IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 73048

HELEN NATKO,

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

District Court Case No. G-13-038863-A

Appellant's Reply Brief

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities 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.

HELEN NATKO is an individual and is not affiliated with any corporation.

I. ARGUMENT

A. The Majority of the State's Answering Brief Consists of an Irrelevant Statement of Facts Including a Knowingly False and Libelous Accusation

The State opens its Statement of Facts with a knowingly false and libelous misrepresentation that Appellant exploited $25,000 from her 30-year life companion, Mr. Mencarelli. Although the State cites to page 33 of the Appellant's Appendix to support this representation, there is no mention on that page or anywhere else in the record that Appellant exploited $25,000 from Mr. Mencarelli.

Otherwise, the State, after providing some basic background information regarding the 30 plus year relationship between Appellant and Mr. Mencarelli, spends four pages of its brief (pages 4, 5, 6, and 7) reciting irrelevant facts with minimal support which have nothing whatsoever to do with the issue on appeal in this case. Appellant will not respond to those irrelevant statements regardless of their falsity and inaccuracy, other than to inform the Court that Appellant and Ms. Black both filed Petitions with the Guardianship Court to be appointed Guardian over Mr. Mencarelli. Appellant prevailed before the Guardianship Commissioner after an 11-day trial and Ms. Black did not object to the Commissioner's recommendation and did not appeal the Judge Hoskin's acceptance of that recommendation. AA 00066, lines 7 – 9.

The primary relevant facts in this case are found in the stipulated trial

exhibits, AA00195, AA00193, and AA00027 (the Credit Union records), the transcript from the hearing settling jury instructions AA00077- 00096, and the Jury Instructions AA0097 – 100. The Credit Union records evidence, without any dispute or conflicting interpretation, Mr. Mencarelli's creation of the Joint Account with Appellant on July 23 2012, Appellant's withdrawal of $195,000 from her Joint Account on July 5, 2013, Appellant's redeposit of the $195,000 into her Joint Account on July 31, 2013, and the fact that Appellant did not spend a dime of the $195,000 during the 26 days the funds were in her sole account.

B. The Appellant Did Provide a Complete Record On Appeal.

In setting forth its largely irrelevant Statement of Facts, the State complains in passing that the Appellant may not have provided a complete record on Appeal by not ordering all of the trial transcripts. Although the State does not dispute the Appellant's Statement of Facts or claim any prejudice or basis for dismissal or sanction, the Appellant is only required to request and submit the "necessary" portions of the transcripts. NRAP Rule 9(a)(1)(B). In the case at bar, the issue on appeal is extremely narrow and focused, i.e. the giving of the erroneous Jury Instruction #18. Appellant provided this Court with the transcript from the hearing settling jury instructions which included the arguments to the Trial Court on the part of both parties regarding Jury Instruction #18. AA0077-00096. Further, the record on appeal in the Appellant's Appendix includes all relevant exhibits admitted at trial that relate to the Joint Bank Account. Finally,

the State had the ability to supplement the record on appeal or order any other transcripts that it desired. NRAP Rule 9(a)(5). The State deemed the record sufficient and did not seek to supplement it in any way. NRAP Rule 9(b)(2) and NRAP Rule 10(c).

C. As A Joint Owner Of The Subject Credit Union Account, Appellant Absolutely Owned The Contents Of The Account And Did In Fact Have Carte Blanche to Withdraw Any Funds Therefrom.

On Page 11 of the Answering Brief, the State proclaims that Appellant's interpretation of NRS 100.085 (1) and (4) must be wrong, otherwise a depositor who adds a joint tenant to his or her account would be giving "carte blanche" to the new joint tenant to take whatever funds he or she wanted from the joint account.

Appellant's response to this statement is YES, that is exactly what happens when a depositor adds a joint tenant to his or her account as per the specific terms of NRS 100.085(1) and (4).

NRS 100.085(1) provides in pertinent part: "When a deposit has been made in the name of the depositor and one or more other persons, and in a form **intended** to be paid or delivered to any one of them, or the survivor or survivors of them, **the deposit is the property of the persons as joint tenants**. If an account is intended to be held in joint tenancy, **the account or proceeds from the account are owned by the persons named**, **and may be paid or delivered**

to any of them during the lifetime of all. (emphasis added)

NRS 100.085(4) provides in pertinent part:

> [T]he use by the depositor of any of the following words or terms in designating the ownership of an account **indicates the intent of the depositor that the account be held in joint tenancy**:
>
> (a) Joint;
> (b) Joint account;
> (c) Jointly held;
> (d) Joint tenants;
> (e) Joint tenancy; or
> (f) Joint tenants with right of survivorship

Thus, when Mr. Mencarelli created the Joint Account by providing the information and signing the Credit Union "Signature Card," AA00195, wherein the word "joint" appears six (6) different times, including "joint owners," "joint member," and "joint share agreement," per NRS 100.085(4) he intended "that the account be held in joint tenancy." Thus per NRS 100.085(1), "the deposit is the property of the persons as joint tenants" and "the account or proceeds from the account are owned by the persons named, and may be paid or delivered to any of them during the lifetime of all."

This is not a disputed interpretation of the statute, this is the clear and unambiguous quoted language of the statute. This Court has held, "[w]hen interpreting a statute, we first determine whether its language is ambiguous. If the language is clear and unambiguous, we do not look beyond its plain meaning. ..." *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 539, 135 P.3d 807, 810

(2006). "A statute's language is ambiguous when it is capable of more than one reasonable interpretation." *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.,* 126 Nev. 397, 402, 245 P.3d 527, 531 (2010).

Per NRS 100.085, the Appellant was, without dispute by the State, a joint tenant on the Joint Account beginning on July 23, 2012. Accordingly, the Appellant owned all of the proceeds in the Joint Account as of July 23, 2012. In July 2013, one year later, the Appellant simply withdrew her own $195,000 from one account and put into another account for 26 days.

D. The State Continues to Conveniently Ignore The Actual Ruling By This Court in *Walch v. State.*

The State failed to address Appellant's analysis in the Opening of Brief regarding this Court's primary holding in *Walch v. State*. In that case, Ms. Walch stole money from Ms. Laird's sole bank account and then sought to gain cover or protection from her criminal act by depositing those stolen funds into a joint account that Ms. Walch had with Ms. Laird. This Court held that Ms. Walch's status as joint holder of the account into which stolen funds were deposited did not in any way absolve her of her crime of theft. *Id*. 112 Nev. at 34, 909 P.2d at 1189.

Appellant never stole any of Mr. Mencarelli funds and deposited them into the subject Joint Account. Appellant did not create the Joint Account, Mr. Mencarelli did. Appellant never sought cover or protection of a prior criminal

act. The case at bar is completely dissimilar to *Walch v. State.*

E. The State Ignored This Court's Ruling in *Pedroli Ranches Partnership v. Pedroli.*

Appellant cited in her Opening Brief to this Court's recent opinion of *Pedroli Ranches Partnership v. Pedroli*, 2017 Nev. App. Unpub. LEXIS 299, 2017 WL 2119474, docket number 67469 (May 9, 2017)(unpublished decision). The State completely avoided discussing or attempting to distinguish the case.

This appeal is based entirely on NRS 100.085. This Court in *Pedroli*, specifically discussed the 1995 amendment to NRS 100.085 and *Starr v. Rousselet*, 110 Nev. 706, 877 P.2d 525 (1994) for the first time since 1995 and discussed at length the significance of the use of word "joint" in the context of multiple party bank accounts. The State's refusal to respond to this critical issue and case in Appellant's Opening Brief should be considered as a confession of error by this Court.

This Court in *Polk v. State*, 126 Nev. 180, 233 P.3d 357 (2010) held

> [w]e have routinely invoked our discretion and enforced NRAP 31(d) when no answering brief has been filed, see County Comm'rs v. Las Vegas Discount Golf, 110 Nev. 567, 569-70, 875 P.2d 1045, 1046 (1994); State of Rhode Island v. Prins, 96 Nev. 565, 566, 613 P.2d 408, 409 (1980). We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal. See Bates v. Chronister, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); Moore v.

> State, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effectively] filed no brief at all," which constituted confession of error), overruled on other grounds by Miller v. State, 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005). *Id.* at 126 Nev. at 184 – *185,* 233 P.3d at 360.

Again, this Court in *Pedroli* held "**[i]n response to the *Starr* decision, the Legislature added NRS 100.085(4) which holds that labeling an account a joint account indicates that the depositor(s) intended the account be held in joint tenancy. *See* NRS 100.085(4).** (emphasis added). *Id.* This Court went on to state that once it is determined that an account was created using the word "joint," that a rebuttable presumption is created that requires the party objecting to the joint account to prove by clear and convincing evidence that there was a different intent. *Id.*

Again, there really is no dispute regarding this Court's opinion in *Pedroli* and its determinative effect on this appeal. The State's refusal to address *Pedroli* even without a sanction amounting to a confession of error is clear evidence that the State is unable to justify its position given the unambiguous statute and the common sense opinion in *Pedroli.*

F. The State's Argument that *Walch v. State* Was Decided In 1996 After The 1995 Amendment Of NRS 100.085 Is Preposterous.

On page 11 of its Opening Brief, the State makes a passing statement that this Court's decision in *Walch v. State* was decided in 1996 and this Court was

aware of the 1995 Amendment to NRS 100.085. The State does not argue that the Amended Statute had any application to the facts of *Walch v. State*. The State does not argue that this Court applied the 1995 Amended Statute retroactively to the 1991 and 1992 facts of *Walch*. Instead, the State simply throws out the date of the *Walch* opinion, suggests some basic speculation, and moves on. The State does not address Appellant's argument on the exact subject in her Opening Brief. Again, although *Walch v. State* was decided by this Court in 1996, the facts of the case occurred in December 1991 and 1992 when the joint account was created and the funds were withdrawn. *Walch v. State* was decided by the district court and this Court under the pre-1995 version of NRS 100.085 consistent with *Starr v. Rousselet*. The language in *Walch v. State* relied upon by the Trial Court in this case, "mere status as a party to the joint accounts did not provide her with lawful authority to use Nell's assets for her own benefit," is a misstatement of law under NRS 100.085 as amended in 1995.

G. The State's Argument That NRS 100.085 Is Solely For The Protection Of Banks and Depositories Is Wrong and Unsupported.

The State implies in its Answering Brief that NRS 100.085 cannot be used to support the position of depositors who create joint accounts, but is only available for the protection of depositors such as banks. As this Court in *Walch* stated, depositors certainly gain protection from the statute; however, there is no support anywhere for the proposition that depositors gain no rights or protections from the statute. Joint checking accounts are used by couples, siblings, parents

and children for many different reasons, including estate planning. NRS 100.085 and its amendment in 1995 provide certainty to individuals that their financial decisions and affairs will be carried out without interference from others. Both a depositor who creates the joint account and a person added onto a joint account are afforded protection by the statute and have every right to seek enforcement of their statutory rights in Court. There is absolute nothing in NRS 100.850 that in anyway restricts or limits it's application or the protections afforded therein to just depositories such as banks. Of course the State does not cite this Court to any authority, but instead make just another passing mention in an effort to imply some non-existent law or policy.

II. CONCLUSION

The State by choosing to ignore the 1995 amendments to NRS 100.085 and the *Pedroli* opinion cannot render the statute or the case law inapplicable or moot. The State's unsupported claims and personal opinions that NRS 100.085 solely protects banks and has no application to depositors who choose to create joint accounts is self-serving, parochial, and completely unsupported.

NRS 100.085 is clear and unambiguous. It was amended in 1995 to legislatively over rule *Starr v. Rousselet* and this Court in *Pedroli* has made clear that depositors who use the statutory language "joint" with respect to their bank accounts intend to and do create Joint Accounts wherein all deposits therein are owned in whole by all parties to the Joint Account.

The State has never questioned the authenticity of Appellant's and Mr. Mencarelli's Joint Account. Accordingly, Appellant owned all funds in the Joint Account as July 23, 2013 and on July 5, 2013 when she withdrew funds therefrom.

The Trial Court correctly instructed the Jury with Instruction #16: "When a deposit has been made in the name of the depositor and one or more other persons, and in a form intended to be paid or delivered to any one of them, or the survivor or survivors of them, the deposit is the property of the persons as joint tenants." AA00098.

However, the Trial Court then gave the opposite Jury Instruction Number 18: "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another's assets for their own benefit." AA00100.

Appellant respectfully maintains that Jury Instruction Number 18 is a misstatement of law that allowed the Jury to ignore NRS 100.085. But for the Trial Court giving Jury Instruction Number 18 and its and reliance on *Walch v. State*, the State's case against Appellant would had to have been dismissed after the State completed its case, or at least after the verdict when Appellant moved the Court to do so.

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Appellant respectfully requests that this Court reverse the Guilty verdict against Appellant and remand the case with Instructions to dismiss all charges against Appellant for withdrawing her own funds from the Joint Account.

DATED this 28th day of March 2018.

FOLEY & OAKES, PC

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt font and using Times New Roman.

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), it is proportionately spaced, has a typeface of 14 points or more and contains 2,997 words.

Finally, I hereby certify that I have read this Appellant Reply Brief and to the best of my knowledge, information, and belief, it is not frivolous or

interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of March 2018.

FOLEY & OAKES, PC

/s/ Daniel T. Foley
Daniel T. Foley, Esq.

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I hereby certify that I am an employee of Foley & Oakes, PC, and that on the 28th day of March 2018, I served the following document(s):

APPELLANT'S REPLY BRIEF

I served the above-named document(s) by the following means to the person s as listed below:

[x] **By Electronic Transmission through the ECF System**:

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[ ] **By United States Mail**, postage fully prepaid to person(s) and addresses as follows:

[ ] **By Direct Email**:

[ ] **By Facsimile Transmission:**

I declare under the penalty of perjury that the foregoing is true and correct.

_/s/ Liz Gould____
An employee of FOLEY & OAKES, PC