IN THE SUPREME COURT OF THE STATE OF NEVADA

GRADY EDWARD BYRD Appellant v. CATERINA ANGELA BYRD Respondent	)	Supreme Court No. 80548

APPELLANT'S OPENING BRIEF

Appeal From the Honorable Judge Kathy Hardcastle's Orders of January 23, 2020.

Submitted by:

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I

RULE 26.1 DISCLOSURE STATEMENT

The Appellant herein is an individual and no interest in any corporation is involved in this case. The attorneys who have appeared on behalf of the Appellant in this case are DANIEL W. ANDERSON, ESQ. BYRON L. MILLS, ESQ. and GREGORY S. MILLS, ESQ.

II

JURISDICTIONAL STATEMENT

This is an appeal of post-trial enforcement orders, which arose out of the rights and obligations of the parties set forth in their decree of divorce, making these orders "special orders" within the meaning of NRAP 3A(b)(8). Such orders are appealable to the Supreme Court/Court of Appeals by timely filing a notice of appeal.

III

ROUTING STATEMENT

This case is an appeal of a district court's post trial orders in family law proceeding. It is therefore presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(5). Appellant has no objection to this presumptive assignment.

IV

STATEMENT OF THE CASE AND RELEVANT FACTS

This is an appeal of the district court's orders entered on January 23, 2020 in a post-divorce enforcement action. The parties were divorced by joint petition decree entered in the district court on June 5, 2014.[1] The Decree of Divorce contains the following provisions that are relevant to this appeal:

12. Husband and Wife agree that neither party shall be required to pay spousal support to the other party.[2]

...

1. SPOUSAL SUPPORT.
   Husband and Wife agree that neither party shall be required to pay spousal support to the other party.[3]

...

1. Caterina A. Byrd is entitled to 50% of Grady E. Byrd's United States Army Retired Pay as long as he lives.[4]

2. Grady E. Byrd will continue to pay Caterina A. Byrd 1500 dollars extra a month to assist with her home mortgage. If her financial situation or changes or if the home is sold or paid off this payment may cease. This is not an alimony payment and is not required.[5]

Following entry of the Decree of Divorce, Grady paid Caterina the sum of

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[1] Appellant's Appendix AA001-012 "hereinafter "AA."

[2] AA003.

[3] AA006.

[4] AA007.

[5] AA008.

$3,000 per month from June 2014 to September 2018. This amount accounted for the $1,500 Grady agreed to pay for mortgage assistance and an additional payment of $1,500 per month that Grady was making voluntarily.[6] Grady stopped making all payments to Caterina in September 2018.[7] Caterina immediately transferred the case from Churchill to Clark County, then she filed her motion for enforcement on October 16, 2018.

Caterina's motion for enforcement sought to hold Grady in contempt for discontinuing the $1,500 per month payment and further sought to compel Grady to cooperate with Caterina so she could obtain 50% of his Army Retired Pay, SBP benefits from Grady's Army Retired Pay, death benefits related to Grady civilian service through the Office of Personnel Management, health insurance and various life insurance benefits.[8] Caterina further claimed that Grady had an undisclosed source of retirement income that was concealed by Grady and should have been divided at the time of divorce.[9]

On November 16, 2018, Grady filed a request for a continued court date and brief response to Caterina's claims.[10] Grady requested that the Court date be

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[6] AA161, ll. 21-23.

[7] AA15.

[8] AA020-024.

[9] AA024-026.

[10] AA892-893

continued as he was residing in the Philippines recovering from surgery and unable to travel to the United States for the hearing until December.[11] The hearing on Caterina's motion was originally set for November 27, 2018 and went forward despite Grady's request.[12] At that hearing, the Court ordered Grady to produce documents verifying his sources of income and documents related to the health and life insurance that Caterina was seeking.[13]

The parties again appeared before the court on January 23, 2019.[14] At that hearing, Senior Judge Kathy Hardcastle determined that the $1,500 per month mortgage assistance was alimony and that Grady was to continue paying it.[15] The Judge further determined that Grady was to pay an additional $1,500 per month to Caterina as her share of Grady's Army Retired Pay, despite there being no proof before the Court of any kind that Grady received $3,000 per month in Army Retired Pay.[16] The Judge further awarded a judgment to Caterina in the amount of $22,000, which consisted of arrears in alimony and retired pay of $7,500 each,

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[11] Id.

[12] AA 894.

[13] AA 895-896

[14] AA097-138.

[15] AA140-141.

[16] AA140-141.

and a $7,000 attorney's fees award.[17]

Grady, who had been unrepresented up to that point, retained counsel and filed a motion for reconsideration of Judge Hardcastle's orders.[18] Specifically, Grady sought reconsideration of Judge Hardcastle's decisions that 1) the mortgage assistance payment of $1,500 per month in the Decree was alimony and 2) that Caterina should be receiving $1,500 per month as a portion of Grady's military retired pay.[19] Accompanying Grady's motion were exhibits demonstrating all sources of Grady's income, which demonstrated at the time of divorce that Grady was only receiving $128.40 per month in Army Retired Pay, and the balance of his income was from federal service-related disability payments.[20] At the time, Caterina filed her motion, 100% of Grady's income was coming from federal service-related disability payments.[21]

The hearing on Grady's reconsideration motion was presided over by Judge Forsberg,[22] who determined that the $1,500 payment characterized by Judge Hardcastle as alimony was in fact not alimony, but a property division, and

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[17] AA143-145.

[18] AA159-177.

[19] AA159.

[20] AA178-198.

[21] AA164.

[22] AA309-353.

ordered Grady to continue to make the payments to Caterina.[23] Regarding the $1,500 payments that Judge Hardcastle ordered Grady to make as Caterina's share of his Army Retired Pay, Judge Forsberg set an evidentiary hearing to determine 1) whether Grady reduced his Army Retired Pay by converting it to disability after the divorce and 2) whether there was a contractual agreement that Grady pay $1,500 per month regardless of the amount of his Army Retired Pay.[24] Judge Forsberg also ordered Grady to continue to pay $3,000 per month pending the outcome of the evidentiary hearing.[25] Finally, Grady was ordered to appear in person at the evidentiary hearing.[26]

Additionally, prior to the evidentiary hearing, Caterina filed a motion for an order to show cause against Grady for his failure to make payments to Caterina.[27] The Court granted the motion and issued a show cause order for Grady to appear and show cause as to why he had not made payments from June 1, 2019 pending the evidentiary hearing.[28] Caterina then filed a motion for reconsideration of Judge Forsberg's decision reversing Judge Hardcastle's decision, asking Judge

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[23] AA355-356.

[24] AA356.

[25] AA358.

[26] AA358.

[27] AA362-365.

[28] AA362-365.

Hardcastle to find that the mortgage assistance payment was alimony.[29] Both the order to show cause and the motion for reconsideration were also set for the October evidentiary hearing date.

Finally, due to Grady's medical issues and his residence in the Philippines, Grady filed a request for audiovisual participation in the October trial.[30] Grady maintained that he had been given instructions by his physician not to travel and could not physically be present.[31] The Court summarily denied his request prior to trial. Grady filed a motion for reconsideration of the denial and attached notes from three doctors stating that he should not travel due to his medical condition.[32] Caterina opposed the request and the Court ultimately affirmed its denial as more fully described below.

The trial occurred on October 21, 2019.[33] At the outset of the trial, the Court affirmed that Grady would not be allowed to participate via audiovisual transmission, finding that the doctors' notes he provided from doctors in the Philippines were "somewhat suspicious".[34] The Court offered no other

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[29] AA400-436.

[30] AA441-448.

[31] AA442.

[32] AA490-507.

[33] AA601-782.

[34] AA605-606.

explanation for its denial and stated that the trial would proceed without Grady.[35]

The next issue the Court addressed was Caterina's motion for reconsideration. The motion for reconsideration, filed on September 30, 2019, requested, *inter alia*, the following relief:

1. Set aside the order filed June 26, 2019 as to the finding that Caterina waived spousal support in the Decree of Divorce;[36]
2. That orders filed on or about April 5, 2019 remain in full force and effect pending further orders of the court;[37]

At no point in the motion for reconsideration or in any of her previous pleadings did Caterina argue that the Decree of Divorce should be set aside under NRCP 60, due to unconscionability, or for any other reason. Nevertheless, the Court framed its determination before taking any evidence as follows:

> The setting aside -- this is the evidentiary hearing. We're going to make the determination today on the evidentiary hearing of whether or not the agreement entered into between the parties what was meant by the language of it and whether or not it constituted a waiver of alimony. And I think you've pointed out case law in there that would indicate that it's probably not a waiver of alimony or that the statement regarding this is not alimony is of no effect in regards to the agreement because it clearly provides for her support. And after a 31-year marriage, it's clearly unconscionable to leave her with nothing after a 31-year marriage and leave total discretion to him of whether or not to pay, when to pay, and when to be able to quit paying. So it

[35] AA606.

[36] AA401.

[37] AA401.

> could be that this whole thing can just be set aside and the parties can still be considered married and we go through this all over again.[38]

After addressing additional issues, which are not the subject of this appeal, the Court proceeded to take testimony from Caterina.[39] Throughout Caterina's testimony, her counsel offered exhibits of emails between Caterina and Grady which discussed negotiations regarding what the terms of the stipulated decree would be.[40] Grady's counsel objected based on the parol evidence rule, but his objection was overruled, and all the emails were admitted over his repeated objection.[41] Caterina went on to testify as to her mental health at the time of divorce negotiations[42] and claims that she felt threatened by Grady telling her to sign the documents or he would hire an attorney and they would go to court.[43]

On cross examination, Caterina admitted that she understood that Grady could stop paying her the mortgage assistance payment at any time based on the language in the proposed decree.[44] Grady's counsel raised questions regarding the negotiations between Grady and Caterina prior to the divorce. Grady's counsel

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[38] AA606-607.

[39] AA614-744.

[40] AA642-670.

[41] AA639, 645, 648, 651, 660, 662, 667, 669.

[42] AA625.

[43] AA668.

[44] AA718-719, 734-735.

asked Caterina, "I believe in some of your emails, you raised questions about the wording of the decree, correct, or the wording of the petition?"[45] Caterina responded affirmatively, and Grady's counsel followed by asking, "And you were concerned that with the wording you may only get 1500 instead of 3,000, isn't that correct based on one of your emails?[46]

Later in the cross examination, Grady's counsel asked, "Since you were divorced in 2014, you could have got a job at any time between then and now, correct?"[47] Caterina responded, "I could have, but --." She continued to state, "I didn't want a -- but he -- he made it where if my financial -- if my financial money changes, then he can [cease] my house payment and give me an extra $1500."[48] Grady's counsel then asked, "Oh, so you were worried that if you went and got a job, he wouldn't have to pay the $1500 anymore."[49] Caterina responded, "Well, he told me, you know, if your life changes in any way and I always thought if I get remarried, but I think he meant if I have any extra money."[50]

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[45] AA718-719.

[46] AA719.

[47] AA734.

[48] AA734.

[49] AA734.

[50] AA734-735.

The Court issued a written decision and order on January 23, 2020.[51] The Court found that Grady owed a fiduciary duty to Caterina as her husband.[52] The Court further found that Grady breached that fiduciary duty by misrepresenting to Caterina the amount she would receive and for how long, and that Grady "engaged in deceit" upon Caterina.[53] The Court also found that Grady did not provide documentation regarding his income to Caterina at the time of divorce.[54] The Court found that Grady paid Caterina $3,000 per month "to keep her quiet, to keep her complacent."[55] The Court further found that, "Grady did everything in his power to keep Caterina from recognizing what her rights were and to leave her in a position where she would receive only $62.40 per month from his Army Retired Pay."[56] The Court stated that, "Were the provision in the Decree of Divorce interpreted to give Caterina 50% of Grady's military pay, so that she would receive only $62.40 per month for her interest in his military pay, after 31 years of marriage, this would be so unconscionable, as to be unenforceable."[57]

The Court found that, "Grady threatened Caterina that she was not to seek

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[51] AA830-850.

[52] AA836-838.

[53] AA837-838.

[54] AA838.

[55] AA838.

[56] AA839.

[57] AA839.

the assistance of counsel to review the language that Grady proposed for the Decree of Divorce or she would regret it."[58] The Court deemed that the $3000 per month that Grady had been paying would be considered alimony.[59] The Court found that, "There is cause to set aside the decree based on Grady's breach of his fiduciary duty to Caterina and that this was timely because Caterina came to court to try to get what was entitled to her upon Grady stopping his monthly payments."[60]

The Court found that Grady's interpretation of the decree was unconscionable because it would provide Caterina just $62.20 per month for her interest in his military pay after 31 years of marriage.[61] The Court stated that, "Grady has a contractual obligation to pay Caterina $1,500 per month from his disability pension."[62] The Court found that the alimony waiver in the Decree of Divorce is not enforceable because Caterina did not knowingly waive alimony and relied on Grady's promise that he would pay her $3,000 per month until she died.[63] The Court also found that, "She could not have waived her right to

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[58] AA839-840.

[59] AA840.

[60] AA842.

[61] AA842-843.

[62] AA843.

[63] AA843.

alimony while simultaneously accepting support to pay her necessities."[64] The basis for the Court's ruling was ultimately that, "The payments Grady is making to Caterina are in the nature alimony."[65]

The district court used Grady's ongoing payment of $1500 per month for a period of approximately 4 years after the divorce decree to support its conclusion that the decree itself was ambiguous as to the $1500 per month mortgage assistance.[66]

The district court also concluded that the statement awarding Caterina 50% of Grady's military retired pay was vague because there is no dollar amount provided and Grady represented to Caterina that 50% of his military pay is $1,500 per month.[67] Again, the court relied on Grady continuing to pay Caterina $1,500 per month for four years following the entry of the decree in support of its ambiguity finding.[68]

Based on all the foregoing, the Court set aside the alimony waiver[69] and

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[64] AA843.

[65] AA843.

[66] AA845.

[67] AA845.

[68] AA845.

[69] AA843.

awarded Caterina with $3,110 in modifiable lifetime alimony.[70] The Court did so notwithstanding its determination that the agreement created a contractual obligation for Grady to pay Caterina $1,500 per month regardless of the actual amount of his Army Retired Pay. Judge Hardcastle's decision effectively overruled Judge Forsberg's decision that the mortgage assistance payment of $1,500 was in fact a conditional payment obligation that had to be continued until one of the conditions occurred. This appeal follows:

V

STATEMENT OF THE ISSUES

1. Whether the district court erred as a matter of law by determining that the terms of the Decree of Divorce were vague and ambiguous regarding Caterina's waiver of alimony and her award of 50% of Grady's Army Retired Pay.
2. Whether the district court erred as a matter of law by considering extrinsic or parol evidence regarding the meaning of the alimony waiver and the award of 50% of Grady's Army Retired pay Grady.
3. Whether the district court erred as matter of law by finding that Grady had a fiduciary duty to Caterina and by construing the alleged ambiguity in the decree against Grady because of a breach of that fiduciary duty and because

[70] AA847.

he was the drafter.

4. Whether Caterina timely filed for relief under NRCP 60b when she made the request on September 20, 2019, which is approximately 5 years after entry of the Decree of Divorce and 1 year after Grady elected to stop making payments to Caterina.
5. Whether the district court abused its discretion by denying Grady's request to appear at trial by audiovisual equipment.

VI

ARGUMENT

SUMMARY OF ARGUMENT

The district court erred as a matter of law when it found that there was ambiguity or vagueness in the terms of the decree relating to Caterina's waiver of alimony and her award of 50% of Grady's Army Retired Pay. There is nothing remotely ambiguous about the three separate and distinct statements in the Decree of Divorce declaring that neither party was entitled to alimony, that neither party would receive alimony and that the mortgage assistance payment to Caterina was not alimony and was not required. Furthermore, the language "Caterina A. Byrd is entitled to 50% of Grady E. Byrd's Unites States Army Retired Pay as long as he lives" is not ambiguous or susceptible to any other interpretation. This language is the exact language that is required by the federal government for a division of

retired pay. There is no requirement that a specific amount be stated, and failure to state a specific amount does not create ambiguity. The district court erred as a matter of law by finding ambiguity in both the alimony and retired pay provisions of the decree.

This error of law led to a host of other clear errors made the by the district court. The district court admitted a series of emails and substantial testimony, over counsel's objections, regarding the settlement discussions between the parties that occurred prior to their execution of the decree, all of which should have been excluded as settlement negotiations and pursuant to the parol evidence rule. Caterina's testimony and Grady's statements in the emails formed the basis of the district court's determination that the $1,500 mortgage assistance was really alimony, and that Grady had really agreed to pay Caterina $1,500 per month from his disability pay, notwithstanding that the decree awarded Caterina 50% of his retired pay.

None of Caterina's testimony regarding the negotiations, nor the emails between the parties should have been admitted as evidence or considered by the district court. The Court went on to construe the alleged ambiguities against Grady as the drafter, despite the unequivocal and clear statements regarding the nature of the mortgage assistance payment and the property award of 50% of Grady's retired pay to Caterina, and approximately 4 months of negotiations back

and forth between the parties regarding the contents of the decree.

The district court erred in invalidating alimony waiver and awarding lifetime alimony in the amount of $3,110 to Caterina. All the Court's findings in support of invalidating the waiver were based on its consideration of extrinsic evidence that should have never been admitted because the decree was clear and unambiguous on its face. While the district court theoretically could have considered the evidence in granting relief under NRCP 60b, Caterina's request was not timely filed as it was submitted to the Court approximately five years after the decree was entered and 1 year after Grady stopped making payments. The district therefore erred as a matter of law in setting aside the alimony waiver and awarding lifetime alimony to Caterina.

Finally, the district court abused its discretion by denying Grady's request to appear and participate in the hearing via audiovisual communication. Grady demonstrated good cause as to why it should be allowed, all factors delineated in the rule favored granting Grady's request, yet the district court refused to allow the audiovisual appearance. This was an abuse of discretion.

1. The district court erred as a matter of law by finding that the Terms of the Decree Were Vague and Ambiguous as to Alimony and Grady's Army Retired Pay, and further committed clear error by Admitting Evidence Barred by the Parol Evidence Rule.

The standard of review for contract interpretation is *de novo*, as is a determination as to whether the contract is ambiguous. These standards are clearly

laid out in *Galardi v. Naples Polaris, LLC*, 129 Nev. Adv. Op. 33, 301 P.3d 364 (Nev. 2013) as follows:

> "[I]n the absence of ambiguity or other factual complexities," contract interpretation presents a question of law that the district court may decide on summary judgment, with de novo review to follow in this court. Whether a contract is ambiguous likewise presents a question of law. A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract. *Parman v. Petricciani*, 70 Nev. 427, 430–32, 272 P.2d 492, 493–94 (1954) (concluding that summary judgment was appropriate because the interpretation offered by one party was unreasonable and, therefore, the contract contained no ambiguity), abrogated on other grounds by *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). Rather, "an ambiguous contract is 'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.'

Galardi v. Naples Polaris, LLC, 129 Nev. Adv. Op. 33, 301 P.3d 364 (Nev. 2013)

If the Court determines that a contract is unambiguous, the case of *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994) requires the district court take the terms at face value. "[I]f no ambiguity exists, the words of the contract must be taken in their usual and ordinary signification." Additionally, parol evidence to determine the meaning of a contract is inadmissible when the contract itself is unambiguous. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001). Based on the foregoing cases, it is clear that a district court is prohibited from considering any extrinsic evidence if the contract is clear and unambiguous on its face.

Such is the case in the parties' Decree of Divorce, which, as a stipulated

agreement is subject to contract law. The terms of the decree in question are as follows:

> 12. Husband and Wife agree that neither party shall be required to pay spousal support to the other party.[71]
>
> ...
>
> 2. SPOUSAL SUPPORT.
> Husband and Wife agree that neither party shall be required to pay spousal support to the other party.[72]
>
> ...
>
> 1. Caterina A. Byrd is entitled to 50% of Grady E. Byrd's Unites States Army Retired Pay as long as he lives.[73]
>
> 2. Grady E. Byrd will continue to pay Caterina A. Byrd 1500 dollars extra a month to assist with her home mortgage. If her financial situation or changes or if the home is sold or paid off this payment may cease. This is not an alimony payment and is not required.[74]

There is no ambiguity in the foregoing terms. The parties expressly stated no less than three times that there would be no alimony obligation from one to the other. There is nothing ambiguous about this waiver. Nor does the fact that Grady agreed to pay $1,500 toward Caterina's mortgage create an ambiguity in the clear and unequivocal waiver. The $1,500 mortgage assistance payment was simply part of the property settlement agreement in conjunction with Caterina being

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[71] AA003.

[72] AA006.

[73] AA007.

[74] AA008.

awarded the home. While the statement "this is not required" contradicts Grady's obligation to continue to pay until certain conditions are met, this contradiction does not create any ambiguity as to the waiver of alimony, which is expressly set forth three separate times in the Decree. Judge Forsberg recognized this in her order dated June 26, 2019 where she determined that the $1,500 per month mortgage assistance payment was a property settlement payment and that Grady was required to continue to pay it until one of the conditions set forth in the agreement occurred.

Nevertheless, the district court in its decision at trial determined (presumably in reliance on *Parker v. Green,* 73176 (Nev. 2018)) that Grady's payments "were in the nature of alimony" because they could terminate if Caterina's financial situation changed. However, the mere fact that the payments could terminate is not determinative of the nature of the payments. In the *Parker* case, there was overwhelming evidence in the parties' written agreement that preceded the divorce decree (which was incorporated in whole by the decree), in the circumstances of the case, and in the decree itself that the parties intended that the agreed upon payment should be interpreted as alimony. That evidence is summarized in the case as follows:

1. The language used in the decree terminates the payments upon death or remarriage, which mirrors standard alimony language.
2. The original agreement was written by Bryan in anticipation of the parties'

domestic union and outlines the payments that will be made to Mary if the union were to terminate. The agreement contains a provision wherein Bryan agrees to pay Mary $2,500 per month "for the rest of her life, or until she marries someone in the future," if the breakup is permanent and is precipitated by Bryan's infidelity and dishonesty. It further states that "[i]f our relationship were to end per the stipulations in this agreement, and payments are being made, and in the future we decided to get back together again, payments would then cease." This language plainly supports an alimony interpretation.[75]

3. It appears that the relationship agreement was drafted, primarily, due to Mary's exposure to Bryan's sexually transmitted disease. It appears that Mary feared an inability to live in accord with "the station in life she enjoyed" before breaking up with Bryan, due to this disease exposure and the hardships it would impose upon any future relationships. *Sprenger*, 110 Nev. at 860, 878 P.2d at 287. Such is an unconventional, but not unheard of, consideration for alimony.[76]

4. Finally, we hold that construing the underlying contract as one for tort damages goes against public policy. An agreement which regulates the details of a person's daily life in order to prevent infidelity, and then penalizes that infidelity with excessive "damages" stemming from causes of action not recognized within this state, is not an enforceable contract. Nevada is a no-fault divorce state and does not have a statute allowing for damage recovery for transmission of a sexually transmitted disease. Thus, we take a page from California's book where a court of appeals held that a party's contract awarding excessive liquidated damages for the "serious emotional, physical and financial injury" caused to one spouse by the other's infidelity was against California public policy because fault is simply not a relevant consideration in the legal process by which a marriage is dissolved." *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 474 (2002). Here, in a state which for decades has been nearly synonymous with the concept of no-fault divorce, we find that logic sound. See *Rodriguez v. Rodriguez*, 116 Nev. 993, 998, 13 P.3d 415, 418 (2000).[77]

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[75] *Id.* at page 4.

[76] *Id.* at page 4.

[77] *Id.* at page 4-5.

As set forth above, there was ample evidence in the *Parker* case that 1) the payment terms in the decree were susceptible to more than one interpretation and 2) because of that ambiguity, the Court was able to and did discover additional circumstances surrounding the agreement that led to the Court's conclusion that the payment was in the nature of alimony. This included a determination that interpreting the payment as tort damages would be against public policy in a no-fault divorce state. The evidence of ambiguity in the terms of the decree in *Parker* abounded, allowing additional inquiry into the circumstances of the agreement and formation of the decree leading to a determination that the payment was alimony in nature.

None of those ambiguities are present in the parties' decree here. The payment terms are simple 1) Grady pays $1,500 to Caterina in mortgage assistance until 2) the house is paid for, 3) the house is sold, or 4) her financial circumstances change. All of these terms are consistent with a property settlement agreement. There is no term regarding termination of the agreement if either party dies or remarries or if the parties reconcile, all of which would be consistent with alimony. Nor is there any public policy that would prevent this court from determining, as Judge Forsberg did, that the agreed upon payment was in the nature of property settlement associated with Caterina being awarded the home. Most importantly, there is **no ambiguity** in the payment terms, the conditions

upon which it would terminate, or the parties clear and unequivocal alimony waivers set forth three separate times in the decree. These facts are markedly different than *Parker*, and the district court's reliance on *Parker* to find ambiguity in this case is misplaced at best.

Given the clear and unambiguous nature of the $1,500 mortgage assistance payment terms, the district court's inquiry should have ended there. While the district court clearly had the ability to enforce the payment agreement, it did not have the ability to admit and consider evidence which would ultimately serve as its basis to declare that the payment was really alimony when it was not. Parol evidence to determine the meaning of a contract is inadmissible when the contract itself is unambiguous. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001). The district court committed clear error when it determined ambiguity existed and compounded that clear error by admitting and considering, in violation of the parol evidence rule, the emails between the parties in support of its decision to set aside the agreement and/or determine that the payment was alimony. This Court should therefore reverse the district court's decisions determining that ambiguity existed and that the mortgage assistance payment was alimony.

The district court also committed clear error when it determined that there was ambiguity in the meaning of the statement "Caterina A. Byrd is entitled to

50% of Grady E. Byrd's Unites States Army Retired Pay as long as he lives."[78] This is as plain and clear a statement as one could possibly make regarding the division of army retired pay. In fact, this mirrors almost exactly the language that the Department of Finance and Accounting Services requires in order to divide military benefits.

10 U.S.C. § 1408 states:

> Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat ***disposable retired pay*** payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court…

The disposable retired pay, which is referred to in the parties' decree as "Grady E. Byrd's United States Army Retired Pay" is further defined by 10 U.S.C § 1408 as follows:

> The term "***disposable retired pay***" means the total monthly retired pay to which a member is entitled ***less amounts*** which--
> (i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
> (ii) ***are deducted from the retired pay of such member*** as a result of forfeitures of retired pay ordered by a court-marital or ***as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38***. § 1408 (a)(4)(A)(emphasis added).

[78] AA007.

The disposable retired pay definition specifically excludes compensation received under "title 38" of the U.S. code, which is the title that provides for disability compensation for veterans. As such, the agreed upon division in the parties' decree was for Grady's disposable retired pay, not his disability pay. At the time the decree was entered, Grady's disposable retired pay was $128.40. There is nothing ambiguous in the phrase, "50% of Grady E. Byrd's United States Army Retired Pay." As such, the district court should have done nothing more than enforce the requirement that Grady pay one half of his disposable retired pay to Caterina.

Notwithstanding the clarity in the foregoing statement, the district court determined that the statement was ambiguous in reliance on *Shelton v. Shelton*, 78 P3d. 5, 119 Nevada 492 (Nev. 2003). Again, the district court's reliance was wholly misplaced in this regard. In *Shelton*, that the parties' agreement awarding the wife with 50% of the husband's retirement benefits in the amount of $577 per month was ambiguous because the two amounts were different. In order to resolve the ambiguity, the Court interpreted the agreement to mean that husband had contractually agreed to the payment of $577 per month to wife, and that he could not avoid that obligation simply because he elected to reduce his military retired pay in favor of receiving VA benefits. As such, the *Shelton* case was decided on principals of contract law and did not address the question of whether the Court

could order the husband to reimburse the wife for any reduction in military retired pay because of his VA election. If that had been the issue, the Nevada Supreme Court would have clearly found (as explained below) that it had no authority to do so.

It's important to note that Grady did not reduce his military retired pay in favor of VA benefits during or after the divorce proceedings. At the time the decree was entered, Grady was already receiving disability benefits. His military retired pay, which began in late 2014, started at $128.40. There was never a reduction that could have triggered a *Shelton* analysis in the first place. Even if *Shelton* had been triggered, the parties' agreement in this case is not ambiguous. It clearly states that Caterina is to receive 50% of Grady's U.S. Army Retired Pay. There was no conflicting specified dollar amount and therefore no basis to assert that ambiguity existed or that Grady contractually guaranteed a specific dollar amount.

Notwithstanding the clear statement in the decree, the district court simply decided that there was ambiguity. The district court then used inadmissible parol evidence consisting of emails between the parties that were exchanged prior to entry of the decree to create ambiguity where none existed. This is evident by the district court's extensive findings on pages 8 and 9 of its decision regarding Grady's representations to Caterina regarding his military pay, all of which never

should have been admitted, let alone considered in the district court's determinations.[79] The district court used parol evidence to create an ambiguity in an unambiguous document, which is clearly not permissible and clear error under Nevada law.

2. The district court erred as a matter of law by finding that Grady owed a Fiduciary Duty to Caterina and by setting Aside the Property Settlement on the Basis of Fraud under NRCP 60b.

The district court's decision asserts several times that Grady owed a fiduciary duty to Caterina and that Grady, by deceit, fraud and/or threats, induced Caterina into signing the stipulated decree. None of the district court's determinations are correct on these issues.

First, Grady did not owe a fiduciary duty to Caterina related to the divorce proceedings. While the Supreme Court of Nevada has stated that a fiduciary duty can exist between husband and wife under specific circumstances, that determination has been made exclusively in reported cases where one spouse is an attorney and actively participated in preparing the stipulated decree of divorce. *Cook v. Cook*, 912 P.2d 264, 112 Nev. 179 (Nev. 1996); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (Nev. 1992).

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[79] Parol evidence to determine the meaning of a contract is inadmissible when the contract itself is unambiguous. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001).

Conversely, in *Applebaum v. Applebaum*, 93 Nev 382, 566 P.2d 85 (1977), the Court stated that that once a spouse announces an intention to seek a divorce, the other spouse is on notice that their interests are adverse. Id. at 384-85, 566 P.2d at 87. The issue of whether a confidential relationship survives an announcement of an intention to seek a divorce necessarily depends on the circumstances of each case. *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (Nev. 1992).

In this case, neither Caterina nor Grady are attorneys. They had been living separate and apart for approximately six years and were in separate countries at the time Grady approached Caterina seeking a divorce. The two exchanged emails regarding the decree's terms for approximately 4 months before arriving at an agreement. The evidence at trial demonstrated that Caterina had the ability to hire an attorney if she wanted, notwithstanding Grady telling Caterina that if she hired an attorney they would go to court and she would get less then he proposed.[80] Grady never threatened to physically harm Caterina, nor would such a threat carry any weight even if it had been made given Grady's residence half-way around the world. There are simply no facts that would support the existence of any fiduciary

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[80] The district court repeatedly claimed that Grady threatened Caterina into signing the divorce decree. One is hard-pressed to explain how this or any other of Grady's statements could be perceived as a threat when made in the context of a divorce proceeding.

duty between Caterina and Grady once Grady informed Caterina that he was pursuing divorce.

At any time during the divorce negotiations, Caterina could have sought the advice of counsel and/or initiated formal proceedings to protect her rights. She voluntarily chose not to, even while acknowledging the risk existed that she would not receive guaranteed payments from Grady for life. Grady was under no fiduciary duty of any kind to Caterina and the district court clearly relied on this finding to support setting aside the parties' agreement on the basis of Grady's supposed fraud or deceit. This district court's finding that Grady owed a fiduciary duty was an abuse of discretion given the facts of this case.

The district court also abused its discretion by setting aside the alimony waiver under NRCP 60B because Caterina's motion was not timely, having been filed 5 years after entry of the decree and 10 months after she initially sought enforcement of the decree with the district court:

> **Rule 60. Relief From a Judgment or Order**
>
> (a) **Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.
>
> (b) **Grounds for Relief From a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may

relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) **no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later**. The time for filing the motion cannot be extended under Rule 6(b).

(emphasis added). It is undisputed that it had been approximately 5 years since the decree had been entered when Caterina sought enforcement of the decree. Even then, Caterina did not request any 60B relief. In fact, it was not until another 10 months had passed that Caterina raised the issue of 60B relief in a pre-trial memorandum. Notwithstanding the 6-month limitation and the undisputed facts that Caterina was late requesting 60B relief by any measure, the Court set aside the alimony waiver citing 60B and alleged fraud committed by Grady. Not only was the motion not timely, the district court never should have even considered

the evidence upon which it relied to find that Grady had committed any fraudulent conduct.

This was an error as a matter of law because the district court relied on evidence that is inadmissible to prove fraud under Nevada caselaw. Parol evidence is inadmissible to prove fraud in the inducement when the purported evidence directly speaks to the terms of the final contract. This is explained in detail in *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 284 P.3d 377, 128 Nev. Adv. Op. 36 (Nev. 2012) as follows:

> As explained by this court in *Tallman*, the purported inducement cannot be something that conflicts with the Subcontract's express terms, as the terms of the contract are the embodiment of all oral negotiations and stipulations. 66 Nev. at 257, 208 P.2d at 306. "'When the plaintiff pleads that the writing ... does not express the intentions of the parties to it at the time, he pleads something which the law will not permit him to prove.'" Id. (quoting *Natrona Power Co. v. Clark*, 31 Wyo. 284, 225 P. 586, 589 (1924)); see also *Green v. Del–Camp Investment, Inc.*, 193 Cal.App.2d 479, 14 Cal.Rptr. 420, 422 (1961) (stating that where "the claim[e]d fraud consists of a false promise with respect to a matter covered by the agreement itself, the oral evidence would contradict the terms of the agreement, in direct contravention of the rules. Such proof is not permitted."); *Sherrodd, Inc. v. Morrison–Knudsen Co.*, 249 Mont. 282, 815 P.2d 1135, 1137 (1991) (providing that the exception made to the parol evidence rule when fraud is alleged "only applies when the alleged fraud does not relate directly to the subject of the contract. Where an alleged oral promise directly contradicts the terms of an express written contract, the parol evidence rule applies.").

Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc., 284 P.3d 377, 128 Nev. Adv. Op. 36 (Nev. 2012)

The foregoing case makes it clear that the district court's use of emails between Grady and Caterina, the substance of which was the agreement negotiations, cannot be used as evidence of fraud to invalidate the final agreement. Nevertheless, that is exactly what the district court did in this case when it found that Grady's representations regarding what he believed Caterina was entitled to were fraudulent. Any representations contrary to the terms embodied in the final agreement cannot serve as a basis to invalidate the agreement under a fraud theory. "'When the plaintiff pleads that the writing ... does not express the intentions of the parties to it at the time, he pleads something which the law will not permit him to prove.'" *Id.* at 380 (quoting *Tallman v. First Nat. Bank*, 66 Nev. 248, 259, 208 P.2d 302, 307 (1949) and *Natrona Power Co. v. Clark*, 31 Wyo. 284, 225 P. 586, 589 (1924)). The district court erred as a matter of law by relying on Grady's statements made prior to the entry of the decree regarding retired pay as a basis for fraud. Since the district court used this purported fraud as a basis to set aside the Decree of Divorce as to Caterina's waiver of alimony and her share of Grady's army retired pay, this Court should reverse the district court's 60b determination and reinstate the terms of the divorce decree as written.

3. The district court erred as a matter of law determining that the Division of Retired Pay and Alimony Waivers were Unconscionable.

The district court also went a step further, arguing that the decree itself was unconscionable because it precluded Caterina from receiving any portion of Grady's disability benefits after a 31-year marriage. As shown below, that Caterina did receive any portion of Grady's disability pay is not only not unconscionable, it is explicitly sanctioned under both United States and Nevada law.

Under Federal and state law, the district court CANNOT order Grady to indemnify Caterina for the loss of veteran's retirement pay caused by his waiver of retirement pay to receive service-related disability benefits. While the district court concluded this was unconscionable, the United States Supreme court has concluded it is not. In *Mansell v. Mansell*, the U.S. Supreme Court held that military retirement pay that had been waived by the former husband in order to receive veterans' disability benefits was not community property divisible upon divorce. 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). The Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible community property. *Id.*, at 594-595. The Court acknowledged that Title 10 had the capacity to inflict economic harm on

former spouses, but it refused to overlook the legislative history which, read as a whole, indicates the intent by Congress to protect military retirees. *Id.* Furthermore, even in the absence of legislative history, the plain and precise language of the statue is enough to make the intent of Congress clear. Under § 1408(c)(1), the term "disposable retired or retainer pay," is used specifically to limit the extent to which state courts may treat military retirement pay as community property. *Id.* at 590. The Court noted that veterans who became disabled as a result of military service are eligible for disability benefits under Title 38 (*Id.* at 583), which are explicitly excluded from the definition of disposable retired pay and therefore cannot not be divided by a state court.

The *Mansell* Court's holding was recently confirmed in *Howell v. Howell*, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017). The *Howell* decision reaffirms that under the *McCarty*[81] holding, federal retirement benefits are not divisible unless specifically authorized by federal statute. While federal law was amended subsequent to *McCarty* to allow states to divide military retired pay under 10 USC § 1408, that statute specifically exempted VA pay. This was confirmed in *Mansell* and again in *Howell*.

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[81] *McCarty v. McCarty*, 453 U.S. 210, 211–215, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

The facts and decision in the *Howell* case are particularly relevant to this Court's decision. In *Howell*, the Arizona court attempted to "restore" a portion of the wife's retirement payment by ordering the husband to repay her the amount she was receiving that was reduced after the husband's military retired pay was reduced in lieu of receiving tax free VA pay. The *Howell* court held that such an order was a violation of federal law, stating the following:

> Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the post-divorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.
>
> The basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay. See 453 U.S., at 232–235, 101 S.Ct. 2728 (describing the federal interests in attracting and retaining military personnel). And those reasons apply with equal force to a veteran's post-divorce waiver to receive disability benefits to which he or she has become entitled.
>
> We recognize, as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U.S., at 594, 109 S.Ct. 2023. But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account

> of reductions in value when it calculates or recalculates the need for spousal support. See Rose v. Rose, 481 U.S. 619, 630–634, and n. 6, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987) ; 10 U.S.C. § 1408(e)(6).

Howell at 137 S.Ct. at 1406. While the *Howell* case leaves open the possibility that a reduction in retired pay could trigger a review of prospective alimony, that is impossible in this case because, 1) Grady's military retired pay has never substantially changed, and 2) there is no alimony order that can be modified. The Decree of Divorce specifically states that neither party will receive alimony and that Grady's contributions toward Caterina's mortgage were completely voluntary.

Nevada's law is also explicit in preventing the Court from awarding any portion of disability pay to Caterina AND prohibiting the assignment of the pay to Caterina after Grady receives it.

NRS 125.165 states the following:

> Federal disability benefits awarded to veteran for service-connected disability: Attachment, levy, seizure, assignment and division prohibited.
>
> Unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS, in making a disposition of the community property of the parties and any property held in joint tenancy by the parties, and in making an award of alimony, the court shall not:
>
> 1. Attach, levy or seize by or under any legal or equitable process either before or after receipt by a veteran, any federal disability benefits awarded to a veteran for a service-connected disability pursuant to 38 U.S.C. §§ 1101 to 1151, inclusive.

> 2. Make an assignment or otherwise divide any federal disability benefits awarded to a veteran for a service-connected disability pursuant to 38 U.S.C. §§ 1101 to 1151, inclusive.

NRS 125.165 (emphasis added). The district court's order is impermissible under Nevada law. Furthermore, even if Nevada law allowed the Court to order Grady to pay a portion of his disability pay to Caterina, federal law and United States Supreme Court jurisprudence forbid it. This Court's order directing Grady to pay Caterina $1,500 as her portion of his retirement is invalid under Nevada law, federal law and according the holdings in *McCarty*, *Mansell* and *Howell*.[82]

4. The District Court abused its Discretion by Refusing to Allow Grady to Appear for Trial Via Audiovisual Communication.

The decision whether to permit a witness to testify is within the sound discretion of the district court, and that determination will not be disturbed on appeal absent an abuse of discretion *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (Nev. 2003). Grady contends that the district court abused its discretion in summarily denying Grady's request to appear by audiovisual equipment and refusing to reconsider its decision on Grady's motion for reconsideration.

There is no dispute that Grady timely filed a request for audiovisual participation. After the district court denied the request, Grady filed a motion for

[82] The district court's order tries to get around this problem by simply calling it all alimony, but the Supreme Court cases cited make it clear that the district court cannot call it alimony to cure the defect that it is really an attempted division of Grady's disability pay.

reconsideration, which laid out an analysis of the factors the Court should consider in deciding whether to allow an audiovisual appearance for trial, which are as follows:

> **Rule 2. Policy favoring simultaneous audiovisual transmission equipment appearances.** The intent of this rule is to promote uniformity in the practices and procedures relating to simultaneous audiovisual transmission equipment appearances. To improve access to the courts and reduce litigation costs, courts shall permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules.
>
> ...
>
> **Rule 4. Appearance by simultaneous audiovisual transmission equipment.**
>
> 1. Appearances by parties or witnesses through the use of simultaneous audiovisual transmission equipment may be made as follows:
>
> (a) Trials, hearings at which witnesses are expected to testify, or hearings on preliminary injunction motions provided there is good cause as determined by the court in accordance with Rule 1(6);
>
> ...
>
> **3. Court discretion to modify rule.**
>
> (a) Applicable cases. In exercising its discretion under this provision, the court should consider the general policy favoring simultaneous audiovisual transmission equipment appearances in family court proceedings.

The foregoing rules clearly state that 1) parties may appear for trial via audiovisual equipment 2) the Court should use the rule to permit access to the court, and 3) the policy of the Court should be to favor audiovisual appearances in

family court proceedings. Furthermore, Grady's motion to the district court demonstrated good cause, using the factors set out in subsection 6 of Rule 1 as follows:

> 6. "Good cause" may consist of one or more of the following factors as determined by the court:
>
> *(a) Whether a timely objection has been made to parties or witnesses appearing through the use of simultaneous audiovisual transmission equipment;*
>
> *(b) Whether any undue surprise or prejudice would result;*
>
> *(c) The convenience of the parties, counsel, and the court;*
>
> *(d) The cost and time savings;*
>
> *(e) The importance and complexity of the proceeding;*
>
> *(f) Whether the proponent has been unable, after due diligence, to procure the physical presence of a witness;*
>
> *(g) The convenience to the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;*
>
> *(h) Whether the procedure would allow effective cross-examination, especially where documents and exhibits available to the witness may not be available to counsel;*
>
> *(i) The importance of presenting the testimony of witnesses in open court, whether the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;*
>
> *(j) Whether the quality of the communication is sufficient to understand the offered testimony; and*

(k) Such other factors as the court may, in each individual case, determine to be relevant.

Grady's motion for reconsideration analyzed these factors in detail, and all supported allowing his audiovisual appearance. Those factors included Grady's health status and his inability to fly internationally, the cost and time involved in Grady's travel, the ease with which he could appear by audiovisual equipment, the relative simplicity of the matters before the court, and the lack of prejudice and surprise to the opposing party if Grady was allowed to make the virtual appearance.

Notwithstanding these facts, the district court again summarily denied Grady's request and proceeded with the trial without him. The district court's reasoning for this denial was nothing more than to state that she did not find the doctor's notes from multiple doctors credible and he had previously been ordered to be there. The district court did not address any of the other factors, such as the distance Grady would have to travel, the cost of the travel for Grady to get from the Philippines to Nevada, the limited physical evidence consisting of only documents, or the relative simplicity of the issues before the Court. There is no discernable reason why the district court should have denied this request and doing so prevent Grady from providing any rebuttal to the one-sided self-serving testimony offered by Caterina. The district court abused its discretion in denying

this request. Therefore, if this Court determines that a remand for additional evidence is necessary based on Grady's substantive requested relief, this Court should do so with instructions to allow Grady to appear by audiovisual communication.

VI.

CONCLUSION

The Decree of Divorce should be enforced on its terms based on the plain and unambiguous language of the mortgage assistance payment, the alimony waiver, and Caterina's award of Grady's Army Retired Pay. The district court erred as a matter of law by finding that ambiguity existed, then compounded that error when it admitted and considered evidence regarding in violation of the parol evidence rule. The district court then used that inadmissible evidence to find that Grady had committed fraud in order to grant 60b relief based on a clearly untimely request. This was an abuse of discretion, as was the district court's refusal to allow Grady to testify by audiovisual appearance.

In sum, this Court should reverse everything that the district court did. The Decree of Divorce should be reinstated and enforced on its plain and unambiguous terms, which include Grady making the mortgage assistance payment until one of the conditions is met, and Caterina receiving 50% of Grady's Army Retired Pay. There should be no alimony in this case. There were

three explicit waivers contained in the Decree of Divorce, and the district court abused its discretion when it set those waivers aside based on inadmissible evidence and an untimely 60b request.

Dated this 30 day of June 2020.

Respectfully submitted by:

MILLS & ANDERSON

By: _____

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CERTIFICATE OF COMPLIANCE

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

2. I 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 contains 9674 words.

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, 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.

4. 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 30 day of June 2020

Respectfully submitted by

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of June, 2020, I caused to be served the instant **APPELLANT'S OPENING BRIEF** to all interested parties as follows:

BY MAIL: Pursuant to NRCP 5(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, address as follows:

Anita A. Webster, Esq.
WEBSTER & ASSOCIATES
6882 Edna Avenue
Las Vegas, Nevada 89146
Attorneys for Respondent

XX BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Odyssey, to the following e-mail address:

Anita Webster, Esq. - anitawebster@embarqmail.com

Tiffany Stewart
Tiffany Stewart an employee of the
MILLS & ANDERSON