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IN THE SUPREME COURT FOR THE STATE OF NEVADA

JEFFREY D. SPENCER, Appellant, v. HELMUT KLEMENTI, EGON KLEMENTI, ELFRIEDE KLEMENTI, MARY ELLEN KINION, ROWENA SHAW, and PETER SHAW, Respondents.	Case No. 77086

APPELLANT'S REPLY BRIEF

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I. ROUTING STATEMENT

Each of the Respondents asserts that the matters of first impression identified by Appellant Jeffrey Spencer ("Spencer") have been resolved by this Court's prior jurisprudence. (Helmut Answr. Br. ("HAB") at 1-2; Kinion and Elfriede Answr. Br. ("KAB") at 2-3; Shaw Answr. Br. ("SAB") at 2-3). Claiming that the holdings in *Circus Circus Hotels v. Witherspoon* ("*Witherspoon*"), 99 Nev. 56, 61, 657 P.2d 101, 104 (1983), and *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983), resolve the issue of the application of absolute privilege to public comment, the Respondents overlook the distinction between public comment at a government body's meeting from testimony offered in a contested case before an administrative body. (HAB at 1-2; KAB at 2-3; SAB at 2-3).

As addressed by Spencer, this distinction is important because the protections provided in a contested case justify the application of an absolute privilege and no such protections apply to public comment. *See Knox*, 99 Nev. at 518, 665 P.2d at 270. The distinction between a contested case and public comment is particularly clear where, as here, the statements being made do not even address an item on the agenda. (*See* 4 AA 798, 800; 5 AA 1002, 1027, 1030, 1033; 6 AA 1247-49, 1311-20, 1323-24, 1333). Because the decisions in both *Witherspoon* and *Knox* address only testimony presented during contested cases in quasi-judicial settings and not all statements made to administrative bodies, the legal question presented in this case is one of first

impression that should be addressed by the Nevada Supreme Court. *See Witherspoon*, 99 Nev. at 59-60, 657 P.2d at 103-104; *Knox*, 99 Nev. at 517-18, 665 P.2d at 270.

The Respondents also each assert that even if the application of absolute privilege to a claim for malicious prosecution was an issue of first impression, Spencer did not preserve that issue for appeal. (*See* HAB at 2, KAB at 3, SAB at 3). Spencer expressly argued that adopting the Respondents' positions regarding the malicious prosecution claim would eliminate any such claim (*see* 6 AA 1262-63) and that the statements made that formed the basis of the malicious prosecution claim were "only subject to qualified privilege, not absolute privilege." (5 AA 1169; *see also* 6 AA 1263). The argument regarding the application of privilege extends from that position and was therefore not waived. Neither is the claim resolved by *Harrison v. Roitman*, 131 Nev. 915, 917, 362 P.3d 1138, 1140 (2015), which applied a functional approach to determine whether absolute privilege should be applied to a tort claim. The *Harrison* decision did not address the specific question of whether absolute privilege should apply to claims of malicious prosecution or whether it would completely eradicate such claims.

The decisions cited by the Respondents do not resolve the issues of first impression raised in this appeal or establish that those issues were waived; therefore, the Supreme Court should retain jurisdiction over this action. *See* NRAP 17(a)(12).

II. STATEMENT OF RELEVANT FACTS

Helmut and Kinion accuse Spencer of omitting documents from the Appellant's Appendix, suggesting a nefarious motive or improper conduct. (*See* HAB at 10 n.5; KAB at 5 n.3). Spencer did not omit from the Appellant's Appendix any of the highlighted documents; however, since they were each attached to several motions, Spencer omitted duplicate copies in accordance with Nevada Rule of Appellate Procedure 30(b). Specifically, Helmut claims that Spencer omitted two exhibits from his motion for summary judgment, the deposition transcript of Deputy McKone and the transcript of testimony of the district attorney who prosecuted Spencer, Maria Pence. McKone's entire deposition transcript is at Volume 3 pages 635-750 of Appellant's Appendix. The entire transcript of the hearing at which Pence's testimony was presented is at Volume 2 pages 283-422 of Appellant's Appendix. Kinion accuses Spencer of omitting a letter from Kinion to Pence, which is at Appellant's Appendix Volume 1 pages 248 to 249.

Helmut, Kinion, and Elfriede go so far as to assert that Spencer's entire factual statement should be disregarded by the Court as being unsupported, but points to no violation of the Nevada Rules of Appellate Procedure. (HAB at 8; KAB at 8). As the disputes between the parties have been continuous for almost a decade, it is clear that the parties disagree about nearly everything. However, the Court should not strike or disregard the factual statement in a brief simply because the Respondents disagree

with the statements presented. These ad hominem attacks are an attempt to distract from the legal issues presented by this appeal and should be disregarded.

III. ARGUMENT

A. The District Court's Legal Errors Require Reversal of Summary Judgment as to Each Respondent

In granting summary judgment to each of the Respondents, the district court made significant legal errors. It ignored the proper summary judgment standard by making findings of fact, substituting its judgment for that of a reasonable juror, and making inferences in favor of the moving parties.[1] (*See* 2 AA 407; 3 AA 523; 6 AA 1460-61; 7 AA 1468, 1470, 1472-76, 1484-86, 1493-96). Substantively, the district court erred by applying absolute privilege to statements made in public comment and to law enforcement and further applying absolute privilege to the claim for malicious prosecution. (*See id.*). Because of these legal errors, the Court should reverse the district court's orders granting summary judgment to each of the Respondents.

1. The District Court Ignored the Proper Summary Judgment Standard

Helmut and the Shaws acknowledge Spencer's argument that the district court applied the incorrect standard of review, but they contend that the standard for which Spencer advocates on appeal is the slightest doubt standard, which was rejected nearly

[1] The Shaws expressly argued that the district court should refuse to make inferences in favor of Spencer, noting that Spencer had presented evidence from which a jury could make an inference that Kinion's statements to Pence influenced the criminal prosecution. (*See* 1 AA 224-25 ("We want inferences, inferences based upon a letter . . . .")).

fifteen years ago in *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). (*See* HAB at 19; SAB at 15). Although Spencer's prior counsel relied on the improper "slightest doubt" standard (*see, e.g.*, 6 AA 1256, 1411), there has been no reliance on that standard on appeal. (*See* Opening Br. ("AOB") at 8, 12-13, 15). Indeed, the district court did not err in applying the *Wood* standard, it erred in misapplying that standard. (*See* 2 AA 407; 6 AA 1400, 1450-52). The district did so in two ways: (1) engaging in fact-finding beyond the evidence that was offered in support of Kinion's first motion for summary judgment and (2) making factual findings on disputed evidence in the first and second rounds of summary judgment motions. (*See* 2 AA 407; 3 AA 523; 6 AA 1460-61; 7 AA 1468, 1470, 1472-76, 1484-86, 1493-96).

Each Respondent argues that the district court properly set a hearing to question the district attorney who prosecuted Spencer, but only Helmut and the Shaws attempt to offer any legal authority to support that proposition. (HAB at 20; KAB at 14; SAB at 16-17). Kinion and Elfriede support only their argument that Spencer invited the error by failing to object to the district court's request. (KAB at 14-15). The other Respondents similarly argue that Spencer waived this issue by failing to object. (HAB at 21; SAB at 17-18). Neither argument excuses the district court's error.

When looking at whether the issue was preserved for appeal or was invited error, the Respondents assert that Spencer was given the opportunity to object, but

failed to do so. (KAB at 14; HAB at 21; SAB at 17-18). Invited error prevents a party who induced the district court into an error from arguing that error as a basis for appeal. *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (citing 5 Am.Jur.2d Appeal and Error § 713 (1962)). Failures in preservation of issues for appeal have been excused when such objection would be futile. *See Bronneke v. Rutherford*, 120 Nev. 230, 236, 89 P.3d 40, 44 (2004) ("[A]ny proffer of jury instructions regarding informed consent would have been futile."). In this case, Spencer did not invite the district court to hold an evidentiary hearing and the district court expressly told Spencer that objecting would be futile.

Although the district court asked for objections to the hearing, before Spencer's attorney substantively responded, the district court said, "You can't say no. . . . I put you in a position that you can't say no." (1 AA 233). Spencer's counsel, recognizing that if the district court's decision would be based on the former district attorney's testimony, then the testimony needed to be part of the record, asked the judge to call her in an evidentiary hearing and not a less formal manner. (1 AA 233). Therefore, the Court should reject the argument that Spencer waived the issue or invited the error.

If the Court believes there was waiver, it should nonetheless hear the issue as holding an evidentiary hearing to resolve an issue of disputed fact on a motion for summary judgment is plain error as addressed below. Error in a civil case is plain if "'the error is so unmistakable that it reveals itself by a casual inspection of the

record.'" *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 n.2 (1990) (quoting *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1983)). While Helmut and the Shaws assert that the evidentiary hearing was proper because a judge is authorized to call witnesses and ask them questions at trial under NRS 50.145,[2] neither Helmut nor the Shaws can offer any authority establishing that calling a witness to resolve a disputed fact on a motion for summary judgment is proper. Indeed, the error in doing so "is so unmistakable that it reveals itself by a casual inspection of the record" because the need for an evidentiary hearing was predicated by a dispute regarding a material fact – what effect the actions of the Respondents had on Spencer's prosecution. (*See* 1 AA 226 ("I want to find out if Miss, is it Kinion? Yes. If Miss Kinion was involved."); *see also* 2 AA 407).

The law at the time of the district court's decision to hold the evidentiary hearing was clear: it could not assist the moving party in meeting its burden of proof on summary judgment by calling for additional testimony. *See* NRCP 56(c) (2018). Perhaps more clearly, the existence of a disputed material fact is the basis for denying a motion for summary judgement. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029 ("Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the

[2] In support of this position, the Shaws additionally cite the unpublished and non-citable *Callara v. Las Vegas Hilton Corp.*, 2010 WL 3271958 (Nev. 2010) in violation of Nevada Rule of Appellate Procedure 36(c)(3).

moving party is entitled to a judgment as a matter of law.'" (quoting NRCP 56(c)). Because the district court used the evidentiary hearing to resolve a factual dispute[3] contrary to the established standard for summary judgment, the error is plain from a casual review of the record. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029; *Torres*, 106 Nev. at 345 n.2, 793 P.2d at 842 n.2.

The failure of the district court to apply the well-established standard for deciding motions for summary judgment requires reversal of the orders granting summary judgment, even if reviewed under a plain error standard.

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[3] Respondents also assert that the district court resolved the factual dispute of whether the statements made were in fact true. (*See* HAB 11; KAB 14-15, 18). In support of that proposition, Kinion and Elfriede state "Helmut's civil claims against Spencer were ultimately settled for a substantial amount confirming the veracity of the claims." (KAB at 14). This statement is in violation of NRS 48.105, prohibiting admission of evidence of compromise to prove liability, and is not supported by citation to the record (because it cannot be since any evidence of a settlement would have been inadmissible) in violation of Nevada Rule of Appellate Procedure 28(a)(10). It should therefore be stricken. The issue of whether Helmut's statement that Spencer punched him, and the others' republication of that statement, was true or could reasonably be believed to be true was a disputed issue of fact for the jury. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Likewise, whether each of the other Respondents' believed their statements that Spencer punched Helmut, even after they had seen a video showing there was no punch, were factual issues. *See id.*

2. The District Court Erred When It Failed to Consider Respondents' Active Participation in Spencer's Criminal Prosecution

Respondents make various arguments regarding malicious prosecution (HAB at 17-19; KAB 12-18; SAB 13-15).[4] As stated in the Opening Brief, the district attorney who prosecuted Spencer, Maria Pence, admitted that comments made by several neighbors to the Kingsbury General Improvement District ("KGID"), the Douglas County Planning Commission, and Spencer's employers were considered in continuing to prosecute the charge of throwing snow on Egon. (*See* 2 AA 266, 371; AOB at 3-4). Pence testified that when she filed the complaint, before Kinion had sent her letter, "the snowplow is not a huge issue" (2 AA 365); at the time of filing the complaint, "it wasn't like the snowplow incident was some pivotal point." (2 AA 366). Over the course of investigating the charges, including talking to Kinion as a witness and reviewing the accusations made by Kinion and the other Respondents at KGID and Douglas County Planning Commission meetings, however, the snowplow incident became the only factual basis on which the charge was to be proven at trial. (2 AA 266, 338-39, 357-358, 365, 371).

To succeed on a claim for malicious prosecution, a plaintiff must establish "(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." *LaMantia v. Redisi*, 118

[4] Spencer notes that the Shaws did not only adopt portions of Helmut's brief as allowed by NRAP 28(i), they copied the exact language. (*Compare, e.g.*, SAB 14 *with* HAB 18).

Nev. 27, 30, 38 P.3d 877, 879 (2002) (internal quotation omitted). Additionally, the plaintiff must link the defendant to being a proximate cause of the prosecution by proving that the defendant "initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff." *Id.* at 30, 38 P.3d at 879-80. None of the Respondents address their active participation in the criminal process by making false statements (Kinion and Helmut) and repeating false statements (the Shaws and Elfriede) at those public meetings, to Spencer's employer, and to investigators and the district attorney. (*See* 4 AA 883, 885; 5 AA 1007-1009, 1027, 1030, 1033 (Helmut); 4 AA 798, 800; 6 AA 1248-49 (Shaws); (1 AA 248-49; 5 AA 1002; 6 AA 1311-20, 1323-24, 1333 (Kinion); 6 AA 1247-48 (Elfriede)).

The parties also rely on an argument that the district court properly found that probable cause existed eliminating a separate element of the *LaMantia* standard for malicious prosecution. (HAB at 18-19; KAB 13-14; SAB at 27). Kinion and Elfrieded erroneously argue that Nevada courts have determined that the existence of probable cause is an issue of law for the court to determine. (KAB at 13-14). On the contrary, "[i]n civil cases, the existence of probable cause generally is a fact question for the jury." *Riggs v. Nye County*, 2019 WL 1300074, at *4 (D. Nev. Mar. 21, 2019). Even in *Dutt v. Kremp*, on which Kinion and Elfriede rely, the court specifically held that probable cause is a question for the court only after the jury resolves any disputed facts. 111 Nev. 567, 572, 894 P.2d 354, 357-58 (1995), *overruled on other grounds by LaMantia*, 118 Nev. at 31, 38 P.3d at 880. Because Spencer presented evidence on

summary judgment that the investigating officer had found insufficient evidence of the snowplow incident to establish probable cause, there was a genuine issue of material fact as to whether probable cause existed to pursue that charge. (1 AA 137; 6 JA 1327-30).

3. The District Court Erred When It Applied Absolute Privilege to Public Comment at Meetings of Government Bodies

Respondents assert that Nevada has not carved out an exception for public comment to the application of absolute privilege to quasi-judicial proceedings. (HAB at 25; KAB at 2-3; SAB 21). No exception to privilege needed to be carved out because while government bodies may be empowered to hold quasi-judicial hearings, not all meetings are such hearings. *See* NRS Chapter 233B (distinguishing between administrative responsibilities and hearing contested cases); NRS 241.016(1) (noting that even quasi-judicial meetings of public bodies are subject to the open meeting laws). Whether the quasi-judicial privilege applies to a particular hearing depends upon whether the body in question is serving a judicial function; if the body takes evidence upon oath or affirmation, calls or examines witnesses, allows the impeachment of witnesses, and offers the opportunity to rebut the evidence presented. *Knox*, 99 Nev. at 518, 665 P.2d at 270 ; *see also* NRS 241.0353(2) ("A witness who is testifying before a public body is absolutely privileged to publish defamatory matter as part of a public

meeting, except that it is unlawful to misrepresent any fact knowingly when testifying before a public body.").[5]

Respondents in this case acknowledge that they made statements at the Douglas County Planning Commission and KGID meetings. (HAB at 1, 23; KAB 18; SAB 19). The parties dispute whether those statements were false, but they cannot dispute that the government bodies were not holding quasi-judicial hearings when the comments were made. (*See*, *e.g.*, 5 AA 1027, 1030, 1033).

Helmut and the Shaws offer a California case from 1958 to support a position that public comment should be included in the absolute privilege. (HAB at 25; SAB at 21-22). Unlike the comments in this case, the statement in *Whelan v. Wolford* was made about the presumed deleterious effects of granting a variance during comment on the hearing on that variance. 164 Cal. App. 2d 689, 693-94, 331 P.2d 689 (Cal. Ct. App. 1958). Moreover, in that case, the California Appellate Court was alternatively applying legislative privilege and testimonial privilege, it did not distinguish between the two in reaching its decision. *Id.* Other jurisdictions have agreed with Spencer's position fully, holding that statements made in public comment are not entitled to the

[5] The qualified privilege expressed in NRS 241.0353(2) belies Respondents' arguments that absolute privilege should apply to all public meetings. Nonetheless, the qualified privilege would not have protected the knowingly false statements made by respondents in this case. (See 4 AA 883, 885; 5 AA 1007-1009, 1027, 1030, 1033 (Helmut); 4 AA 798, 800; 6 AA 1248-49 (Shaws); (1 AA 248-49; 5 AA 1002; 6 AA 1311-20, 1323-24, 1333 (Kinion); 6 AA 1247-48 (Elfriede)).

same privilege as testimony. *See*, *e.g.*, *Stevens v. Tillman*, 568 F. Supp. 289, 294 (N.D. Ill. 1983).

The statements at issue in this case were either entirely unrelated to an agenda item at the public meeting or were in general public comment when there was no agenda item for which the Spencers would have even been present. (4 AA 798, 800, 826; 5 AA 1002, 1027, 1030, 1033; 6 AA 1247-49, 1311-20, 1323-24, 1333). Absolute privilege should not apply to such comments because they do not carry the procedural protections of testimony, and even if they did they were unrelated to any agenda item before the bodies. *See Knox*, 99 Nev. at 518, 665 P.2d at 270; *Jacobs v. Adelson*, 130 Nev. 408, 412, 325 P.3d 1282, 1285 (2014).

4. Privilege for Testimony Should Not Preclude a Claim for Malicious Prosecution

Respondents assert that Spencer waived his challenge to the application of absolute privilege to a claim for malicious prosecution by failing to raise it. (HAB 27-28; KAB 3; SAB 3, 23-24). However, Spencer argued, as he does on appeal, that if the district court adopted the Respondents arguments on malicious prosecution, no such claim could ever be established. (5 AA 1169; 6 AA 1262-63). Because his argument on appeal is a fair extension of the argument in district court, the Court should not deem it waived. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016) ("there is 'no waiver if the issue was raised, the party took a position, and the district court ruled on it[.]'" (quoting *W. Watersheds Project v. U.S. Dep't of Interior*, 677 F.3d 922, 925 (9th Cir.2012))).

Respondents assert that the functional approach outlined in *Harrison v. Roitman*, 131 Nev. 915, 917, 362 P.3d 1138, 1140 (2015), decides this issue. (HAB 2, 27-29; KAB 3, 22-24; SAB 3). The functional approach, however, fails recognize that the application of absolute privilege to such claims would mean that no claim for malicious prosecution could ever be made. If absolute testimonial privilege applies to statements made in anticipation of litigation as well as statements made in judicial proceedings, even patently false statements made to a prosecutor to induce a criminal charge would be protected. *See Jacobs*, 130 Nev. at 413, 325 P.3d at 1285; *see also Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 631, 331 P.3d 901, 904 (2014) (holding that absolute litigation privilege does not apply to attorneys statements in a later malpractice claim because, in part, "if the privilege protected the attorney from suit by the client, no client could ever bring a malpractice suit against his or her attorney"); *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277, 283 (2005).

This Court should follow its precedent in *Pope* and join other courts in expressly holding that absolute testimonial privilege applies to all torts except malicious prosecution. 121 Nev. at 317, 114 P.3d at 283; *see Silberg v. Anderson*, 786 P.2d 365, 371 (Cal. 1990); *Albertson v. Raboff*, 295 P.2d 405, 410 (Cal. 1956). Because the district court applied absolute privilege to dismiss both the claims for defamation and malicious prosecution, the Court should reverse the order granting summary judgment as to each respondent and remand for a decision that properly applies the standard for summary judgment and privilege.

B. Spencer's Claims Were Not Frivolous and the District Court Erred in Awarding Attorneys' Fees on That Basis

Helmut, Kinion, and Elfriede argue that when the district court said it was "inviting attorney's fees" and specified the amounts in which it would grant those fees, it was not indicating that it would be futile to oppose the motions for fees. (6 AA 1454; HAB 32-33; KAB 26-28). This argument is laughable when the district court stated "[o]f course I will grant them," after admonishing the Respondents to be careful with the amount of fees. (6 AA 1454). While perhaps Spencer could have contested the amount of the award, the district court had already reached its conclusion regarding the grant of attorneys' fees and any opposition on the basis that Spencer's claims were not frivolous would have been futile. (*See id.*). When raising an issue would be futile, the Court has refused to apply waiver of that claim. *See Bronneke*, 120 Nev. at 236, 89 P.3d at 44.

While this appeal has been pending, this Court has reiterated the standard to apply for an award of fees under NRS 18.010(2)(b) on the basis of frivolousness. *See Patush v. Las Vegas Bistro*, 135 Nev. Adv. Op. 46 at *6-7 (Sept. 26, 2019). Repeating that a claim is only groundless in a manner that justifies an award of fees "if no credible evidence supports it," the Court held that "[a]ttorney fees are not appropriate where the underlying claim rested on novel and arguable issues, even if those issues were not resolved in the claimant's favor." *Id.*

In this case, not only were Spencer's claims based upon credible evidence that the district court ignored, the applications of privilege in this case are issues of first impression. Even if the Court resolves the legal disputes against Spencer, it should reverse the award of attorneys' fees because Spencer claims have been brought in good faith based upon credible evidence. *See id.*

IV. CONCLUSION

This dispute between neighbors has been going on for nearly a decade. The rancor is apparent, but that cannot prevent this Court from reviewing the district court's myriad legal errors, in wrongly applying the summary judgment standard, inappropriately applying absolute privilege to non-privileged statements or statements entitled to only qualified privilege, and disregarding the credible facts on which Spencer based his claims. Because of these errors, the Court should reverse the orders granting summary judgment and the awards of attorneys' fees.

ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Reply 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond in size 14 point font.

2. I further certify that this Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is less than 4,569 words (less than the 7,000 word count available for a reply brief).

3. Finally, I certify that I have read this 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 Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a

reference to the page of the record on appeal where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 2nd day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Doyle Law Office, PLLC and that on the 2nd day of October, 2019, a true and correct copy of the above APPELLANT'S REPLY BRIEF was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

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