

Case No. 73837

In the Supreme Court of Nevada

IN THE MATTER OF THE W.N.
CONNELL AND MARJORIE T.
CONNELL LIVING TRUST, dated
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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA J. STURMAN
District Court Case No. P-09-066425-T

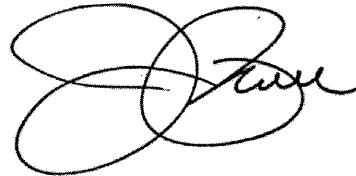
RESPONDENT'S ANSWERING BRIEF

JOSEPH J. POWELL
State Bar No. 8875
DANIEL P. KIEFER
State Bar No. 12419
MATTHEW W. PARK
State Bar No. 12062
RUSHFORTH LEE & KIEFER LLP
1707 Village Center Circle, Suite 150
Las Vegas, NV 89134
Telephone (702) 255-4552
probate@rlklegal.com
Attorneys for Respondents

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Petitioner-Respondent Jacqueline M. Montoya is an individual. The undersigned was counsel for Ms. Montoya, the Respondent, in the district court action. Petitioner-Respondent Kathryn A. Bouvier is an individual. Ms. Bouvier has been represented in this matter by the following law firms: (1) ALBRIGHT, STODDARD, WARNICK, & ALBRIGHT, and (2) RUSHFORTH LEE & KIEFER LLP. Respectfully submitted this 4th day of September, 2018.

RUSHFORTH LEE & KIEFER LLP

A handwritten signature in black ink, appearing to read 'Joe Powell', written over a horizontal line.

By: _____

JOSEPH J. POWELL

State Bar No. 8875

DANIEL P. KIEFER

State Bar No. 12419

MATTHEW W. PARK

State Bar No. 12062

1707 Village Center Circle, Suite 150

Las Vegas, NV 89134

Telephone (702) 255-4552

e-mail: probate@rlklegal.com

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. Was Judge Sturman's award of punitive damages supported by substantial evidence?
2. Did Judge Sturman award punitive damages in a "subsequent" proceeding as required by NRS 42.005(3)?
3. Did Judge Sturman's punitive damages award comply with the Due Process Clause of the Fourteenth Amendment of the United States Constitution?
4. Was Judge Sturman's denial of Appellant's late motion to continue the evidentiary hearing, given Appellant's ample prior notice and her failure to meaningfully participate in the case, an abuse of discretion?

I. FACTUAL BACKGROUND

Not surprisingly, the Opening Brief minimizes the acts and omissions of Appellant Eleanor Ahern (“Ahern”). In reality, her conduct was reprehensible and represented continual violations of her solemn fiduciary duties. It was also unrepentant – Ahern committed multiple breaches both as Trustee and after she was removed. A restatement of the facts is necessary to accurately portray the record which prompted Judge Sturman to impose punitive damages on Ahern.

A. THE DECLARATORY RELIEF PETITION AND ASSOCIATED PROCEEDINGS

This matter began in 2013, when Jacqueline Montoya (in her representative capacity for herself and Kathryn Bouvier) (the “Beneficiaries”) filed a Petition for Declaratory Relief because Ahern stopped providing their rightful beneficiary distributions in June 2013. (7-8 AAPP 800-936.) These distributions were due to the Beneficiaries under the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the “Trust”).

As explained in the Petition, from the time of the surviving settlor’s death until June 2013, the Beneficiaries had consistently received a 65% share of the income from the Trust’s oil and gas property, with Ahern receiving the remaining 35%. (*Id.* at 7 AAPP 802-808.) In June 2013, when Ahern began acting as sole trustee of the Trust, she suddenly stopped making any distributions to the Beneficiaries. (*Id.*) Instead, for the first time, she asserted she was entitled to 100%

of the Trust's oil property income. (*Id.*) The Beneficiaries' Petition sought a declaration that Ahern was only entitled to a 35% distribution, with the remaining 65% to go to the Beneficiaries, via the MTC Living Trust, which was established by the surviving settlor, Marjorie T. Connell. (*Id.*)

1. The Interim Order to Secure the Beneficiaries' Funds

On January 6, 2014, the district court entered an Interim Order ("Interim Order") for Ahern to secure the litigated funds. (8 AAPP 937-941). It required that Ahern, as Trustee, hold the Beneficiaries' 65% of Trust income in the Trust, until the parties' dispute was resolved. (*Id.*)

2. The District Court Removes Ahern as Trustee and Appoints Frederick Waid, Esq. as an Independent Court-Appointed Trustee

Meanwhile, on March 20, 2015, due to concerns regarding Ahern's administration of the Trust, the district court signed an Order "immediately" removing Ahern as Trustee of the Trust, and replacing her with Frederick Waid, Esq. as a neutral, Court-Appointed Trustee. (1 AAPP 44-45).

3. Order on Petition for Declaratory Relief Finds Ahern Improperly Withheld Distributions

Ultimately, on April 16, 2015, the district court resolved the Beneficiaries' Petition, finding that Ahern had improperly withheld distributions from the Beneficiaries. (1 AAPP 35-36.) It ordered Ahern to reimburse the Beneficiaries their 65% share of all unpaid distributions. (*Id.*)

B. ORDER REGARDING THE ACCOUNTING, BREACH OF FIDUCIARY DUTY CLAIMS, AND AWARD OF ATTORNEY’S FEES

On April 20, 2015, the district court entered an Order Regarding the Accounting Breach of Fiduciary Duty Claims, and Award of Attorney’s Fees, finding that Ahern had breached her fiduciary duties to the Beneficiaries. (1 AAPP 39-43.) Specifically, the district court found as a matter of law that Ahern’s decision, as Trustee, to unilaterally and without court order, cut off the Beneficiaries’ 65% distributions, as well as her failure to retain a third-party trustee, breached her fiduciary duties. (*Id.* at 1 AAPP 42.)

C. THE MOTION FOR ASSESSMENT OF DAMAGES AGAINST ELEANOR AHERN; ENFORCEMENT OF NO-CONTEST CLAUSE; AND SURCHARGE OF ELEANOR’S TRUST INCOME (“SURCHARGE PETITION”)

As new information about Ahern’s deceptions came to light, the Beneficiaries filed additional motions to protect their rights. They filed the Surcharge Petition against Ahern on June 3, 2015. (6-7 AAPP 748-771.)

The Beneficiaries asserted they were unaware of the true extent of Ahern’s damage when they filed their initial Petition for Declaratory Relief in 2013. (6 AAPP 750.) In the two years that passed, the Beneficiaries learned they not only lost the benefit of using their 65% share of the Trust distributions, but they also lost most of the 65% share which Ahern was obligated to safeguard as Trustee. (*Id.*)

Moreover, the Beneficiaries alleged Ahern refused to cooperate with the Court-Appointed Trustee, Frederick Waid, to recover missing Trust funds (that Ahern stole). (7 AAPP 751-52.) Mr. Waid’s preliminary investigation showed Ahern mismanaged Trust assets, stole Trust funds, and used the Trust as her personal piggy bank to fund personal ventures. (*Id.*) In furtherance of these bad acts, the Surcharge Petition also asserted Ahern made perjurious misrepresentations to the district court. (*Id.*)

The Surcharge Petition noted that the district court had already found that Ahern had breached her fiduciary duties, and due to new information argued for (1) damages of \$2,650,000 – which represented the Beneficiaries’ 65% share of Trust income allegedly taken by Ahern; (2) a declaration that Ahern triggered the “no contest” clause; (3) treble damages due to conversion; (4) punitive damages; (5) a surcharge of Ahern’s trust interest; and (6) attorney’s fees. (7 AAPP 754-768.)

Importantly, the Surcharge Petition charged that “punitive damages [were] warranted against [Ahern] as she intentionally and fraudulently breached her fiduciary dut[ies] and committed tortious and criminal acts in converting and embezzling Trust funds.” (7 AAPP 761). Ahern filed an Opposition to the Surcharge Petition on June 29, 2015. (7 AAPP 772-784.)

1. Supplement to the Surcharge Petition – The Interim Trustee Report Highlights Ahern’s Additional Bad Acts

The Beneficiaries supplemented the Surcharge Petition on July 31, 2015 (“Supplement”) due to the discovery of additional information. (1 AAPP 46-94.) The Supplement emphasized the shockingly small amount of Trust funds that the Court-Appointed Trustee had been able to recover, due to Ahern’s breach of her fiduciary duties, deceit, and fraud. (*Id.*) Despite owing more than \$2.5 Million-dollars to the Beneficiaries, Mr. Waid had only been able to salvage less than \$10,000 from the Trust’s accounts. (*Id.*)

2. The February 22, 2016 Evidentiary Hearing on the Surcharge Petition

On February 22, 2016, the Honorable Gloria Sturman heard argument from all the relevant parties – Ahern’s counsel, the Beneficiaries’ counsel, and Mr. Waid’s counsel.

One of the specific issues argued at this hearing was whether Ahern’s bad acts rose to the level of punitive damages. Indeed, Beneficiaries’ counsel expressly asked for punitive damages at this hearing, explaining that “there’s a reason to ask for punitive damages. And so those are some of the issues that we want to argue today too.” (1 AAPP 123.) Beneficiaries’ counsel also argued that Ahern’s conduct was an “intentional violation of the trust provisions. She withheld distributions she

wasn't supposed to have withheld... in NRS Chapter 42, it provides for punitive damages.” (2 AAPP 131.)¹

The hearing also included evidence and argument on Ahern's other bad acts, including her alleged breach of the no-contest clause² and how to account for the Trust's income going forward due to the surcharge request. (1 AAPP 100 – 3 AAPP 311.)

At the hearing, Mr. Waid appeared as a neutral third-party witness, and the district court noted that “I don't view this as [Waid] would be advocating for any party.” (1 AAPP 112.) His purpose was to provide a status on his accounting of Trust assets. (*Id.*) Indeed, because Mr. Waid acts as a “fiduciary to both sets of beneficiaries [Ahern and the Beneficiaries]” he was “not here to advocate for either of them.” (1 AAPP 116.)

Beneficiaries' Counsel conducted a direct examination of Mr. Waid, who confirmed that Ahern took hundreds of thousands of dollars she was not authorized to take, after she had been removed as Trustee. (2 AAPP 152-218.) Mr. Waid also confirmed when he took over as Trustee, he learned Ahern did not hold 65% of the

¹ The Beneficiaries' counsel also noted that Ahern continually violated a district court order from April 2015 that she sit for a deposition by Mr. Waid. (2 AAPP 133.)

² This discrete issue is currently on Appeal to this Court and has been fully briefed and argued. *See* Case No. 71577.

Trust income in Trust (2 AAPP 198.) Instead “she treated trust income as her own. She lived lavishly....” (*Id.*) However, the Court understood Mr. Waid was not yet ready to provide the district court with his final accounting. (2 AAPP 207.)

Ultimately, after cross-examination by Ahern’s counsel, the district court continued the hearing for a week until March 3, 2016. (3 AAPP 307.)

3. The Continued March 3, 2016 Evidentiary Hearing on the Surcharge Petition

At the March 3, 2016 continued evidentiary hearing, the district court heard final arguments on the Surcharge Petition. (3 AAPP 314.) In closing argument, the Beneficiaries’ counsel repeated his argument that punitive damages were appropriate because the “trustee has acted maliciously, in bad faith, or in a fraudulently or particularly reckless or self-serving manner.” (3 AAPP 363.)

Ahern’s counsel argued that there was little harm to the Trust, or the Beneficiaries, because once Ahern was removed and Mr. Waid was appointed as Trustee, he worked hard to recover approximately \$1.6 Million-dollars of the \$1.9 million in Trust funds that he argued Ahern took. (3 AAPP 375.) Ahern argued that because some of the money was returned, then the harm stemming from her breach of fiduciary duty was *de minimis*. (*Id.*)

The district court rejected this argument and sided with the Beneficiaries. Judge Sturman found that Ahern’s unilateral decision to stop distributions to the Beneficiaries, her failure to safeguard their 65% share, and her subsequent

unauthorized theft of Trust funds after she had been removed as a Trustee, were enough to find against Ahern. (4 AAPP 387-408.)

4. The District Court Specifically Found that Ahern's Conduct Rose to the Level of *Punitive Damages* at the Continued March 3, 2016 Evidentiary Hearing on the Surcharge Petition

During the February/March 2016 evidentiary hearing, punitive damages were on the table from the beginning. (1 AAPP 123.) Accordingly, based on the evidence and the argument of counsel, the district court found that Ahern engaged in a “gross misuse of those [Trust] funds,” comparing Ahern’s conduct to “something really wrong and something that may, in fact, justify criminal prosecution. It’s pretty shocking to me what has happened here.” (4 AAPP 388.) Judge Sturman continued with her punitive damages analysis:

Punitive damages are intended to punish and this seems to me to be a very willful and malicious --- if we read our jury instruction on liability for punitive damages, you know, the conduct probably satisfies that. I don’t have any real concern that we can satisfy the standard for punitive damages in this case.

(4 AAPP 389) (emphasis added.) The district court later confirmed that “**I think this is punitive damage time. I do.** No trustee should be allowed to behave this way without consequences.” (4 AAPP 390) (emphasis added.) Indeed, Judge Sturman emphasized: “It’s a very serious thing and I believe should be – should subject the trustee to some kind of punishment and **I think that’s probably punitive damages.**” (4 AAPP 390-391) (emphasis added.) The district court

confirmed “**just looking at the standard set forth in our jury instructions for jurors when they’re to look at punitive damages, we’ve met it and I don’t have any doubt we have.**” (4 AAPP 391) (emphasis added.)

The district court recognized, having determined that Ahern’s conduct rose to the level of punitive damages, a separate hearing was required to determine the amount of those punitive damages. “I think you need to specifically look at that issue and brief that issue because I think it’s a big deal, to impose punitive damages on an individual is a very huge undertaking and it requires its own separate hearing...” (4 AAPP 391.)

Upon a question from Ahern’s counsel, the district court judge confirmed that a punitive damages calculation should be done in a “separate hearing,” but she confirmed her initial finding that “I think the conduct rises to punitive damages.” (4 AAPP 395.) She was not “awarding [a specific amount] now...we have to have a hearing on what the damages are.” (4 AAPP 396.)

The district court’s Order on the Surcharge Petition confirms that Ahern’s “conduct was shocking and needs to be dealt with in a serious fashion...,” and that her accounting “filed under penalty of perjury” was “incomplete and intentionally inaccurate.” (4 AAPP 411.) Further, Judge Sturman explained that “the exact amount of any damages resulting from those serious breaches of fiduciary duty will be determined at a later evidentiary hearing.” This final calculation, at a later

date, necessarily included a determination of the exact amount of punitive damages. (*Id.*)

D. AHERN HAD NOTICE OF HER ATTORNEY’S WITHDRAWAL WELL BEFORE (OVER THREE MONTHS) THE SECOND EVIDENTIARY HEARING TO DETERMINE THE AMOUNT OF DAMAGES

In a November 9, 2016 minute order, the narrative reflects that Ahern’s counsel, Mr. Kirk Lenhard, did not want to be responsible for his client’s refusal to be deposed on November 29, 2016, and so “he advised his client he was going to move to withdraw immediately.” (1 RA 12-13.)

On November 21, 2016, Mr. Lenhard filed his Motion to Withdraw and testified via affidavit that “Ms. Ahern has refused to follow the advice of the undersigned and the undersigned and Ms. Ahern are in a fundamental disagreement as to the best course of action in this matter.” (1 RA 14-21.) Moreover, Mr. Lenhard explained that Ahern “has been aware that BHFS would be filing the Motion and has been put on notice that she must retain new counsel.” (*Id.*)

On November 23, 2016, the district court held a hearing on Marquis Aurbach Coffing’s Motion to Adjudicate Attorney Lien, and Mr. Lenhard’s Motion to Withdraw as Ahern’s Counsel. (4 AAPP 427.) At that hearing, Mr. Lawrence Semanza appeared because of his discussions with Ahern regarding possible representation. (4 AAPP 430.) The district court noted it had also received

a fax from Ahern, requesting that Mr. Waid pay for her counsel out of Trust funds. (4 AAPP 431.) Ahern provided no justification for the Trust to pay for her legal fees. The district court found that “it is unfortunate that it appears [Ahern] doesn’t listen to any attorney.” (*Id.*)

Having duly considered Ahern’s request, Judge Sturman noted that Ahern’s request for Trust funds ignored the reality of her situation. “...her fate is in her own hands... [I]t is through her own actions that she has left the Court with no alternative but to take the action that’s been taken...while I appreciate her request that she needs to be – to have an attorney and to be able to pay that attorney, if she had cooperated with her attorney and with her Trustee, we wouldn’t be in this situation. She would have had the money.” (4 AAPP 432.)

The district court offered that it would “look at advancing some funds again” for Ahern to retain counsel, if “[Ahern] want[s] to file something saying you need some sort of a budget...” because “it’s upon a request.” (4 AAPP 445-446.) Judge Sturman explained further, “we would need something that would tell us, yes, you’re going to represent her and you’re going to need some sort of retainer... [because] we have issued, in the past, some advances for her fees.” (*Id.*) On December 14, 2016, Mr. Lenhard filed a Notice of Entry of Order Granting Motion to Withdraw as Counsel for Ahern. (1 RA 22-25.)

Ahern never submitted a budget for attorney's fees or retainer before the February 9 and 10, 2017 evidentiary hearing, as she was instructed to do by Judge Sturman. Instead, on February 8, 2017, Ahern made a very late *ex parte* request to the court for disbursement of attorney's fees to obtain representation at the February 9 and 10 evidentiary hearing. (4 AAPP 463.) Despite the lateness of the request, the district court granted Ahern's request. (*Id.*)

E. THE COURT-APPOINTED TRUSTEE'S ACCOUNTING AND REPORT OF TRUST ACTIVITY FROM 2013 TO 2015 HIGHLIGHTS AHERN'S BAD ACTS

On February 1, 2017, Mr. Waid, as the Court-Appointed Trustee, filed his Accounting and Report of the Trust's activity during 2013 to 2015 (the "Accounting"). (4 AAPP 452-463.) It concluded that Ahern "had exclusive access and control of all Trust checking, savings and other accounts" during most of the June 2013 – April 2015 time period. (*Id.* at 452.) The Accounting also notes that despite several court orders directing Ahern to cooperate with Mr. Waid, she did not comply. (*Id.*) Rather, she only provided limited records and never sat for her court-ordered deposition, "notwithstanding the findings of the Court regarding fraud and other misconduct...." (*Id.*)

The Accounting makes clear that the Beneficiaries, through their interest in the MTC Living Trust, "did not receive a single distribution of royalty income from the Trust between June 2013 and April 2015." (4 AAPP 453.) Only after Ahern was removed as Trustee did payments to the Beneficiaries resume. (*Id.*)

Accordingly, the Trust owed the Beneficiaries approximately \$3,956,550 during the 2013 through 2015 period. (*Id.*)

\$2,581,994.92 of that amount was to be protected in a segregated account awaiting the district court's determination on the Beneficiaries' Petition for Declaratory Relief. (*Id.*) Instead, less than \$10,000 of the Beneficiaries' funds were in the segregated account when Mr. Waid took over as Trustee for Ahern. (*Id.*)

G. THE SECOND EVIDENTIARY HEARING PROVIDES THE BASIS FOR CALCULATING PUNITIVE DAMAGES AGAINST AHERN

1. The February 9, 2017 Hearing to Determine Damages Amounts

On February 9, 2017, the district court held an evidentiary hearing to determine damage amounts. (4 AAPP 464 – 6 AAPP 605.) Ahern attended the hearing via video conference, per her request as she did not want to attend in person. (4 AAPP 465, 472.)

Mr. Semanza appeared to state that while he had obtained a copy of the district court's February 8th order authorizing disbursement of attorney's fees for Ahern the day before, he was not sufficiently prepared and declined to represent Ahern under the circumstances (4 AAPP 467-470.) Mr. Waid's counsel clarified that Mr. Semanza was told about the approval of funds the day before, via an afternoon phone call from Mr. Todd L. Moody. (4 AAPP 470.)

The district court informed Ahern that despite authorizing her request to release Trust funds to pay for Mr. Semanza, he declined to represent her. (4 AAPP

475.) Ahern then raised her hand and made an oral request for a continuance. (4 AAPP 476.) The district court denied her request. (*Id.*) But, Ahern continued to ask questions of the district court and the sole witness, Mr. Waid, during the hearing (*e.g.*, 4 AAPP 495, 5 AAPP 506-510, 512-513, 515, 565), after initially stating she was choosing not to participate in the hearing. (4 AAPP 476).

Mr. Waid, in his capacity as the Court-Appointed Trustee of the Trust, was the Beneficiaries' only witness. (4 AAPP 484.) He confirmed that he expected to find more than \$2 Million-dollars in Trust accounts when he took over, but "found less than \$10,000. Approximately nine thousand and some change." (4 AAPP 487.) Mr. Waid testified that based on his research and calculations, approximately \$2,581,994.92 should have been sitting in the Trust account for the Beneficiaries. (5 AAPP 542.) Mr. Waid explained that those funds should have been "held and segregated, safeguarded." (5 AAPP 549.)

Mr. Waid also addressed a litany of costs and disbursements from the Trust while Ahern was Trustee. (5 AAPP 531-584.) Mr. Waid highlighted the deceptive manner of Ahern's theft, including transferring funds via cashier's check from small branches in various states which made it very difficult to trace the funds. (5 AAPP 521-532.) For example, Ahern, who had just been removed as trustee earlier in the day, suspiciously withdrew \$500,000 in trust funds via cashier's

check from a Wells Fargo branch located within a grocery store late in the day, and at time after normal branches would have already closed (5 AAPP 528.)

Mr. Waid further detailed that Ahern damaged the Trust by failing to properly pay taxes related to Trust generated income. (5 AAPP 590.) In addition, he testified that Ahern created false trustee expenses for a non-existent staff she never employed, for office space she never rented, and a \$500,000 payment to something called “Fidelity Capital,” which he explained was not a licensed financial institution. (5 AAPP 594-596.)

In summary, Mr. Waid was asked the following questions:

Q: Would it be a fair characterization that Ms. Ahern’s action in regard to the [Beneficiaries] was reckless in your opinion?

A.: I believe the adjective to be appropriate.

Q: How about the adjective inappropriate?

A: Yes.

Q: Fraudulent?

A: Term of art, legal conclusion, but yes.

(5 AAPP 598.)

2. The February 10, 2017 Hearing to Determine Damages Amounts

On February 10, 2017, the parties appeared again before the district court. Ahern asked again for funds to hire counsel, and the district court iterated that she had already “authorize[d] Mr. Waid to release funds to Mr. Semanza to appear for

you at this hearing.” (5 AAPP 609.) She noted it was Mr. Semanza’s decision whether to appear or not for Ahern at that point. (*Id.*)

Next, the Beneficiaries’ counsel referenced Mr. Waid’s qualifications as a professional trustee and referenced his testimony in arguing Ahern had stolen more than \$2.5 Million from the Beneficiaries. (5 AAPP 617-618.) Beneficiaries’ counsel also identified other breaches of fiduciary duties, including “tens of thousands of dollars for private jets, tens of thousands of dollars for family therapy sessions, tens of thousands of dollars for personal security.” (5 AAPP 620.) He noted that the Trust account contained less than \$10,000 when Mr. Waid took over, instead of the Beneficiaries’ full share of Trust income, more than \$2.5 Million-dollars. (*Id.*) And, counsel noted that a large \$800,000 tax liability could also impact the Beneficiaries. (*Id.*)

Specifically, Beneficiaries’ counsel highlighted the approximately \$1.2 Million-dollar cashier’s check that Ahern stole from the Beneficiaries’ funds, and that Mr. Waid had to personally research and act to retrieve. (5 AAPP 531, 585.) He then likened this act to Ahern’s “various lies and mistruths.” (*Id.*)

Beneficiaries’ counsel then reminded the district court that Ahern continually refused to participate in the legal process, not because she was silenced, but because she refuses to talk to Mr. Waid despite numerous requests for explanations, refuses to release relevant documents, refuses to sit for her deposition

despite a court order to do so, and will not instruct third-parties to release documents. (5 AAPP 622.)

Ultimately, Beneficiaries' counsel asked the district court to award them \$2,581,994.92 in compensatory damages (noting that even though a portion of that amount was recovered, it was "only repaid after it was stolen"). (5 AAPP 623-624.)

Originally, Counsel asked for punitive damages under NRS 42.005, at three times the compensatory amount (6 AAPP 637.) The district court clarified that it could only award specific punitive damages for Ahern's willful, fraudulent, malicious conduct. (6 AAPP 645.) Accordingly, Beneficiaries' counsel tied the request for punitive damages to Ahern's most egregious act, the \$1,287,580.85 Million-dollars in cashier check fraud. (5 AAPP 531, 585) (6 AAPP 651-652.)

Subsequently, the district court awarded compensatory damages of \$2,581,994 (6 AAPP 662.) Finding that Ahern's conduct was undertaken with conscious disregard, fraud, malice, intentional malice and oppression, it resulted in an award of punitive damages in the amount of \$3,600,000. (6 AAPP 664-665.)

H. THE COURT'S AUGUST 8, 2017 ORDER PROPERLY LAYS OUT THE FACTUAL AND LEGAL BASIS FOR COMPENSATORY AND PUNITIVE DAMAGES

On August 8, 2017 the district court entered an extensive Order reflecting its basis for the district court's findings of fact and conclusions of law which

supported the compensatory and punitive damages rulings against Ahern, including the punitive damage award's compliance with NRS Chapter 42. (1 AAPP 1-13.) Importantly, the Order also holds that the district court issued an adverse inference against Ahern in accordance with *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006) as to any information or documentation Ahern could have provided to Mr. Waid concerning the Trust but did not. (1 AAPP 12.)

Ahern filed a timely appeal from the Order.

SUMMARY OF THE ARGUMENT

Ahern's Opening Brief can be distilled into two simple arguments – (1) the punitive damages award is defective because punitive damages were not imposed, and then calculated in a subsequent proceeding; and (2) Ahern was prejudiced because the district court denied her last-minute, oral motion for a continuance during the second evidentiary hearing.

Judge Sturman properly awarded punitive damages against Ahern. She entered an Order containing detailed findings of fact and conclusions of law supported by the record, which meet Nevada's standard for awarding punitive damages. Given Ahern's reprehensible breaches of fiduciary duty as Trustee, and bad acts after her removal, exemplary damages were warranted.

Moreover, the district court made a finding that Ahern was subject to punitive damages, and subsequently, held a hearing to quantify those damages.

There is no reason to substitute this Court's judgment for Judge Sturman's careful consideration of this case's facts and circumstances.

With respect to the Ahern's last-minute request for a continuance, Judge Sturman did not abuse her discretion by denying it. Ahern was on notice in November 2016 that she needed to secure an attorney for the February 2017 evidentiary hearing. Even though the Trust was not obligated to pay for her attorney, the district court offered to provide Ahern funds once it was given a budget. Despite this offer, Ahern never provided a budget to the district court.

Even though Ahern ignored the district court's prior instruction, Judge Sturman was lenient and still approved Ahern's last-minute request. Ahern's putative attorney, however, refused to appear on her behalf. Her failure to secure counsel was an issue of her own making. The district court properly used its discretion to deny her oral request for a continuance.

For all these reasons, Ahern's appeal is without merit and this Court should affirm the district court's Order in its entirety.

STANDARD OF REVIEW

“The district court has discretion to determine whether the defendant's conduct merits punitive damages as a matter of law...” *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006). “An award of punitive damages will not be overturned if it is supported by substantial evidence of implied malice or oppression.” *ETT, Inc. v. Delegado*, 126 Nev. 709, 367 P.3d 767 (2010) citing *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 738, 192 P.3d 243, 252 (2008). Accordingly, the Court reviews a court’s finding that a defendant was guilty of oppression, fraud or malice for abuse of discretion.

Further, a decision granting or denying a motion to continue, including for reasons related to lack of counsel, is within the sound discretion of the district court. *See e.g., Dodd v. Cowgill*, 85 Nev. 705, 711, 463 P.2d 482, 486 (1969); *Hopper v. Hopper*, 79 Nev. 86, 88, 378 P.2d 875, 876 (1963); *see also Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (pointing out that it is not within the purview of an appellate court to weigh conflicting evidence or assess credibility of the witnesses).

This Court, however, will “review the excessiveness of a punitive damages award *de novo*” if alleged to violate due process rights. *Bongiovi v. Sullivan*, 122 Nev. 556, 583.

II. LEGAL ARGUMENT

Ahern's various breaches of her fiduciary duties, and her conduct after she was removed as trustee, are inexcusable. The most heinous theft is one that which features a betrayal of trust, a violation of a special relationship, an "inside job." A trustee maintains a special relationship of trust and loyalty with her beneficiaries. Consequently, courts deal with violations of these fiduciary duties harshly. Here, Judge Sturman followed Nevada law. She appropriately punished Ahern's total disregard of her fiduciary role, and her malicious and fraudulent actions after she was removed as trustee.

This Court should uphold Judge Sturman's punitive damages award for three reasons. First, Ahern's breach of fiduciary duties provided the district court with clear and convincing evidence of fraud, oppression, and malice. Second, the punitive damages award was made in a "subsequent" proceeding pursuant to NRS 42.005(3). Third, the punitive damages award complies with both the Nevada and U.S. Constitutions because the amount is rational and not excessive.

Further, Ahern had months to retain her counsel before the February 2017 evidentiary hearing. Nevertheless, Ahern refused to participate, declined to follow proper procedure, and sat on her hands. On the other hand, Judge Sturman recognized that the Beneficiaries had waited a year for a final determination of this

proceeding. The district court did not abuse its discretion by denying Ahern's last-minute request for a continuance.

A. The District Court's Decision to Award Punitive Damages Was Not Procedurally or Substantively Flawed.

It would be difficult to imagine a more compelling case for preserving the integrity of the fiduciary role than protecting beneficiaries from outright theft. Indeed, not punishing Ahern to the fullest extent of the law, including exemplary damages, would have been an injustice. "Punitive damages are designed not to compensate the plaintiff for harm suffered but, instead, to punish and deter the defendant's culpable conduct." *Bongiovi v. Sullivan*, 122 Nev. 556, 580. Here, the district court's punitive damages award against Ahern is both procedurally and substantively proper.

The Court must consider whether a fact-finder "could award punitive damages based upon the evidence presented at trial, not whether we would have awarded punitive damages." *Rockefeller v. Grabow*, 136 Idaho 637, 647, 39 P.3d 577, 587 (2001). Here, there is ample evidence in the record to support the district court's reasonable award.

1. Ahern's Breaches Provided Clear and Convincing Evidence for Punitive Damages.

Ahern pointedly ignores the district court's 2015 Order that found she breached her fiduciary duties to the Beneficiaries by withholding their rightful

funds. (1 AAPP 39-43.) As additional information concerning the scope of Ahern's fraud was discovered, the district court learned that the breach included mismanaged Trust assets, stolen Trust funds both before and after she was removed as Trustee, and use of the Trust as her personal piggy bank to fund personal ventures. (7 AAPP 751.) Accordingly, the district court held that Ahern "intentionally and fraudulently breached her fiduciary duties... and committed tortious acts in **converting** and **embezzling** Trust funds. Accordingly, the Court finds that Ms. Ahern acted with oppression, fraud, and malice." (1 AAPP 9-11) (emphasis added).

Ahern's fiduciary duties required her to act with the utmost honesty. Indeed, "the fiduciary obligations of a trustee are great." *Riley v. Rockwell*, 103 Nev. 698, 701, 747 P.2d 903, 905 (1987). A "trustee is a fiduciary who must act in good faith and fidelity to the beneficiary of the trust" and "[she] should not place [her]self in a position where it would be for [her] own benefit to violate [her] duty to the beneficiary." *Bank of Nevada v. Speirs*, 95 Nev. 870, 874, 603 P.2d 1074, 1076 (1979). "A Trustee is held to stricter morals than that of the marketplace; not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior." *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. vs. Scheller*, 629 So.2d 947 (Fla. 4th DCA 1993), citing to *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

Due to these high standards, a breach of fiduciary duty will support an award of punitive damages. *Clark v. Lubritz*, 113 Nev. 1089, 1099, 944 P.2d 861, 867 (1997) (confirming award of punitive damages for breach of fiduciary duty, where one party pocketed the other party's distributions); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App. 2000) ("A defendant's intentional breach of fiduciary duty is a tort for which a plaintiff may recover punitive damages"); *Bunch v. Byington*, 292 Ga. App. 497, 504, 664 S.E.2d 842, 848 (2008) ("A breach of fiduciary duty will support an award of punitive damages.") Put simply, "Nevada law permits the recovery of punitive damages for a breach of fiduciary duty." *In re Spectrum Golf, Inc.*, 2007 WL 7540965, at *3 (B.A.P. 9th Cir., Aug. 16, 2007).

And, where "a fiduciary in fact gains a benefit by breaching her fiduciary duty, willful and fraudulent acts may be presumed. *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App. 2000). Here, the district court found clear and convincing evidence that Ahern was guilty of "oppression, fraud or malice, express or implied..." NRS 42.005(1). The district court expressly found that Ahern "**intentionally and fraudulently** breached her fiduciary duties... and committed tortious acts in **converting and embezzling Trust funds**. Accordingly, the Court finds that **Ms. Ahern acted with oppression, fraud, and malice.**" (1 AAPP 9-11) (emphasis added).

As if to leave no doubt, the Order later emphasized that Ahern's conduct was "troubling and egregious" as well as "reprehensible." (1 AAPP 13).

a. The District Court's Award of Punitive Damages is Based on Ahern's Specific Theft of Specific Funds.

Ahern argues the punitive damages award is improper because it is not "grounded in the conduct giving rise to the underlying tort claim." *See* Op. Br. at 19. In other words, Ahern believes the punitive damages award fails because it is based on Ahern's specific theft of a \$1,278,580.85 cashier's check, and not Ahern's failure to distribute approximately \$1.7 Million-dollars (actually \$2,581,994.92) of Trust income to the Beneficiaries. *See* Op. Br. at p. 19-20. Curiously, she seems to be stating that punitive damages cannot be tied to any particular bad act, it must be tied to all of them (including violations of court orders). This is simply untrue.

First, the district court used Ahern's largest single theft, via the cashier's check, as its guide because it is the best example of Ahern's most reckless fiduciary breach. (1 AAPP 9-13.) The Order is clear – Section C.18 states:

As the Court finds Ms. Ahern's actions in relations [sic] to the February 2015 Cashier's Check to the **be the most egregious and reprehensible of Ms. Ahern's conduct**, the Court shall treble the amount of funds removed through the February 2015 Cashier's Check (\$1,287,580.85) and award such as punitive damage [sic] in favor of the Movants and against Ms. Ahern.

(1 AAPP 13) (emphasis added.)

The Beneficiaries do not dispute that Ahern's bad acts are "egregious" and "reprehensible." (*Id.*) The Order even provides several examples of Ahern acting with fraud, oppression and malice. (1 APP 11-13.) And, stealing Trust funds in the form of a cashier's check was particularly clear and convincing evidence of Ahern's most egregious fiduciary duty breach. It represented nearly one-half of the funds belonging to the Beneficiaries. In providing her rationale, Judge Sturman explained that:

However, certain actions appear **to warrant punitive damages, additional damages intended to punish and discourage this kind of conduct.** Because that's the thing that has concerned me and it's concerned me since 2015 when Ms. Ahern was removed, **that there was this flurry of activity, which appears intended at hiding the money....** and something that was really disturbing to Mr. Waid as a Trustee, is **holding funds in the form of a cashier's check, totally improper.** No Trustee should ever do that, very bad practice. Needs to be discouraged, and **clearly appears to have been intended to defraud the Trust.**

(6 AAPP 663-664) (emphasis added). And so, the district court pointed to Ahern's wrongful theft of the \$1,278,580.85 cashier's check as the best example of Ahern's worst conduct. This is exactly the type of behavior that punitive damages were designed to punish.

b. The Punitive Damages Award Bears a Reasonable Relationship to the Compensatory Damages Because Both Highlight Ahern's Breaches of Fiduciary Duty.

Second, Ahern argues that the cashier's check does not bear a "reasonable relationship" to Ahern's other bad acts, *i.e.* the improper withholding of Trust

distributions. Op. Br. at p. 19-20, citing *Philip Morris USA v. Williams*, 549 U.S. 346, 350 (2007). But the “reasonable relationship” articulated in *Phillip Morris* is inapplicable to this case.

The United States Supreme Court held in *Phillip Morris* that a jury may not punish, through punitive damages, for the harm caused to others. *Id.* at 357. It held that punitive damages must reflect a “reasonable relationship” to the harm caused to the plaintiff in the action, not to “strangers to the litigation.” *Id.* In this case, there are no “strangers to the litigation,” all of Ahern’s bad acts were directed at the Beneficiaries.

And, even if applicable, both types of damages are “reasonably related” to another because they are tied to Ahern’s breaches of fiduciary duty. The punitive damages award is based on Ahern’s egregious theft of \$1,278,580.85 of Trust money – a particularly heinous act. (1 AAPP 9-14). The district court trebled that amount in awarding \$3.6 Million-dollars in punitive damages. Thus, the punitive damages bore a direct relationship to the harm imposed on the Beneficiaries.

Similarly, the underlying compensatory damages are pegged to Ahern’s other fiduciary breaches, including her improper withholding of the Beneficiaries’ distributions, as well as her failure to segregate Trust funds. (1 AAPP 1-17.) Thus, both the punitive damages and the compensatory damages are reasonably related as both are premised on Ahern’s breaches.

c. The Punitive Damages Award Was Based on the Court's Findings that Ahern's Breaches of Fiduciary Duty Were Fraudulent, Oppressive, and Made with Malice and Conscious Disregard to the Beneficiaries' Rights.

The district court's basis for awarding compensatory and punitive damages is found in its extensive Order. (1 AAPP 2-17.) Yet, Ahern latches onto one sentence of a sixteen-page Order to argue "the district court assessed punitive damages as a sanction for [Ahern's] purported contempt more than anything else." *See Op. Br.* at p. 20. This comment ignores the district court's detailed Order, which provides the precise basis for the district court's punitive damages award:

As the Court finds Ms. Ahern's actions in relation to the February 2015 Cashier's Check to be the most egregious and reprehensible of Ms. Ahern's conduct, the Court shall treble the amount of funds removed through the February 2015 Cashier's Check...

(1 AAPP 13 at C.18.)

Despite this clear pronouncement, Ahern cherry-picks a sentence where the district court expresses frustration with Ahern's failure to obey court orders. *See Op. Br.* at p. 20. The emphasized portion of that sentence, which reads "[t]he Court believes that such willful behavior and disregard of the Segregation Order needs to be discouraged," is not the trigger for punitive damages. (1 AAPP 13.) When read with the whole punitive damages section of the Order, it becomes clear that Ahern is manipulating that sentence into something it is not. (1 AAPP 9-13.)

There is no dispute the record reflects that Judge Sturman was unhappy with Ahern's refusal to participate in the case. However, the court's frustration was not the basis for punitive damages. Indeed, the Order succinctly demonstrates in Paragraph C.18 that Ahern's "egregious and reprehensible" theft of the \$1,278,580.85 cashier's check, was the true basis for punitive damages. (1 AAPP 13.)

2. NRS 42.005(3)'s "Subsequent Proceeding" Requirement Was Followed Because the District Court Made a Finding Punitive Damages Were Available in 2016, and Calculated Those Damages in 2017

The district court properly held two evidentiary hearings to determine liability for punitive damages, and a subsequent hearing to calculate the amount of those damages. Nearly one full year apart. Notwithstanding, Ahern argues that, despite these separate evidentiary hearings spread out over a year's time, the district court did not afford her a "subsequent proceeding" on punitive damages. *See Op. Br. at pp. 15 – 18.*

NRS 42.005(3) states that once the trier of fact has made a "finding of whether such damages will be assessed" then "a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed." *Id.* In short, the district court followed this two-step inquiry.

First, the trier of fact must make a "finding." NRS 42.005(3). BLACK'S LAW DICTIONARY 632 (6th ed. 1990) provides the legal definition of a "finding" as: "a

decision upon a question of fact reached as a result of judicial examination or investigation, jury, referee, or other designated fact finder.” This entire case was tried by the same judge/trier of fact. Judge Sturman took argument and testimony on punitive damages during the February/March 2016 evidentiary hearing, and after careful examination, she reached a decision – finding repeatedly that Ahern’s conduct rose to the level of punitive damages.

Second, a subsequent proceeding is required to allow a defendant, like Ahern, enough time to marshal a punitive damages defense.³ Here, the district court agreed that a subsequent proceeding was needed to prove the amount of punitive damages. Judge Sturman reserved judgment on the amount of punitive damages until the *second* February 2017 hearing. Judge Sturman’s decision to give Ahern approximately one year to provide her defense to those punitive damages more than complies with the subsequent proceeding requirement under NRS 42.005(3).

In short, Ahern’s liability proceeding (2016 evidentiary hearing) was properly bifurcated from the damages proceeding (2017 evidentiary hearing) pursuant to NRS 42.005(3).

³ Ahern was well-aware of Judge Sturman’s finding that her conduct rose to the level of punitive damages in 2016, and she had ample opportunity to present any evidence, or make any arguments she wished to, on the issue in 2017. She had approximately *one year* to prepare and respond.

a. The District Court Made a Finding That Punitive Damages Were Appropriate at the 2016 Evidentiary Hearing.

Judge Sturman had all the necessary evidence to find that Ahern's conduct warranted punitive damages during the *first* evidentiary hearing. She had already found that Ahern repeatedly, maliciously, and fraudulently breached her fiduciary duties as Trustee of the Trust. (1 AAPP 39-43.)

At the 2016 hearing, she heard the testimony of the Court-Appointed Trustee, Mr. Waid, and all his information concerning Ahern's bad acts. (2 AAPP 152-218.) Mr. Waid testified she breached the first, most important rule of acting as a fiduciary, "she treated trust income as her own. She lived lavishly...." (2 AAPP 198.)

Having considered this evidence, Judge Sturman found that Ahern engaged in a "gross misuse of those funds," comparing Ahern's conduct to "something really wrong and something that may, in fact, justify criminal prosecution. It's pretty shocking to me what has happened here." (4 AAPP 388.) The district court reasonably determined that Ahearn acted to intentionally breach her fiduciary duties and defraud the beneficiaries. (4 AAPP 389).

Specifically, in 2016, Judge Sturman found clear and convincing evidence that Aherns, oppression, fraud and malice warranted punitive damages because:

[T]his seems to me to be a very willful and malicious --- if we read our jury instruction on liability for punitive damages, you know,

the conduct probably satisfies that. I don't have any real concern that we can satisfy the standard for punitive damages in this case.

(4 AAPP 389) (emphasis added.) The district court later confirmed that **"I think this is punitive damage time. I do.** No trustee should be allowed to behave this way without consequences." (4 AAPP 390) (emphasis added.) Indeed, Judge Sturman emphasized "It's a very serious thing and I believe should be – should subject the trustee to some kind of punishment and **I think that's probably punitive damages.**" (4 AAPP 390-391) (emphasis added.) The district court confirmed "just looking at the standard set forth in our jury instructions for jurors **when they're to look at punitive damages, we've met it and I don't have any doubt we have.**" (4 AAPP 391) (emphasis added.) Put simply, Judge Sturman found that punitive damages should be assessed.

Having already determined that Ahern's conduct rose to the level of punitive damages, Judge Sturman confirmed that a subsequent hearing was required to determine the amount of those punitive damages. "I think you need to specifically look at that issue and brief that issue because I think it's a big deal, to impose punitive damages on an individual is a very huge undertaking and it requires its own separate hearing..." (4 AAPP 391.)

These findings provide necessary context to the colloquy between Judge Sturman and Mr. Lenhard cited by Ahern. *See id.* at Op. Br. p. 17. Judge Sturman explained to Mr. Lenhard that she was not awarding any punitive damage *amount*

at that February 2016 evidentiary hearing. (4 AAPP 394-395). She first clarified that that the separate hearing to calculate those damages was necessary: “I said [setting a punitive damages amount] requires a separate hearing.” But, she made clear that punitive damages were warranted: “**I think the conduct rises to punitive damages.**” (*Id.*) (emphasis added). The district court, however, was not “awarding [a specific amount] now...we have to have a hearing on what the damages are.” (4 AAPP 396.) In other words, Judge Sturman had *already* found that compensatory and punitive damages were appropriate, but she needed a *subsequent* hearing to calculate the appropriate damages amounts.

Accordingly, Ahern’s citation to *Wyeth v. Rowatt*, 126 Nev. 446, 476, 244 P.3d 765, 785 (2010) for the proposition that liability and punitive proceedings should be bifurcated is unhelpful. These proceedings *were* bifurcated. Moreover, this case is unlike *Wyeth* because this was not a jury trial. Likewise, *D.R. Horton, Inc. v. Betsinger*, 130 Nev. Adv. Op. 84, 335 P.3d 1230, 1232 (2014) concerned a reversal and remand under NRS 42.005(3) because different juries determined the defendants’ liability and punitive phases. But, *Betsinger* is inapplicable because Ahern benefitted from the equivalent of a bench trial – the same finder of fact presided over both the liability and punitive phases.

The district court properly assessed Ahern’s punitive damages under Nevada law by *first* finding that punitive damages were warranted, and then determined she

needed to conduct a *second* hearing (one year later) to determine the amount of such damages. *See* NRS 42.005(3).

Even assuming *arguendo*, that the “subsequent proceeding” in 2017 was insufficient time under the statute, this oversight would constitute harmless error under NRCP 61, and did not affect the substantial rights of Ahern. Rather, it is the Court’s “duty to search the record as a whole, and exercise a judicial discretion in deciding whether the error is harmless or reversible in nature... [w]e do not presume prejudice from the occurrence of error in a civil case. *Boyd v. Pernicano*, 79 Nev. 356, 359, 385 P.2d 342, 343 (1963). Here, any alleged technical violation of NRS 42.005(3) is harmless because Ahern had sufficient time to obtain counsel and present a defense to the punitive damages claim.

3. The Court’s Punitive Damages Award Was Constitutional and Not Excessive.

The district court’s award of punitive damages was not excessive under Nevada law. Indeed, “punitive damages are designed to punish and deter a defendant’s culpable conduct and act as a means for the community to express outrage and distaste for such conduct.” *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008).

In reviewing punitive damages for excessiveness, the Court looks to ““ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.””

Bongiovi, 122 Nev. at 582–83 (quoting *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 426, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)).

Nevada uses the three-factor federal standard in determining whether an award of punitive damages is excessive. *Bongiovi v. Sullivan*, 122 Nev. 556, 583. The three factors for determining whether punitive damages are excessive are: “(1) ‘the degree of reprehensibility of the defendant's conduct,’ (2) the ratio of the punitive damage award to the ‘actual harm inflicted on the plaintiff,’ and (3) how the punitive damages award compares to other civil or criminal penalties ‘that could be imposed for comparable misconduct.’” *Bongiovi*, 122 Nev. at 582 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

Applying these three factors to this case confirms that the district court’s imposition of punitive damages was not excessive.

a. The Court’s Award Was Based on the High Degree of “Reprehensibility” of Ahearn’s Conduct.

Turning to the first guidepost, Ahearn’s underlying conduct was highly reprehensible, as she recklessly stole money from the Beneficiaries. (1 AAPP 9-13.) At least two of her cashier’s check withdrawals came within days after her removal as Trustee, when she was not acting as a trustee but as a common thief. *See e.g., BMW*, 517 U.S. at 576–77 (knowingly disobeying the law supports the use of “strong medicine ... to cure the defendant’s disrespect for the law”).

For her part, Ahern argues that because the Court-Appointed Trustee recovered some of the funds, **after she stole them**, then there was nothing egregious about her conduct. *See* Op. Br. at p. 22. She also argues that because the \$1,278,580.85 cashier's check represented a single transaction, the harm was not enough to merit punitive damages. *Id.* This is the functional equivalent of a bank robber arguing the robbery is of little concern because auditors eventually found some of the money in the getaway car. A fraudster's reprehensible conduct is not excused because some funds were later recovered *after* they were caught.

Mr. Waid testified that Ahern's taking of this check was an absolute breach of fiduciary duty. (5 AAPP 531-532). And Judge Sturman clarified that even though those funds were recovered, it "does not excuse the fact that [theft of the \$1,278,580.85 cashier's check] never should have been done in the first place." (6 AAPP 664.) Indeed, "that [theft of the cashier's check] appears, to me, to have been undertaken with conscious disregard of the rights of the [Beneficiaries] appears to have been fraudulent." (*Id.*)

Ahern transferred large sums of money via cashier's checks to obscure the source of Trust funds and to steal them in a fraudulent manner. The district court accurately determined that this misconduct was reprehensible behavior.

b. The Ratio of Punitive Damages to Actual Damages is Less Than the Three-to-One Standard.

The district court imposed an award of punitive damages that is much less than three times the approximately \$1.7 Million-dollar net judgment amount, not to mention the approximately \$2.5 Million-dollar full judgment amount. Here, the punitive damages award was \$3.6 Million-dollars, a multiple of the approximately \$1.2 Million-dollar cashier's check stolen by Ahern.

Where an award of punitive damages is less than three times the compensatory damages award, this Court has held it is "well within the accepted ratios" mandated by NRS 42.005(1)(a). *Wyeth*, 126 Nev. at, 244 P.3d at 785. The United States Supreme Court even noted in *BMW* that a ratio of more than 4:1 may be "close to the line," but "did not 'cross the line into the area of constitutional impropriety.'" *BMW*, 517 U.S. at 581 (quoting *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). Here, the less than 3:1 ratio of punitive damages to compensatory damages is appropriate.

c. The Punitive Damages Award Is Well Within the Range of Damages That Could Be Imposed.

The punitive damages award in this case is well within the range of damages that could be imposed for comparable misconduct because, pursuant to NRS 42.005(1), the district court was permitted to award three times the compensatory damage award of \$2,581,994.92. This calculus would allow an award of

\$7,745,984.76. Even if the Court were to use the Opening Brief's "net judgment" amount of \$1,742,053,⁴ three times that discounted amount is still \$5,226,159.

Here, the district court imposed a relatively restrained punitive damages award of \$3,600,000 based on a figure that is much less than three times the full compensatory damage amount of \$2,581,994.92. The award is both reasonable and proportionate to the amount of harm caused to the beneficiaries, and to the compensatory damages award.

Ahern's argument that her theft of Trust funds, and attendant breach of fiduciary duties, caused no "actual harm" to the Beneficiaries is implausible. *See* Op Br. at 23-24. Nevada's legislature has intentionally created a trust-friendly statutory scheme to foster investment.⁵ Ahern's argument ignores the very core of fiduciary jurisprudence because it fails to recognize that breach of the fiduciary duty *itself* is the "actual harm," not just the amount of money ultimately recovered. *See e.g.*, James C. Dawson, Advisers Act Release No. 3057, 2010 WL 2886183, at

⁴ The district court noted the Court-Appointed Trustee was able to claw back \$809,841.92 of the compensatory award amount, partially reducing the judgment amount going forward.

⁵ Kevin R. McKinnis, *The Good, the Bad, and A New Kind of Prenup: An Analysis of the Ohio Legacy Trust Act and What Asset Protection Trusts Will Mean for Ohio*, 61 Clev. St. L. Rev. 1105, 1124 (2013) ("...New York's trust business was decreasing significantly as individuals left for states that had trust friendly laws, such as Delaware, Alaska, and Nevada.")

*3 (SEC, July 23, 2010) (within the fiduciary context, a finding that “conduct was egregious is based on the nature of the violation itself, not solely on any calculation of financial harm to his clients.”) Violating a fiduciary’s duty of care and a duty of loyalty by stealing Trust funds cannot be labeled as a “non-existent” harm, regardless of the final ledger.

Finally, as explained above at pages 28-29, the punitive damages award was expressly based on Ahern’s breach of fiduciary duties, and outright theft, to the Beneficiaries – not the violation of some court order or a stealth contempt sanction.⁶ *See* Op. Br. at p. 24.

To accept Ahern’s argument is to ignore the clear Order in this case that contradicts that argument. (1 AAPP 9-13.) One would also have to ignore the district court’s clear reasoning on why the cashier’s check is an appropriate reference point for Ahern’s multiple breaches of fiduciary duty. *See* pages 28-29 *supra*. In short, there is no fair reading of the record that transforms the district court’s well-supported punitive damages award into a stealth contempt citation.

4. Ahern Should Be Estopped from Challenging Her Punitive Damages Award Based on Her Representations in the Parallel Appeal.

⁶ Indeed, Judge Sturman already referred a contempt action against Ahern to Judge Elizabeth Gonzales, which was denied. Thus, Ahern’s violation of court orders was no longer a viable basis for punishment.

In the parallel “No-Contest” appeal, (Case No. 71577), Ahern’s counsel, Mr. Lenhard, represented to this Court that she had accepted, and was not challenging her punitive damages award, as a reason for the court to impose leniency in that case. Generally speaking, “courts do not relish the prospect that an adept litigant may succeed in proving a proposition in one action, and then succeed in proving the opposite in a second.” *See e.g.*, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.).

As context, Mr. Lenhard told this Court, “I’m asking you to affirm...an order where it was determined that [Ahern] had improperly administered the trust. She had violated her duties as trustee. [Ahern] had failed to segregate 65 percent of the trust per a court order. [Ahern] had misapplied trust income. I’m asking that order be affirmed because we did not realistically challenge those findings at the trial.” (1 RA 44.)

Specifically arguing for leniency, Mr. Lenhard stated she had to pay compensatory damages, punitive damages, and attorney’s fees, and so the other beneficiaries have been made whole. (1 RA 41.) Indeed, Ahern’s counsel doubled down by stating she had already paid her dues via compensatory and punitive damages: “she paid a horrible price as a result of it. She paid millions of dollars back in compensatory and punitive damages...she has paid the price.... she has paid the price.” (1 RA 50.)

In one appeal, Ahern has argued that she accepts and has paid punitive damages, and so no further punishment is justified. But in this appeal, Ahern is arguing the punitive damages are wholly unjustified. Justice and equity demand that Ahern cannot have it both ways. These inconsistent positions, if both accepted, lead to inequitable results for the Beneficiaries.

B. Denying Ahern's Last-Minute Motion to Continue the Evidentiary Hearing Was Not an Abuse of Discretion.

One cannot sit on one's hands and then claim she was prejudiced by doing so. *In re Estate of Eccleston*, 279 P.3d 739 (Kan. Ct. App. 2012) ("One cannot sit on one's hands and then claim excusable neglect.") Ahern's alleged prejudice, due to the denial of her last-minute request for a continuance, is a consequence of her own making. Ahern had months to secure representation at the second evidentiary hearing, but she failed to do so.

Ahern's failure to follow the necessary steps to obtain counsel, or funding for counsel, after being advised of those steps, does not trump the district court's discretion to manage its docket. *See* 88 C.J.S. Trial § 79 ("The trial court has wide discretion to control, regulate, and manage its cases and calendar or docket for orderly, efficient, and expedient disposition of business"). Permitting Ahern's last-minute continuance would have undermined the district court's docket management, disrupted the litigation, and rewarded Ahern's indolent and cavalier

behavior. Accordingly, the district court used appropriate discretion in denying Ahern's oral motion for continuance.

1. Ahern Lacks Standing to Challenge the District Court's Denial of Her Oral Motion for Continuance

First, as a procedural matter, Ahern's failure to file an affidavit setting forth her grounds for continuance is sufficient to deny her appeal on this issue. *See Piazza v. Reid*, 83 Nev. 123, 123, 424 P.2d 413, 413 (1967). In that case, the appellant made an oral motion for continuance, based upon the illness of a material witness, which was denied by the court. *Id.* This Court held that the appellants "failed to file an affidavit setting forth their grounds for continuance." *Id.*, citing NRCp 21; NRS 16.010.

Although the appellants argued that it was undisputed that the witness was material to their case, this Court held that it "was incumbent upon them to file an affidavit in order to establish standing to attack the district court's discretion." *Id.* Like Ahern in this case, "since no affidavit was filed, we cannot say that the lower court abused its discretion." *Id.* Accordingly, Ahern lacks standing to challenge the district court's denial of her oral motion for continuance, and this portion of the appeal must be dismissed.

2. Nevada Law Allows District Courts Discretion to Control Their Dockets and to Grant or Deny Continuances

This Court has an extensive body of jurisprudence on trial continuances, including for reasons of lack of counsel. It has held that even “the withdrawal, on the eve of trial, of the attorney for one of the parties to an action, leaving such party unprepared for trial, is not *ipso facto* a ground for continuance...” *Benson v. Benson*, 66 Nev. 94, 98, 204 P.2d 316, 318 (1949); *see also S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978) (no abuse of discretion in denying motion for continuance, on the eve of trial, to depose an expert witness whose identity had been disclosed one week before); *accord, Baer v. Amos J. Walker, Inc.*, 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).

In short, Ahern had months to secure counsel, and funding for counsel, leading up to the February 2017 hearing. She cannot now claim she was prejudiced when her own acts created the alleged prejudice. It is well settled that “[i]n seeking equity, a party is required to do equity.” *Transaero Land & Dev. Co. v. Land Title of Nevada, Inc.*, 108 Nev. 997, 1001, 842 P.2d 716, 718 (1992). Here, the district court was well within its discretion to deny Ahern’s request for a last-minute continuance.

In response, Ahern virtually ignores the Nevada precedent on this issue because it weighs so heavily against her. *See* Op. Br. at pp. 25-26. Conceding the point, she cites to a foreign case like *Neal v. Swaby*, 975 So. 2d 431, 433 (Fla. Dist. Ct. App. 2007) which ignores Nevada’s broad grant of discretionary authority, and

articulates factors that have not been adopted in Nevada.⁷ *Cf. Benson v. Benson*, 66 Nev. 94, 98; *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243; *Baer v. Amos J. Walker, Inc.*, 85 Nev. 219, 220.

In short, resorting to out-of-state authority is unpersuasive where several controlling Nevada cases are directly on point. The district court has broad authority to grant or deny motions for continuances, and in this case, Judge Sturman was in the best position to assess the relevant circumstances. The district court did not abuse its discretion in denying Ahern's oral motion for continuance, and it should be affirmed.

a. The Court Gave Ahern Every Reasonable Opportunity to Participate at the Evidentiary Hearing

Despite no obligation to do so, the district court offered to pay for Ahern's legal counsel if she submitted a budget. The district court expressly told Mr. Semanza, who was Ahern's putative counsel and was in direct communication with her, that if "you want to file something saying you need some sort of a budget ..." because "we would need something that would tell us, yes, you're going to represent her and you're going to need some sort of retainer... [because] we have issued, in the past, some advances for her fees." (4 AAPP 445-446). Ahern never retained Mr. Semanza and never filed a budget.

⁷ Ahern also cites to a Texas case, *Villegas v. Carter*, 711 S.W.2d 624 (Tex. 1986) that is entirely unhelpful to the Court for the same reasons.

Even so, the district court relented and granted Ahern's cursory request for funding the day before the hearing. (4 AAPP 463.) The record shows that Mr. Waid's counsel, Mr. Todd L. Moody, even called Ahern's putative counsel on the same day the order was issued to inform him that the Trust would pay Mr. Semanza to represent Ahern at the next day's hearing. (4 AAPP 467-470.) In other words, Mr. Semanza had a day to prepare for the hearing and money to secure his services. Despite this, he argued he had insufficient time. Certainly, Ahern's documented problems with listening to her counsel's advice may have played a part. In any event, Mr. Semanza appeared at the hearing but refused to represent Ahern. (4 AAPP 475.)

b. Ahern Had Months to Secure an Attorney – There is Simply No Truth to the Allegation Ahern Had One Day's Notice to Obtain Counsel

Months – Ahern had *months* to secure an attorney for the February 2017 evidentiary hearing. As early as November 9, 2016, Ahern's former counsel told the district court he had already "advised his client he was going to move to withdraw immediately." (1 RA 12-13.)

On November 21, 2016, Mr. Lenhard filed his Motion to Withdraw and testified via affidavit that "Ms. Ahern has refused to follow the advice of the undersigned and Ms. Ahern are in a fundamental disagreement as to the best course of action in this matter." (1 RA 14-21.) Moreover, Mr. Lenhard testified

that Ahern “has been aware that [Mr. Lenhard] would be filing the Motion and has been put on notice that she must retain new counsel.” (*Id.*)

And so, because Ahern refused to follow the advice of her counsel, she lost her representation. (*See id.*) The district court confirmed that that “it is unfortunate that it appears [Ahern] doesn’t listen to any attorney.” (4 AAPP 431.) Regardless of reason, Ahern undisputedly knew that she was losing her counsel in November 2016. Not surprisingly, she contacted new counsel, Lawrence Semanza, who appeared at a November 23, 2016 hearing to discuss possibly representing Ahern in this matter. (4 AAPP 430.)

Ahern knew for *months* that she needed to retain new counsel. If she was planning on retaining Mr. Semanza, the district court expressly told him that “you want to file something saying you need some sort of a budget ...” because “we would need something that would tell us, yes, you’re going to represent her and you’re going to need some sort of retainer... [because] we have issued, in the past, some advances for her fees.” (4 AAPP 445-446). No such budget was ever filed.

Instead, Ahern waited until the last minute and faxed a request to the district court on February 8, 2017. Even though this late filing failed to comply with the minimal requirements imposed by Judge Sturman, she still *granted* Ahern’s request to obtain Trust funds to pay counsel. (4 AAPP 463.) Ahern can blame nobody but herself that waited until the day before the hearing to make the request.

On February 9, 2017, the district court held an evidentiary hearing. (4 AAPP 464 – 6 AAPP 605.) Ahern attended the hearing via video conference per her request. (4 AAPP 465, 472.) Mr. Semanza appeared at the hearing to state he had obtained a copy of the district court’s February 8th order authorizing disbursement and was informed by Mr. Waid’s counsel that the Trust would pay his fees. (4 AAPP 467-470.)

Regardless, Mr. Semanza decided he was not sufficiently prepared and declined to represent Ahern. (*Id.*) The district court informed Ahern that, despite authorizing her request to release Trust funds to pay for Mr. Semanza, he declined to represent her. (4 AAPP 475.)

As the timeline above demonstrates, Ahern’s argument that she had one day to obtain counsel is pure fiction.

c. Ahern’s Lack of Counsel Was the Inevitable Consequence of Her Own Actions

The district court explained that Ahern’s issue keeping an attorney was a problem of her own making: “it is unfortunate that it appears [Ahern] doesn’t listen to any attorney.” (4 AAPP 431.) “[I]t is through her own actions that she has left the Court with no alternative but to take the action that’s been taken...while I appreciate her request that she needs to be – to have an attorney and to be able to pay that attorney, if she had cooperated with her attorney and with her Trustee, we wouldn’t be in this situation. She would have had money.” (4 AAPP 432.)

Critically, in *Benson*, *supra* this Court found that denying a continuance based on lack of representation is justified “where the withdrawal is unexplained, where no diligence in inducing counsel to remain in the case or in securing new counsel is disclosed, and where it is not shown that the party is free from fault in the matter.” *See Benson*, 66 Nev. 94, 98-99. “Likewise when new counsel is engaged just prior to the trial date, the alleged lack of preparation on the part of such counsel is not necessarily a ground for continuance, particularly where the party has been guilty of negligence, such as inexcusable delay in employing the new counsel...” *Id.*

The *Benson* court concluded, that like the instant case, “it is equally clear that the necessity the appellant found of engaging new counsel the day before the trial was due entirely to her own negligence and lack of diligence. This being true, the court did not abuse its discretion in refusing to grant the continuance.” *Id.* at 100.

d. Evidence of Ahern’s Financial Condition Is Not Part of the Excessiveness Review

There is no requirement that the district court must undertake an inquiry into Ahern’s financial condition before imposing the punitive damages award. Consequently, Ahern suffered no prejudice where that inquiry was not expressly undertaken. Under the old Nevada standard, articulated in *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 509, 746 P.2d 132, 137 (1987), *abrogated*

by *Bongiovi v. Sullivan*, 122 Nev. 556, the financial position of the defendant was one of the relevant considerations when reviewing the excessiveness of a punitive damages award. *See id.*

However, *Bongiovi* expressly pre-empted the old standard and adopted the federal standard. *Id.* at 583 (“By adopting the federal standard in Nevada, the necessity for both a state and federal review for excessiveness is obviated.”) The ability to pay is no longer one of the guideposts used to review an award of punitive damages in Nevada. *See id.*; *cf. Wyeth*, 244 P.3d at 784.

Neither the Beneficiaries or the district court bear the burden of establishing the defendant’s ability to pay a punitive damages award. *See id.* Rather, a defendant can *choose* to raise her ability to pay, with supporting documentation, for the fact finder’s consideration. *Cf. Wohlers v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998) (applying the pre-*Bongiovi* standard that “financial position” can be a factor in determining excessiveness of punitive damages).

Ahern’s financial condition is not one of the prima facie elements used to decide punitive damages. Indeed, NRS 42.005(4) addresses the timing of introduction of any “[e]vidence of the financial condition of the defendant” *separately* from the plaintiff’s obligation to present elements supporting the claim, (NRS 42.005(1)), and from the limitations on the amount of the award (NRS 42.005(1)(a)-(b)).

It is the defendant's burden to introduce any mitigating evidence of her financial position. *See e.g., Kemezy v. Peters*, 79 F.3d 33, 33–34 (7th Cir. 1996); *Smith v. Lightning Bolt Prod.*, 861 F.2d 363, 373 (2d Cir.1988) (“[I]t is the defendant's burden to show that his financial circumstances warrant a limitation of the award.”). Ahern attended the hearing and had every opportunity to address her financial condition at issue and did not.

Further, it is important to note that the punitive damages award is taken from the Trust proceeds, not Ahern's own pocket or other resources (“The Court finds that the punitive damage award described above should be paid from and/or offset against Ms. Ahern's share of the Trust.”). (6 AAPP 744). Therefore, the punishment does not take any of Ahern's assets, but rather defers the flow of Trust income until the punishment has been carried out. (6 AAPP 744-745).

e. Having Appeared at the Evidentiary Hearing in a Pro Se Capacity, Ahern Still had the Opportunity and Obligation to Participate.

Even pro se litigants must follow the rules. *See e.g., Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 718 (2012). Due to her own failure to secure counsel, Ahern attended the 2017 evidentiary hearing as a pro se litigant. In that capacity, “such a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys... [t]hus, as is the case with attorneys, pro per litigants must follow correct rules of procedure.”

Nwosu v. Uba, 122 Cal. App. 4th 1229, 1246–47, 19 Cal. Rptr. 3d 416, 430–31 (2004).

Ahern had every opportunity to participate at the hearing. The Court cannot save a party who “had legal remedies available... that she neglected.” *Bonnell v. Lawrence*, 128 Nev. 394, 404. Indeed, her alleged failure to have the “Beneficiaries’ proposed exhibits” is a failure of her own making. Counsel for Mr. Waid mailed these exhibits to Ahern, but they were returned because she had not updated her address with the court. (5 AAPP 538-540.) Further, all documents had already been filed or provided to Ahern’s prior counsel. (5 AAPP 494-496.)

Ahern’s argument that she “likely would have seized the opportunity” to provide a defense belies the facts and common sense. For more than a year, she chose not to be deposed or participate in a meaningful way during the entire litigation. *Cf.* Op. Br. at p. 28. This was no different – she cannot ask the Court to save her from her own recalcitrance.

f. The Guardian Ad Litem Issue is a Red Herring, The Court Did Not Appoint One Until Well After the 2017 Evidentiary Hearing Where the Punitive Damages Were Calculated

Appointment of a Guardian Ad Litem (“GAL”) six months after a hearing does not taint or otherwise invalidate the preceding hearing. (7 AAPP 730-731.) The parties did everything they reasonably could to ensure Ahern was able to participate, including the commission of an independent medical examination to

ensure she could sit for a deposition. (3 AAPP 322-323.) Mr. Waid also visited Ahern's house on January 21, 2017 but she refused to meet him. (5 AAPP 551.)

Indeed, on that same day, Mr. Waid testified that out of an abundance of caution he had the Mesquite Police perform a "well check" on Ahern and they said she was in satisfactory condition. (5 AAPP 551-553.) Moreover, Ahern participated and asked questions at the hearing. The provision of a GAL six months after these events has no bearing on the evidence, or Ahern's ability to meaningfully participate.

C. Conclusion

For these reasons, Judge Sturman's Order awarding both compensatory and punitive damages should be fully affirmed on appeal.

Respectfully submitted this 4th day of September, 2018.

RUSHFORTH LEE & KIEFER LLP



By: _____

JOSEPH J. POWELL

State Bar No. 8875

DANIEL P. KIEFER

State Bar No. 12419

MATTHEW W. PARK

State Bar No. 12062

Telephone (702) 255-4552

1707 Village Center Circle, Suite 150

Las Vegas, NV 89134

e-mail: probate@rlklegal.com

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

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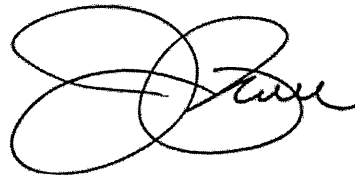
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3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 4th day of September, 2018.

RUSHFORTH LEE & KIEFER LLP.

A handwritten signature in black ink, appearing to read 'Joe Powell', written over a horizontal line.

By: _____
JOSEPH J. POWELL
State Bar No. 8875
DANIEL P. KIEFER
State Bar No. 12419
MATTHEW W. PARK
State Bar No. 12062
1707 Village Center Circle, Suite 150
Las Vegas, NV 89134
Telephone (702) 255-4552
e-mail: probate@rlklegal.com