of the parties skyrocketed over the term of their separation through the date of divorce. (AA 44:8489.)

The community was never financially harmed by any of Dennis' actions. Unless the district court was going to unilaterally, retroactively impose an arbitrary budget on the parties, there was simply no loss to the community. In spite of those factors, the district court charged Dennis twice for the same transactions.

Gabrielle wants to impose more fines and sanctions against the person who grew the community and made her a multimillionaire. (RAOB, pp.67-70.) Gabrielle claims there is no "wealth exception" to Dennis' conduct. However, there is no also no "wealth penalty." (RAOB, p.70.) Gabrielle argues for a "wealth penalty" arguing the district court did not sanction Dennis enough , but Nevada

law does not allow this Court to increase the penalty statutorily prescribed by NRS 22.100 just because a party is wealthy.

For the foregoing reasons, the $19,500 in sanctions imposed by the district court should be reversed and this Court should deny Gabrielle's argument that additional sanctions should be awarded against Dennis.

2. *The district court erred in awarding expert witness costs.*

The district court committed reversible error and violated NRS 18.005(5), NRS 18.110(1), and *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365 (2015), when it awarded $75,650.00 in expert witness fees to Gabrielle. (AA 44:8477.)

The statute for awarding expert witness fees as a cost is contained in NRS 18.005(5). The party seeking expert fees, as a cost, must file a verified Memorandum of Costs within five (5) days after entry of judgment. NRS 18.110(1). The party is limited to an award of $1,500 per expert witness unless the court provides written findings based on the *Frazier* factors. NRS 18.005 (5); *see Frazier*, 357 P.3d at 377. The five (5) day rule is a statutory requirement and is jurisdictional. NRS 18.110(1). Additionally, the court found there was no prevailing party in the case. (AA 47:9286.)

Gabrielle filed her request for expert fees twenty-two (22) days after entry of the decree. There was no explanation for the late filing. Gabrielle never asked the court to extend the time for the filing. Gabrielle does not address this failure in her

Answering Brief. She simply states she reserved her right to file a motion for fees and costs in her closing brief, but cites no law allowing such action. (RAOB, p.70.) Based on the timeliness issue, this Court should reverse the district court's award of $75,650 in expert witness costs.

If this Court wants to review the cost award on the merits, the expert witness costs should still be reversed. The district court erred when it provided no analysis of any of the eleven (11) enumerated *Frazier* factors or explanation why expert costs in excess of $1,500 were awarded. (AA 47:9276-79.)

Because this is a divorce, there are more reasons to deny an award of expert witness costs than in a normal civil case. Both parties' expert costs were paid by the community, so Gabrielle did not specifically pay for her own expert fees. Without any analysis, including a *Frazier* analysis, the district court awarded $75,650 in expert witness costs from Dennis' share of the community, even though the expert costs were already paid by the community. This has the effect of awarding those fees to Gabrielle twice. The court engaged in a "double-dip" by making Dennis pay twice for the same costs, even though he had to pay for his own expert. Since Gabrielle received over $23 million in assets from the divorce, not including the unequal division and alimony, there was no need to award such costs under *Sargeant.*

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Gabrielle tries to rehabilitate the district court's failure to make *Frazier* findings by analyzing those factors in her Answering Brief. That attempt is without merit. Gabrielle provided no detailed affidavits regarding the normal fees charged in Clark County for the expert, nor did she provide comparable expert fees charged in similar cases. Instead, she analyzes only five (5) of the eleven (11) factors. (RAOB, pp.71-73.) After failing to comply with NRS 18.110(1), the *Frazier* case, or make findings as required by *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81 (2016), this Court should reverse the expert cost award.

In her cross-appeal, Gabrielle asserts the district court abused its discretion when it did not award her all the expert witness costs she incurred. This argument is without merit based on the fact that NRS 18.110(1) and the requirements of *Frazier* and *Khoury* were not met, and the community paid for both experts.

3. *The district court properly exercised its discretion to award no attorney's fees.*

In her cross-appeal, Gabrielle requests this Court reverse the district court's decision to not award her fees. (RAOB, pp.74-80.) There is no legal authority to award Gabrielle attorney's fees.

An award of attorney's fees and costs is a two-step process. *Miller v. Wilfong*, 121 Nev. 619, 623,119 P.3d 727 (2005). First, Nevada law does not allow an award of attorney's fees unless allowed by express or implied agreement or when allowed by statute or rule. *Id.* The party must identify the legal basis for the

award, and then the district court decides whether such a basis exists. *Id.* Second, if a basis for an award is found, the court then determines the reasonable amount of attorney's fees based on an analysis of the factors set forth in *Brunzell v. Golden Gate Natl. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The court does not analyze the *Brunzell* factors unless there is a statutory or contractual basis to allow an award of fees. *Id.* Gabrielle cites no statute, rule, or contract to provide a basis for such an award. Therefore, the *Brunzell* factors do not apply. Litigants in Nevada pay their own attorney's fees and costs with few exceptions. This case does not fall into any of those exceptions.

Because neither party did an offer of judgment, Gabrielle is not entitled to fees under NRS 125.141. Gabrielle concedes that she did not do an offer of judgment. (RAOB, p.75.)

The district court concluded there was no prevailing party in this case, so NRS 18.010 cannot provide a basis for an award of attorney's fees. (AA 47:9286.) Gabrielle sought permanent alimony of $100,000 a month and over $6 million in community waste. (AA 43:8245 & 8261.) She fell significantly short in those arguments, so the district court exercised its discretion in finding no prevailing party. (AA 47:9286.)

An award of attorney's fees and costs is not supported under *Sargeant*, *Miller*, or *Wright v. Osburn*. In *Sargeant*, the Court found that the "wife must be

afforded her day in court without destroying her financial position." 88 Nev. at 227. The wife in *Sargeant* would have been required to "liquidate her savings and jeopardize the child's and her future subsistence still without gaining parity with her husband." *Id.* Although *Sargeant* has been cited by courts to support the wealthier spouse paying attorney's fees, *Sargeant* is inapplicable to the facts of this case.

In *Miller*, the Court found that attorney's fees may be awarded to *pro bono* counsel. 121 Nev. at 623. *Miller* also relies on *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071 (1998), which states that the court should consider the disparity of income between the parties when making such awards. *Id.*

None of this applies to the instant case. Gabrielle's financial position could not be destroyed by litigating this case. She was awarded over $23 million, not including the unequal division and alimony. (AA 44:8581.) In addition, while there is a disparity in income, that distinction does not change the fact that Gabrielle was on the same exact footing as Dennis throughout this litigation as the community paid the fees. In fact, Gabrielle was actually awarded more property than Dennis. (AA 44:8581.) She received over $27 million, including the unequal division and alimony, while Dennis only received approximately $20 million. (AA 44:8580-81.) Based on the district court's decision, there is actually a disparity in wealth in Gabrielle's favor.

Gabrielle is not like the women in *Sargeant*, *Miller*, or *Wright*. She does not have to make sacrifices to pay her attorney's fees. Gabrielle claims, "The wealth of either party is irrelevant, the question before the Court is whether a party can meet their adversary on an equal footing." (RAOB, p.76) Certainly Gabrielle met Dennis on an equal footing.

Gabrielle cites NRCP 7.60 as a basis for an award of fees. (RAOB, p.77.) This rule does not exist. Insofar as this is a typographical error, and Gabrielle actually intended to cite EDCR 7.60, this Court can equally dismiss this argument. First, this rule does not apply to an award of attorney's fees spanning an entire divorce. The rules and case law discussed above govern such awards. Second, the district court made no finding under EDCR 7.60 to permit an award of attorney's fees and costs. There is no finding that Dennis failed to give reasonable attention to this case or failed to appear when necessary under EDCR 7.60(a). There is no finding that Dennis presented a frivolous, unnecessary or unwarranted motion or opposition under EDCR 7.60(b)(1). There is no finding that he failed to prepare for a presentation, refused to comply with the rules, or refused to comply with the judge's orders. EDCR 7.60(b)(2, 4, & 5). Finally, there is no finding that Dennis multiplied the proceedings to unreasonable and vexatiously increase the costs under EDCR 7.60(b)(3).

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Finally, Gabrielle cites NRCP 37 as a basis for fees. (RAOB, p.77.) This rule does not apply to this case because it relates to "Failure to make disclosure or cooperate in discovery." Gabrielle never filed a motion to compel during the discovery portion of this case. As such, there is no basis for any award of attorney's fees and costs under this rule.

After not showing any statutory or other basis for an award of attorney's fees and costs, Gabrielle begins her analysis of the *Brunzell* factors that must be considered by a district court to justify the amount of fees awarded. (RAOB, pp.77-80.) The court does not utilize the *Brunzell* factors unless there is a basis for fees. *Miller*, 121 Nev. at 623. Since there is no basis, *Brunzell* does not apply. *Id.*

Since the district court found there was no legal basis for an award of attorney's fees in this case, this Court should affirm the district court's decision on an abuse of discretion standard.

DATED this 15 day of December, 2017.

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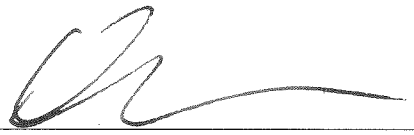

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CERTIFICATE OF COMPLIANCE

1. 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 in 14 point font and Times New Roman.

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 does not exceed 30 pages/ or contains no more than 14,000 words. It contains 13,844 words.

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.

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

DATED this 15 ~~day~~ of December, 2017.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 15 day of December, 2017, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL BRIEF** on the following:

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