

IN THE SUPREME COURT OF THE STATE OF NEVADA

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DAVID DEZZANI; AND  
ROCHELLE DEZZANI,

Supreme Court Case No. 69410  
District Court Case No. CV1500826

Appellants,

vs.

KERN & ASSOCIATES, LTD.;  
AND GAYLE A. KERN,

Respondents.

RESPONDENTS' ANSWERING BRIEF  
APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT'S  
ORDER FILED NOVEMBER 19, 2015

The Honorable Elliott A. Sattler, Presiding

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## **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.

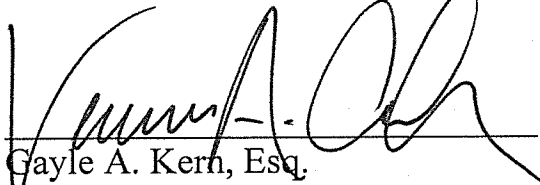
The name of the professional corporation is Gayle A. Kern, Ltd. dba Kern & Associates, Ltd. There is no parent corporation of Gayle A. Kern, Ltd., a Nevada professional corporation, organized pursuant to the provisions of NRS Chapter 89. There is no publicly-held company that owns stock in the corporation.

The following are counsel of record who have appeared in this action on behalf of Kern & Associates, Ltd. and Gayle A. Kern:

GAYLE A. KERN, LTD. dba KERN & ASSOCIATES, LTD.  
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Dated this 16<sup>th</sup> day of May, 2016.

KERN & ASSOCIATES, LTD.



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## TABLE OF CONTENTS

<b>NRAP 26.1 DISCLOSURE</b>	ii
<b>TABLE OF CONTENTS</b>	iii
<b>TABLE OF AUTHORITIES</b>	v
<b>JURISDICTIONAL STATEMENT</b>	viii
<b>ROUTING STATEMENT (NRAP 17)</b>	viii
<b>STATEMENT OF ISSUES PRESENTED FOR REVIEW</b>	ix
1. Whether the Dezzanis failed to state a claim for relief against Kern, as at all times relevant to the allegations of the Complaint, Kern was acting as an attorney on behalf of her client, the Association, and when the Dezzanis' interests were in opposition to those of Kern's client?	
2. Whether, even if this Court finds the Dezzanis set forth sufficient facts to establish a cause of action against Kern directly, the district court lacks subject matter jurisdiction over the claims for relief asserted in the Dezzanis' Complaint because there has been no mediation pursuant to Chapter 38 of the Nevada Revised Statutes and resolving the merits of the Dezzanis' asserted claims for relief requires the interpretation and application of the governing documents of the Association.	
<b>STATEMENT OF THE CASE</b>	1
<b>STATEMENT OF FACTS</b>	5
<b>SUMMARY OF ARGUMENTS</b>	12
<b>LEGAL ARGUMENTS</b>	14
I. <u>The District Court Properly Granted Kern's Motion to Dismiss on the Grounds that the Dezzanis Presented No Legally Cognizable Claim Against Kern.</u>	14
A. Standard of Review	15
B. As a Matter of Law, No Cause of Action Exists Against Kern For Actions Taken As the Attorney for the Association.	16

1.	<i>The Only Factual Allegations Asserted Involve Kern's Provision of Legal Services to the Association . . . .</i>	16
2.	<i>There is No Theory of Liability Under Which Kern is Liable Directly to the Dezzanis For Actions Taken During the Scope of Kern's Representation of the Association. . . . .</i>	17
3.	<i>NRS 116.31183 Does Not Permit Attorneys to be Personally Liable on Behalf of an Association. . . .</i>	21
4.	<i>The Facts Alleged by the Dezzanis Do Not Demonstrate Any Retaliatory Action by Kern . . . . .</i>	25
5.	<i>The Remaining Cited Provisions of Chapter 116 Do Not Create a Cause of Action Against Kern Directly. . . . .</i>	26
II.	<b><u>Even if This Court Finds A Cause of Action Exists Against Kern, and Dezzanis Set Forth Sufficient Facts To State A Claim Against Kern, The Dezzanis Failed to Comply with NRS 38.310 and the District Court Lacks Subject Matter Jurisdiction. . . . .</u></b>	29
	<b>CONCLUSION . . . . .</b>	33
	<b>CERTIFICATION OF COUNSEL . . . . .</b>	34

## TABLE OF AUTHORITIES

<i>B.L.M. v. Sabo &amp; Deitsch</i> , 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (1997) .....	20-21
<i>Bull v. McCuskey</i> , 96 Nev. 706, 709, 615 P.2d 957, 960 (Nev. 1980) .....	15
<i>Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.</i> , 112 Nev. 737, 917 P.2d 447, (Nev. 1996) .....	19
<i>Hamm v. Arrowcreek Homeowners' Ass'n</i> , 124 Nev. 290, 295-96, 183 P.3d 895, 900 (Nev. 2008) .....	30, 32
<i>Mainor v. Nault</i> , 120 Nev. 750, 768-69; 101 P.3d 308, 320-21 (2004) .....	19
<i>Munda v. Summerlin Life &amp; Health Ins. Co.</i> , 267 P.3d 771, 774 (Nev. 2011)	15
<i>Norton v. Hines</i> , 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975) .....	20
<i>Omega Video Inc. v. Superior Court</i> , 146 Cal. App. 3d 470, 480, 194 Cal. Rptr. 574 (1983) .....	20
<i>Parnell v. Smart</i> , 66 Cal. App. 3d 833, 837-838, 136 Cal. Rptr. 246 (1977)	20
<i>Ricks v. Dabney (In re Jane Tiffiany Living Trust)</i> , 124 Nev. 74, 81, 177 P.3d 1060, 1064 (Nev. 2008) .....	19

<i>Sanchez v. Wal-Mart Stores, Inc.</i> , 125 Nev. 818, 823, 221 P.3d 1276, 1280 (Nev. 2009) .....	15
<i>St. Paul Title Co. v. Meier</i> , 181 Cal. App. 3d 948, 952, 226 Cal. Rptr. 538 (1986) .....	21
<i>Weaver v. Superior Court</i> , 95 Cal. App. 3d 166,180, 156 Cal. Rptr. 745 (1979) .....	20

## NEVADA STATUTORY AUTHORITY

NRS 38.300(3) .....	29-30
NRS 38.310(1) .....	11, 29
NRS 38.320 .....	29
NRS 38.310 -360 .....	3, 13
NRS 116.31031 .....	22
NRS 116.3108 .....	27
NRS 116.31083 .....	27
NRS 116.31084 .....	27
NRS 116.31085 .....	27
NRS 116.31087 .....	27
NRS 116.3115(4) & (6) .....	22
NRS 116.3116-31166 .....	22
NRS 116.3118 .....	4, 21
NRS 116.31183 .....	11, 14, 21-24, 32, 33

NRS 116.31184 ..... 26-27

**NEVADA RULES OF APPELLATE PROCEDURE**

NRAP 3(A)(b)(1) ..... viii

NRAP 17 ..... viii

NRAP 28 ..... 4, 34

**NEVADA RULES OF CIVIL PROCEDURE**

NRCP 12(b)(1) ..... 11

NRCP 12(b)(5) ..... 11, 15, 26, 28, 32

NRCP 12(h)(3) ..... 11

## **JURISDICTIONAL STATEMENT**

Appellants, David Dezzani and Rochelle Dezzani (collectively the “Dezzanis”), appeal from an order of the Second Judicial District Court signed by District Judge Elliott Sattler on November 19, 2015. The Order granted Respondents’ Motion to Dismiss Complaint and dismissed the case in its entirety. (App. 142-146). Jurisdiction is granted pursuant to NRAP 3(A)(b)(1) in that Appellants appeal a final judgment.

## **ROUTING STATEMENT**

This subject matter of this appeal is neither presumptively retained by the Supreme Court pursuant to NRAP 17(a)(1) -(14), nor presumptively assigned by the Court of Appeals pursuant to NRAP 17(b)(1)-(10). In accord with NRAP 17(c), this Court has discretion to assign this appeal to the Court of Appeals, dependent upon the workloads of each court.



## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the Dezzanis failed to state a claim for relief against Kern, as at all times relevant to the allegations of the Complaint, Kern was acting as an attorney on behalf of her client, the Association, and when the Dezzanis' interests were in opposition to those of Kern's client?
2. Whether, even if this Court finds the Dezzanis set forth sufficient facts to establish a cause of action against Kern directly, the district court lacks subject matter jurisdiction over the claims for relief asserted in the Dezzanis' Complaint because there has been no mediation pursuant to Chapter 38 of the Nevada Revised Statutes and resolving the merits of the Dezzanis' asserted claims for relief requires the interpretation and application of the governing documents of the Association.

## STATEMENT OF THE CASE

Respondent, Kern & Associates, Ltd.,<sup>1</sup> is a professional corporation providing legal services to a variety of clients in Northern Nevada, including over 250 common-interest community homeowner associations, including the McCloud Condominium Homeowners Association (“Association”). Gayle A. Kern is an attorney employed by Kern & Associates who provided legal counsel to the Association on a variety of matters, including the matters which gave rise to the Dezzanis’ Complaint. Respondents Kern and Associates, Ltd. and Gayle A. Kern are referred to collectively herein as “Kern.”

The Dezzanis are members of the Association and owners of Unit #211 in the Association (“the Property”). (App. 2, Complaint ¶ 1). The Dezzanis purchased the Property with an existing rear deck extension which was approved by the Board of Directors in 2002, but which unlawfully extended into the common area of the Association. (App. 3, Complaint ¶ 8; App. 102-103, Kern Motion to Dismiss, Exhibit 2). In an effort to address the unlawful common area encroachment, the Board sent the Dezzanis, and numerous other similarly situated members of the Association, a Notice of Violation articulating the facts giving rise to the violation, the applicable provisions of the governing

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<sup>1</sup>Kern & Associates, Ltd. is a dba for a Nevada corporation, Gayle A. Kern, Ltd.

documents, and offering two possible solutions to the violation. (App. 10-12, "Notice of Violation", Complaint Exhibit "1"). The solutions included the opportunity for the Dezzanis to submit an architectural application to restore the deck to its original condition OR execute a covenant stating that the deck extension would be permitted to remain during the Dezzanis' ownership and one subsequent conveyance of ownership. *Id.*

Upon receiving correspondence from the Dezzanis regarding the Notice of Violation, the Board requested Kern reply on behalf of the Association. (App. 102-103, Kern Motion to Dismiss, Exhibit 2). What followed was a sequence of unsubstantiated attacks by the Dezzanis of Kern's provision of legal services to the Association and knowledge of the facts and law. This case is simply an extension of the unwarranted attacks on Kern.

The Dezzanis filed their Complaint against Kern directly, in connection with the firm and Gayle Kern's representation of the Association, for actions taken on behalf of the Association. (App. 1-8, Complaint). Kern filed a Motion to Dismiss Complaint ("Motion to Dismiss") on the grounds that the Dezzanis have no legally cognizable claim against Kern as the attorney for the Association for actions taken in connection with the representation of the Association and on behalf of the Association. At all times relevant to this case,

Kern was acting solely as the attorney for the governing body of the Association. (App. 39-105).

Kern's Motion to Dismiss asserted that the allegations contained within the Dezzanis' Complaint were without merit and the causes of action asserted against Kern should be dismissed for the following reasons: (1) Kern was at all times pertinent to the subject matter of the litigation acting solely as the attorney for the Association and, therefore, the Dezzanis have no direct cause of action against Kern; (2) the Dezzanis failed to state any cognizable claim against Kern for which relief could be granted; and (3) even if the district court found a cognizable claim existed, the court lacked subject matter jurisdiction over the asserted claims for relief, as evaluating the merits of the claims for relief would have required the court to interpret and apply the governing documents of the Association, and thus the claims were subject to mandatory mediation pursuant to the provisions of NRS 38.310-360, inclusive. (App. 39, Motion to Dismiss).

The district court agreed with the arguments made in the Motion to Dismiss and issued its Order granting the Motion to Dismiss and dismissing the case in its entirety. (App. 142-146). The court recognized that the Dezzanis have no cause of action against Kern, stating:

The Court finds there is *no basis in law or fact* to support the causes of action alleged against Kern. The Court finds to permit such causes against Kern would result in a *chilling effect on individuals' ability to hire and retain counsel*. NRS 116.3118 does not permit attorneys to be personally liable for actions taken *on behalf of an association*.

(App. 144, Order). (Emphasis added).

The district court correctly acknowledged the absence of any legally recognizable claim against Kern as the attorney for the Association for claims of relief which relate solely to actions taken by Kern on behalf of the Association. The Dezzanis appeal the district court's ruling and ask this court to set aside the Order and allow their unfounded claims to continue. However, there is simply no legal basis for the Dezzanis to assert their claims for relief against Kern. This appeal lacks both legal and factual support.<sup>2</sup>

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<sup>2</sup> It should be noted that the "Appellants' in *pro per* Opening Brief" filed by the Dezzanis is not compliant with the Nevada Rules of Appellate Procedure governing the content and form of briefs, specifically NRAP 28(a). Respondents acknowledge that the Dezzanis are proceeding pro se in this appeal, as they did in the district court proceedings. However, the Dezzanis also did not use the form provided by the Supreme Court clerk for appellants proceeding without assistance of counsel as required by NRAP 28(k). As a retired attorney, Mr. Dezzani should be well aware with the procedural requirements of litigation and should not be permitted to ignore such requirements. The Dezzanis' failure to file either a brief that complies with NRAP 28(a) or complete the brief form provided by the Supreme Court clerk is grounds for sanctions pursuant to NRAP 28(j).

## STATEMENT OF FACTS

The Dezzanis' Statement of Facts is incomplete, self-serving, and contains allegations of "fact" which are entirely unsubstantiated, immaterial, and without a shred of evidentiary support.<sup>3</sup> Kern submits the following correct Statement of Facts for the Court's review:

1. Respondent Kern & Associates, Ltd. is a professional corporation and law firm serving a variety of clients in Northern Nevada including, but not limited to, over 250 common-interest community homeowner associations. (App. 2, Complaint ¶ 2, 3). Gayle A. Kern is an attorney licenced in the State of Nevada and owner of Kern & Associates. Kern & Associates represents the Association and on numerous occasions provided legal services to the Association and its managing body on a number of different issues, including those issues involving the Dezzanis. The Dezzanis' Complaint solely alleges on

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<sup>3</sup> The Dezzanis falsely assert that Kern undertook and directed actions for the purpose of retaliation against Appellants. (Opening Brief, page 2). Such allegation is apparently based upon the "content and tenor of Respondents' many emails and letters." (Opening Brief, fn. \*, page 2-3). Even if the factual allegations in the Complaint are taken as true, such allegations are immaterial as there is no cause of action against Kern for the actions she undertook and directed on behalf of the Association. As admitted by the Dezzanis, these actions were taken solely in connection with the firm and Gayle Kern's representation of the Association.

wrongdoing as a result of Kern's provision of legal services to the Association. (App 3-6, Complaint ¶¶ 13, 14, 17, 19, 22, 24, 25, 26, 35, 38).

2. The Dezzanis are the owners of the Property and, as a result, are members of the Association. (App 2, Complaint ¶ 1).

3. The Association is governed by the Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominium Homeowners' Association ("CC&Rs"), recorded January 28, 2008, as Document No. 3614779 with the Office of the Washoe County Recorder. (App 54-100, CC&Rs). Plaintiffs purchased the Unit on July 1, 2004. Complaint ¶ 6.

4. Prior to the Dezzanis' purchase of the Property, the rear deck was extended from its original dimensions by a previous owner. (App 3, Complaint ¶ 8.) The architectural request for the deck extension was submitted to the Association's Board of Directors and approved in 2002. (App 26-27, Complaint, Exhibit 3).

5. Upon exterior inspection of the rear deck by members of the Association's Board on or about March 14, 2013, the Board of Directors issued the Dezzanis a "Notice of Violation" for the deck extension. (App 11-12, Complaint, Exhibit 1). The Notice of Violation stated that the deck extension

was unapproved and unallowed pursuant to the Sections 12.5 and 13.8.2 of the CC&Rs. (App 3, 11-12, Complaint ¶ 11, 12, 13, Exhibit 1). Sections 12.5 and 13.8.2 of the CC&Rs provide:

12.5 Association Maintenance and Decoration Authority. The Board of Directors, or its duly appointed agent, including the manager, if any, shall have the exclusive right to paint, decorate, repair, maintain and alter or modify the exterior walls, balconies, railings, exterior door surfaces, roof and all installations and improvements in the common area, and no owner of a condominium shall be permitted to do, or have done, any such work. The approval of the Board of Directors shall be required in writing for the installation of any awnings, sunshades, or screen doors, or any antennae or structures on the roof of any condominium building.

13.8.2 [An Owner] May not change the appearance of the Common Areas, the exterior appearance of a unit, any component that may be seen from the exterior of the building, or any other portion of the Project, or make any change or modification to that Owner's Unit, such as replacing carpeting with hardwood floors, without permission from the Board or the Architectural Committee, as applicable.

(App. 90, 93, CC&Rs).

6. As part of its enforcement of the CC&Rs, the Board provided that the Notice of Violation include two options for the Dezzanis to correct the violation. They could either submit an application for the restoration of the deck to its original condition, OR they could sign a covenant stating that the deck extension in its current condition could remain during the entire course of their ownership and one subsequent conveyance of ownership, but the deck would be



required to be removed at the owner's expense thereafter, *i.e.* after a second, subsequent conveyance of ownership. (App. 11-12, Complaint Exhibit 1).

7. In connection with Kern & Associates' representation of the Association, the Board sought the assistance of its counsel regarding the extension of multiple rear decks within the community, including the Dezzanis, and the unlawful encroachments of the extended decks in the common area (App 5-6, Complaint ¶ 35). Upon receiving correspondence from the Dezzanis regarding the Notice of Violation, the Board of Directors requested Kern reply to the Dezzanis on the Association's behalf as counsel to the Association. (App. 102-103, Kern Motion to Dismiss, Exhibit 2). Kern communicated with the Dezzanis on behalf of the Association by letter dated April 4, 2013. *Id.* The letter clearly informed the Dezzanis that Kern was acting as attorney for the Association. *Id.* In fact, this is mentioned in the first paragraph. *Id.* The letter states, in pertinent part:

"Dear Mr. And Mrs. Dezzani:

***I represent the McCloud Condominium Homeowners Association. The Board requested I respond to your email*** request to review communications and/or information related to another unit and Board minutes....

*Id.* (Empasis added).

8. Kern's April 4, 2013 letter sets forth the Association's position regarding the deck extension, stating:

The Board understands your frustration and appreciates you are addressing the matter of the unapproved deck extension that wrongfully encroaches in the common area. There is no question the extension exists in the common area, as do the other extensions. The common area is owned in common by *all* owners of the community. While it is unfortunate the issue of deck extensions and the wrongful taking of common area was not addressed earlier, the Association has properly taken action to protect the integrity of the common area. There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112.

*Id.*

9. *After* Kern sent the April 4, 2013 letter outlining and confirming the Association's conclusion regarding the deck extension on the Property, the Dezzanis emailed the Association's Board of Directors vehemently contesting the Notice of Violation and statements in Kern's letter. (App 14-22, Complaint Exhibit 2). Essentially, the email was a lengthy attack on Kern's provision of legal services to the Association, the conclusion stated in her April 4<sup>th</sup> letter, her knowledge of the facts and law, and her ability to assist and advise the Association *Id.* In various places, the email refers to Kern's representation of the Association and the communications Kern had with the Plaintiffs on behalf of the Association. The email explicitly acknowledges that Kern communicated

directly with the Dezzanis as counsel for the Association with regard to the deck extensions. *Id.* at page 2, ¶ 6.

10. On May 10, 2013, Kern sent another letter to the Dezzanis regarding their request for a hearing and for various documents. Again, Kern clearly indicated she represents the Association and that the Dezzanis should direct all further communication regarding the deck extension to Kern rather than directly to the Board of Directors. Specifically, the letter stated:

Dear Mr. And Mrs. Dezzani:

The Board of Directors requested I respond to your various communications.... If you have any further communications, the Board request that you communicate with me. We appreciate your anticipated cooperation. If I have failed to address any of your communications, please advise me.

(App. 105, Kern Motion to Dismiss, Exhibit 3).

11. The Board held a hearing on the matter, attended by the Board and by Kern as attorney on behalf of the Association. (App 4, Complaint ¶ 18). The Board subsequently issued the Result of Hearing letter, dated September 5, 2014. (App 4, 31-32, Complaint ¶ 18; Complaint Exhibit 5.) Kern continued to correspond with the Dezzanis as counsel for the Association regarding the deck extension. (App 4, Complaint ¶ 20, 21, 22). At all times, Kern responded on

behalf of her client, the Association, and asserted the legal positions she was retained to express by her client.

12. The Dezzanis filed their Complaint on May 4, 2015, asserting claims against the Kern and Karen Higgins, an individual member of the Board. (App 1-38). The claims asserted against Kern were never submitted to the NRED as required by NRS 38.310(1).

13. Kern filed the Motion to Dismiss, alleging that all claims against Kern must be dismissed in accord with NRCP 12(b)(5), and or NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310(1). (App 39-105). The Dezzanis filed a “Memorandum in Opposition [sic] Defendants, Kern & Associates Ltd. And Gayle Kern’s Motion to Dismiss Complaint” (“Memorandum”) alleging that the claims asserted against Kern were not subject to dismissal because they asserted direct violations of NRS 116.31183 and other provisions of Chapter 116. (App 106-109). Further, the Dezzanis asserted their claims were not subject to mandatory mediation as proscribed by NRS Chapter 38, as they arose from Kern’s actions after becoming aware of the Dezzanis’ complaints and criticisms. (App 107-108).

14. The district court found that the claims asserted against Kern were without merit. (App 142-146, Order). The court acknowledged the “chilling

effect” which would undoubtedly result from allowing the Dezzanis’ claims against Kern for her representation of the Association. (App 144). The court noted that there was no statutory basis for the claims asserted against Kern for actions taken upon advisement by the Board throughout her representation of the Association. *Id.*

### **SUMMARY OF ARGUMENTS**

The Dezzanis have sued Kern as the attorney for the Association for actions taken and advice given during the course of her representation of her client, the Association. There is no Nevada authority which supports the Dezzanis’ causes of action as against Kern as attorney for the Association. All of the factual allegations raised by the Complaint assert actions taken by Kern while acting as attorney for the Association and while providing legal advice to her client. The interests of the Dezzanis were, at all times relevant to the Complaint, adversarial to the interests of the Association. To hold that an adversary may assert a cause of action for the legal advice an attorney tenders to its client is contrary to Nevada law. There are only limited circumstances in which an attorney may be liable to a third party, including when the third party is a beneficiary to a contract and in claims for abuse of process, neither of which is present here. Simply put, Nevada law does not recognize a cause of action in this instance for the claims made by the Dezzanis against Kern as attorney for

the Association for actions taken on behalf of the Association. This analysis was confirmed by the district court in its Order, and should be affirmed by this Court.

Even if this Court finds that a cause of action exists against Kern as attorney for the Association for actions taken in connection with Kern's representation of the Association, the claims asserted by the Dezzanis were not properly before the district court, and this Court should find the mandatory mediation provisions of Chapter 38 to be applicable. If a claim exists against Kern for actions taken on behalf of the Association as its counsel, such a claim must first be mediated pursuant to the provisions of NRS 38.310-360, inclusive. Chapter 38 requires that any claims which require the interpretation, enforcement or application of an association's governing documents be first submitted to mediation.

Determining whether Kern's advice to her client was proper necessarily requires the Court to look to the Association's CC&Rs. As such, to the extent the Dezzanis' claims are deemed merited, such claims should have been submitted to mediation, and the district court has no jurisdiction before such mediation takes place.

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## LEGAL ARGUMENTS

### **I. The District Court Properly Granted Kern's Motion to Dismiss on the Grounds that the Dezzanis Presented No Legally Cognizable Claim Against Kern.**

The district court dismissed all of the Dezzanis' claims for relief asserted against Kern, concluding that there was no statutory basis to hold Kern, as the attorney for the Association, personally liable to a third party for actions taken on behalf of the client. The Dezzanis urge this Court to set aside the district court's order, in order to proceed with discovery relating to their asserted claims against the Association's attorney, Kern. The Dezzanis are proceeding on the erroneous theory that NRS 116.31183 authorizes civil actions against association attorneys for actions taken by the attorney on behalf of the association. The district court expressly rejected this contention, and found there was no basis in law or fact to support the Dezzanis' claims for relief.

This Court should uphold the district court's Order for the reasons stated below, including the Dezzanis improperly asserted causes of action against Kern directly as the attorney for the Association. The Dezzanis assert no facts which demonstrate that Kern took any independent actions directed at the Dezzanis. Rather, at all times and in all communications with the Dezzanis, Kern was acting on behalf of the Association as its attorney. Further, even if

this Court recognizes a cause of action against Kern directly and disagrees with the conclusion of the district court, remand of the claims to district court would be improper because of the Dezzanis' failure to mediate their claims pursuant to NRS 38.310-38.360, inclusive. If the Court opines that the Dezzanis asserted cognizable claims for relief against Kern, and holds that a third party has a right to sue the attorney for an adversary,<sup>4</sup> then it must hold that such claims are subject to the mandatory mediation requirement of Chapter 38.

#### **A. Standard of Review**

This Court reviews a district court order granting a motion to dismiss de novo. *See Munda v. Summerlin Life & Health Ins. Co.*, 267 P.3d 771, 774 (Nev. 2011). An order dismissing claims under NRCP 12(b)(5) is subject to rigorous appellate review. *See Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (Nev. 2009). However, while this Court accepts all factual allegations of the complaint as true, "the allegations must be *legally sufficient* to constitute the elements of the claim asserted." *Id.* (citing *Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 107, 108 (1995)). (Emphasis added). Thus, the

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<sup>4</sup> While a cause of action for abuse of process may exist against an adversary's attorney, such a claim requires the "misuse of regularly issued process." *See Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2d 957, 960 (Nev. 1980). No allegations of misuse of process are asserted in the Complaint.



Dezzanis must demonstrate that there is sufficient basis to hold an adversary's attorney liable to third parties for actions taken solely as a result of the attorney-client relationship and during the course of the representation. This, they cannot do.

**B. As a Matter of Law, No Cause of Action Exists Against Kern  
For Actions Taken As the Attorney for the Association.**

*1. The Only Factual Allegations Asserted Involve Kern's  
Provision of Legal Services to the Association.*

The factual allegations of the Complaint, even if taken as true, simply do not give rise to a cause of action against Kern. In their Complaint, the Dezzanis acknowledge that Kern provided legal services to the Association and assisted her client in enforcing the CC&Rs regarding the deck extension on the Dezzanis' Property. The only factual allegations contained in the Complaint relate to Kern's provision of legal services to the Association. The Complaint alleges that Kern: (1) drafted, edited, approved and/or authored the Notice of Violation (App 3, Complaint ¶ 13); (2) advised the Board regarding placing the matter on a meeting agenda and holding a hearing on the Notice of Violation (App 4, Complaint ¶ 17); (3) drafted, edited, approved and/or authored the Result of Hearing letter sent to the Dezzanis by the Association (App 4,

Complaint ¶ 19); and (4) drafted, edited, approved and/or authored a letter sent from the Association confirming the Board's position in the Result of Hearing letter and inviting the Dezzanis to attend the next regularly scheduled hearing of the Board (App 4, Complaint ¶ 22).

The Dezzanis do not assert that Kern took any of these alleged actions on her own behalf, and any such assertion would be absurd. The Association issued the Notice of Violation for the deck, based upon the conclusion that the deck was an unlawful encroachment on the common area of the Association. The *only* interactions between Kern and the Dezzanis were communications regarding the Association's ultimate decision that the deck was unlawful. In all such communications, Kern advised that she was acting as the attorney for the Association and upon direction from the Board of Directors.

2. *There is No Theory of Liability Under Which Kern is Liable Directly to the Dezzanis For Actions Taken During the Scope of Kern's Representation of the Association.*

The Dezzanis acknowledge that the only relevant actions of Kern are those taken on behalf of the Association, yet seek to hold Kern independently and directly responsible for the acts of the Association. This, the law does not allow. There is simply no theory of liability under which Kern could be

independently liable to the Dezzanis for actions taken during the course of her and the firm's representation of the Association. This is fatal to the causes of actions asserted by the Dezzanis.

As a matter of law, the Plaintiffs cannot assert any cause of action against Kern. As attorney for the Association, Kern owed no duty directly to the Plaintiffs. Her duties were to the Association. Yet, the Dezzanis are suing Kern in her direct capacity as counsel for the Association, for actions taken to enforce the CC&Rs and correct a wrongful transfer of common area property to an individual unit owner without a vote of the majority of homeowners. Rather than assert claims challenging the legality of the Association's position, the Dezzanis chose to attack Kern directly because of her representation of her client. However the purported wrongful actions are characterized, it does not change the fact that Kern owed a duty to her client, the Association, and owed no duty to the Dezzanis in their individual capacities.

Regardless of Plaintiffs' opinions or interpretation of the CC&Rs or the provisions of NRS Chapter 116, except for limited and narrow exceptions, only a client may maintain an action against an attorney for breach of contract, or negligence, or breach of fiduciary duty, or failure to adhere to a recognized standard of care. There are limited exceptions in which this Court has addressed

attorney liability to third-parties. In *Ricks v. Dabney*, this Court reiterated that no civil cause of action exists against an attorney based upon a violation of the Rules of Professional Conduct. *Ricks v. Dabney (In re Jane Tiffiany Living Trust)*, 124 Nev. 74, 81, 177 P.3d 1060, 1064 (Nev. 2008); *see also Mainor v. Nault*, 120 Nev. 750, 768-69; 101 P.3d 308, 320-21 (Nev. 2004). This Court has held an attorney liable to a third party for the attorney's failure to pay the third party settlement funds that the client lawfully assigned to the third party. *See Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.*, 112 Nev. 737, 917 P.2d 447, (Nev. 1996). Liability in that case was based upon the attorney's breach of an express and enforceable contract, the assignment agreement. *Id.* at 741-42.

*Edwards*, however, does not support liability against Kern directly, as there is no contract between the Dezzanis and Kern. Kern is not personally bound by the CC&Rs. There is not now, and never was, any contract between Kern and the Dezzanis. The Dezzanis clearly are not a third party beneficiary to any contract between Kern and the Association. Kern represents the Association, a non-profit corporation. Kern does not represent the individual homeowners like the Dezzanis. The Dezzanis do not even allege the existence of a contract between Kern and themselves. As a matter of law, there can be no

claim sustained against Kern for a breach of a non-existent contract. Further, although the Dezzanis do not directly assert that Kern is liable for any alleged breach of the CC&Rs by the Association, such a claim would be subject to mandatory mediation pursuant to Chapter 38.

Other courts have consistently held that attorneys are not liable to third parties for actions taken in connection with the representation of a client, especially third parties whose interests are adverse to those of the client. *See B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (1997) (holding that attorney could not be liable to third party for negligent misrepresentation based upon the attorney's legal opinion provided to the client when the third party held an adverse position to the client); *Norton v. Hines*, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975) (finding that while an attorney may be liable in tort for damages sustained by a person intended to be benefitted by the attorneys services, an adverse party is clearly not an intended beneficiary of an attorney's services); *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 180, 156 Cal. Rptr. 745 (1979) (finding that to impose a duty of care to persons whom the attorney's client deals at arms length would "seriously jeopardize the attorney-client privilege"); *Parnell v. Smart*, 66 Cal. App. 3d 833, 837-38, 136 Cal. Rptr. 246 (1977); *Omega Video Inc. v. Superior Court*, 146 Cal. App. 3d

470, 480, 194 Cal. Rptr. 574 (1983); *St. Paul Title Co. v. Meier*, 181 Cal. App. 3d 948, 952, 226 Cal. Rptr. 538 (1986).

As noted by the court in the *B.L.M. v. Sabo* decision, to find that by entering into a contract to provide legal services, the attorney also owed a duty to the party against whom action was to be taken, is unworkable and undermines the very nature of the attorney-client relationship. The district court expressed the same concerns when it stated that permitting the Dezzanis' claims for relief against Kern directly would "result in a chilling effect on individuals' ability to hire and retain counsel." (App 144, Order, page 3, lines 7-10). The reasoning of the district court is sound.

3. *NRS 116.31183 Does Not Permit Attorneys to be Personally Liable on Behalf of an Association.*

The Dezzanis assert that their cause of action against Kern is warranted because they allege specific violations of NRS 116.31183, which prohibits retaliatory action against unit owners. The district court properly found that this statute does not permit attorneys to be personally liable for actions taken on behalf of an association.<sup>5</sup> (App 144, Order page 3, lines 9-10). To hold that

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<sup>5</sup> The district Order cited "NRS 116.3118", not NRS 116.31183, for the proposition that attorneys cannot be personally liable for actions taken on behalf of an association. Dezzanis assert that it would be improper to assume that the citation

NRS 116.31183 does permit civil actions directly against attorneys for associations for actions taken at the request of the association would have devastating impacts on associations' ability to carry out their obligations. Associations retain counsel to take various lawful actions, including actions directed against homeowners in the community. For example, Chapter 116 authorizes associations to impose fines for violations of the governing documents (NRS 116.31031), impose assessments for common expenses which benefit solely that owner or which were caused by the willful misconduct or gross negligence of an owner (NRS 116.3115(4) & (6)), and enforce the association's lien for assessments through foreclosure (NRS 116.3116-31166). Of course, many of these actions are met with great frustration, reluctance, and often hostility from homeowners, and as in the case at bar, viewed as "retaliatory." Though unfortunate, the interests of an association and the owners and members are often at odds. However, the effective management of the

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was in error and also improper to assume the court intended to cite NRS 116.31183. NRS 116.3118 deals with the maintenance and availability of certain financial records necessary to provide information required for resale of units. This statute has absolutely no bearing on the merits of this case and is entirely irrelevant. Dezzanis specifically assert a cause of action against Kern based upon NRS 116.31183. (App. 5, Complaint ¶ 26). The district court found that such a cause of action is without merit. Dezzanis seek to ignore the clear implications of the district court's order based upon an obvious typographical and/or clerical error. Any other conclusion is absurd.

community requires that associations be authorized to take appropriate action against owners for violations of the governing documents and Nevada law.

Authorizing suits by owners against attorneys for associations for actions taken on behalf of the association would be a significant impediment to the necessary assistance counsel provides to associations. Attorneys must be able to take action as appropriate and upon direction from the Board in order to protect the interests of the client, which is only the Association. When owners are in an adversarial position to that of the association, it is without question that the duty of the attorney is to the client, the association, not the individual owner.

Finding that an owner does not have a direct cause of action against the association's attorney for actions taken on behalf of the association under NRS 116.31183 does not deprive owners of protection from retaliatory actions and is consistent with the language of the statute. Of course, attorneys are subject to liability for actions taken outside of the scope of representation or on their own accord. Additionally, and importantly, associations are subject to liability for alleged retaliatory actions and for directing others to take retaliatory actions. The statute provides:

NRS 116.31183 Retaliatory action prohibited; separate action by unit's owner.

1. An executive board, a member of an executive board, a community manager or an officer, employee or agent of an association shall not take,



or direct or encourage another person to take, any retaliatory action against a unit's owner because the unit's owner has:

- (a) Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association;
- (b) Recommended the selection or replacement of an attorney, community manager or vendor; or
- (c) Requested in good faith to review the books, records or other papers of the association.

2. In addition to any other remedy provided by law, upon a violation of this section, a unit's owner may bring a separate action to recover:

- (a) Compensatory damages; and
- (b) Attorney's fees and costs of bringing the separate action.

As made clear by the language of NRS 116.31183, associations are certainly subject to liability for directing or encouraging others to take retaliatory action against an owner. Further, an attorney could be liable for actions taken independently. However, exposing *attorneys* to liability for actions taken *on behalf of and at the request of the association*, would, as stated by the honorable Judge Sattler, "have a chilling effect on individuals' ability to hire and retain counsel." (App 144 Order, page 3, lines 9-10). It would stymie the ability of attorneys to represent the interests of their clients zealously and effectively.

Here, Kern acted solely on behalf of the Association throughout her interactions with the Dezzanis. To have abandoned the interests of her client because an owner in an adversarial position recommended replacement of Kern as attorney for the Association would have been a dereliction of her duty to her

client. Rather, despite the harassing communications from the Dezzanis, and at the request of the Board, Kern carried on the enforcement of the governing documents as authorized by law.

4. *The Facts Alleged by the Dezzanis Do Not Demonstrate Any Retaliatory Action by Kern.*

Notwithstanding the fact that Kern acted solely on behalf of the Association and upon direction from the Board, the contention that Kern acted in a retaliatory fashion is meritless. Apparently Kern retaliated as a result of the “lengthy email” which the Dezzanis sent to the Board of Directors accusing Kern of possessing “faulty knowledge of the facts of the law, a propensity to presume matters without evidence and a willingness to espouse legal opinions which ignore, overlook, misconstrue and/or fail to consider applicable Nevada laws.” (App 4-5, Complaint ¶ 24).

However, this communication from the Dezzanis was sent *after* the Association issued the Notice of Violation. Dezzanis do not allege they had sent any communication prior to the Notice of Violation which addressed the taking of common area. At no point after the Dezzanis made any communication with the Association, the members of the Board, or Kern directly, did Kern stray from the Board’s initial position that the deck extension was unlawful and

action was required to correct the violation of the governing documents and Nevada law. At all times relevant to the Complaint, Kern's actions and communications remained consistent with the decision of the Board, which was made before the Dezzanis complained. Kern did not take any additional action, and there are no allegations regarding any action taken by Kern individually rather than in her capacity as attorney for the Association.

In fact, it was the Dezzanis who went through great lengths to attack Kern's representation of the Association and her professional capabilities. Kern merely responded to the allegations contained in Plaintiffs' numerous emails and letters, repeatedly expressing the unchanged position of the Board. Even if all allegations of the Complaint are viewed as true, the Dezzanis have simply failed to demonstrate any retaliatory action on the part of Kern. The district court properly dismissed all claims against Kern pursuant to NRCP 12(b)(5). Upon de novo review of the district court's granting Kern's Motion to Dismiss, this Court should reach the same conclusion because it is correct.

5. *The Remaining Cited Provisions of Chapter 116 Do Not Create a Cause of Action Against Kern Directly.*

The Dezzanis further argue Kern is liable to them for alleged violations of NRS 116.31184 (App 6, Complaint ¶ 36). There are simply no facts in the

Complaint that support the Dezzanis' reliance on this statute. NRS 116.31184 prohibits an agent of the Association from threatening, harassing or otherwise causing harm or serious emotional distress to an owner or creating a hostile environment for an owner. Nowhere in the Complaint do the Dezzanis assert any facts which, if true, would illustrate that Kern threatened or harassed them. Actually, it was the Dezzanis who, by their own admission, "communicated with the Board on many occasions; challenging and criticizing not only the [Notice of Violation's] drafting, editing, authorship, reasoning, logic and legality" and "questioning the competency of the legal services provided to the Board by Defendants Kern." (App 3, Complaint ¶ 14). The Dezzanis offered no facts which demonstrate that Kern threatened or harassed them in any way. As such, the district court's dismissal of Dezzanis' claims with respect to this statute should be affirmed.

Finally, the Dezzanis cite various other provisions of Chapter 116 of the Nevada Revised Statutes in support of their claims, including NRS 116.3108, 116.31083, 116.31084, 116.31085, and 116.31087. (App 6, Complaint ¶ 38.) Dezzanis take issue with the fact that the district court did not squarely address these statutory provisions. (Opening Brief, page 3, Section A). The cited provisions regulate the meetings of unit owners, meetings of the executive

board, voting by members of the executive board, the right of unit owners to speak at certain meetings, the right of unit owners to have certain complaints placed on the agenda of meetings and the maintenance and availability of Association books and records. These statutes provide no basis for a claim by the Dezzanis against Kern, as the attorney of the Association. Again, Kern owed a duty to the Association by virtue of her representation. However, that duty did not extend to the Dezzanis as individual owners. Further, any allegations of wrongdoing in connection with the above cited statutes of Chapter 116 would not properly be brought against Kern as the attorney for the Association.

It is clear, therefore, that the Dezzanis failed to state any claim for relief against Kern upon which relief may be granted, even if all the allegations of the Complaint are taken as true. First, there is no cause of action against Kern directly for actions taken on behalf of the Association. Additionally, the Dezzanis failed to allege any actions which could be construed to constitute retaliatory action on behalf of Kern. The district court was correct in dismissing the Complaint in its entirety against Kern, in accord with NRCP 12(b)(5).

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**II. Even if This Court Finds A Cause of Action Exists Against Kern, and Dezzanis Set Forth Sufficient Facts To State A Claim Against Kern, The Dezzanis Failed to Comply with NRS 38.310 and the District Court Lacks Subject Matter Jurisdiction.**

Nevada law requires that all claims involving the interpretation, application or enforcement of the governing documents applicable to residential property be mediated pursuant to the provisions of NRS 38.310 to 38.360, inclusive, before any action may be filed in this Court. Nevada law could not be clearer. NRS 38.310(1) provides in pertinent part:

**No civil action** based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; ... **may be commenced in any court in this State unless the action has been submitted to mediation...**

NRS 38.310(1)(Emphasis added).

NRS 38.320 states, in pertinent part: "Any civil action described in NRS 38.310 must be submitted to mediation or referred to a program by filing a written claim with the [NRED]." (Emphasis added.) NRS 38.300(3) defines a "civil action" as follows:

"Civil action" includes an action for money damages or equitable relief. The term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.

NRS 38.300(3).

This Court has confirmed the requirements of the mediation process pursuant to Chapter 38. Any civil action related to the enforcement or interpretation of an association's CC&Rs must first be submitted to mediation. *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 295-96, 183 P.3d 895, 900 (Nev. 2008). If, assuming *arguendo*, the Court finds that a party may sue an adversary's attorney for alleged improper advice given to the adversary, then the allegations of the Complaint and the Dezzanis' spurious alleged claims against Kern of improper advice rest entirely upon an interpretation of the provisions of the CC&Rs. More particularly, whether Kern's advice to her client regarding the deck extension and actions taken in connection therewith were improper requires an analysis and interpretation of the Association's governing documents.

Articles 12.5 and 13.8.2 of the CC&Rs clearly provide that the Association has the exclusive authority to modify the common areas. Additionally, Section 4.1 provides that "The undivided, fractional interest a unit

owner has in the Property's common areas... are established and are to be conveyed with the unit, and cannot be changed." (App 64, CC&Rs). Kern's advice to her was based on provisions of the governing documents regulating the ownership, use and enjoyment of the common area. If this Court finds that a cause of action exists against Kern directly for the actions she took on behalf of the Association in connection with the Dezzanis' deck extension, this Court must also find that the claims should properly be submitted to mediation pursuant to Chapter 38.

The simple fact is Kern was retained by the Board of Directors to enforce various provisions of the governing documents. The Dezzanis are challenging Kern's representation and the authority by which the Association took enforcement action against them under the governing documents. The district court simply has no jurisdiction to address the merits of the Dezzanis' Complaint, assuming this Court even finds that the allegations were sufficient to set forth a claim for relief against Kern, without an analysis of the Association's governing documents.

The assertion of a various violations of Chapter 116 of the Nevada Revised Statutes does not exempt the Dezzanis from going through the Chapter 38 process, provided that this Court finds a *legally cognizable* claim asserted



against Kern. However, for all of the reasons set forth above, Plaintiffs have no legally cognizable claim against Kern. Even if there were a legally cognizable claim asserted, this Court has previously ruled that all disputes involving the "interpretation, application or enforcement" of the CC&Rs must be submitted to mediation or arbitration under NRS 38.310 before a civil action may be filed. *See Hamm*, 124 Nev. 290 at 295-96. In short, dismissal of the Dezzanis' Complaint and causes of actions against Kern by the district court pursuant to NRCP 12(b)(5) was proper, as NRS 116.31183 does not create a cause of action against Kern directly for advice provided as the attorney for the Association and for actions taken as the Association's attorney. However, if this Court finds a cause of action against Kern exists, this Court must also find that the district court lacks jurisdiction to rule on the merits of the Complaint, because the allegations of the Dezzanis require the interpretation of the Association's governing document, and thus first have must be submitted to mediation pursuant to Chapter 38. Therefore, if this Court finds that the Dezzanis asserted legally cognizable claims against Kern, this Court should direct that the Dezzanis must first proceed with the process proscribed by Chapter 38. Mandatory mediation pursuant to Chapter 38 is a necessary prerequisite to

bringing claims in district court which, as the Dezzanis' claims do, require the interpretation or application of the governing documents of an association.

### **CONCLUSION**

The district court properly dismissed all of Dezzanis' claims for relief against Kern, holding that NRS 116.31183 does not permit claims against attorneys for an association for actions taken on behalf of the Association. This Court should confirm the district court's sound reasoning. Kern provided advice to her client, the Association. To permit a cause of action directly against Kern for the advice she gave as the attorney for the Association would have chilling results. Further, there is no Nevada law which supports such a claim against an adversary's attorney as asserted in the Complaint. For all the reasons stated above, Kern respectfully requests this Court affirm the holding of the district court and the dismissal of all claims against Kern as attorney for the Association.

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## **CERTIFICATION OF COUNSEL**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in Times New Roman 14 point.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,410 words.

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

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16<sup>th</sup> day of May, 2016.

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**CERTIFICATE OF SERVICE**

Pursuant to NRAP Rule 5(b), I certify that I am an employee of KERN & ASSOCIATES, LTD., and that on this day I served the foregoing document(s) on the party(s) set forth below by:

**RESPONDENTS' ANSWERING BRIEF**

  X   Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

       Personal delivery.

       Facsimile (FAX).

       Federal Express or other overnight delivery.

       Reno/Carson Messenger Service.

or

       Electronically

addressed as follows:

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DATED this 17<sup>th</sup> day of May, 2016.

  
TERESA A. GEARHART