IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADMINISTRATION OF THE SSJ'S ISSUE TRUST,
IN THE MATTER OF THE ADMINISTRATION OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST.
TODD B. JAKSICK, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE SSJ'S ISSUE TRUST; MICHAEL S. KIMMEL, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST; KEVIN RILEY, INDIVIDUALLY AND AS FORMER TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE WENDY A. JAKSICK 2012 BHC FAMILY TRUST; AND STANLEY JAKSICK, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, Appellants/Cross-Respondents, vs. WENDY JAKSICK, Respondent/Cross-Appellant.

Case No. 81470

APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS APPEAL

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rules of Appellate Procedure ("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.

Appellants are all individuals appealing in the following capacities: Todd B. Jaksick as a former Co-Trustee of the Samuel S. Jaksick Jr. Family Trust and as a former Trustee of the SSJ's Issue Trust; Michael S. Kimmel individually and as a former Co-Trustee of the Samuel S. Jaksick Jr. Family Trust; and Kevin Riley, individually, as former Trustee of the Samuel S. Jaksick Jr. Family Trust, and as Trustee of the Wendy A. Jaksick 2012 BHC Family Trust. These parties were represented in the district court and in this appeal by Donald A. Lattin, Esq.; Carolyn K. Renner, Esq.; and Kristen D. Matteoni, Esq. of Maupin, Cox & LeGoy.

Dated this 6th day of October, 2021.

MAUPIN, COX & LeGOY

By: _____

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I. ARGUMENT

A. Wendy's Response Fails to Show Sufficient Findings or Substantial Evidence in Support of the $300,000 Attorneys' Fees Award to Wendy.

Nevada law is clear on this issue. A fee award must be supported by "sufficient reasoning and findings". *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). Wendy does not and cannot demonstrate that the district court's decision is based on sufficient reasoning and findings.

Wendy concedes that she failed to provide any analysis of the *Brunzell*[1] factors in support of her fee request. JT APP Vol. 8 at TJA 001462-65. In a failed effort to strengthen her position, she relies on citations to cases which are entirely inapposite to the issue.

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[1] *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969)

Wendy's reliance on *O'Connell v. Wynn Las Vegas LLC*, 134 Nev. 550, 553-54, 429 P.3d 664, 667-68 (2018) is misplaced for two reasons: (1) *O'Connell* provided a full analysis of the *Brunzell* factors to the Court; and (2) the holding in *O'Connell* was based on a finding that it was improper for the district court to "[decline] to assess the reasonableness of a request for attorney fees, based upon a contingency fee agreement, because the motion was not supported by hourly billing statements" when considering reasonableness of fees under *Beattie.*[2] Thus, in *O'Connell*, the decision is distinguished from this case for a number of reasons: (1) Wendy has not stated that she has a contingency fee agreement with her counsel; (2) Wendy's counsel has not stated that they are unable to provide billing records for their work on this case, nor was that the basis of the Trustees' argument on appeal; and (3) unlike the case in *O'Connell*, there was no attempt in Wendy's situation to provide an analysis to determine the reasonableness of fees.

Likewise, Wendy's reliance on *Cooke v. Gove*, 61 Nev. 55, 114 P.2d 87 (1941) is misplaced because the holding in *Cooke* was based on the attorney's lack of a formal fee agreement with his client, contingent or otherwise. Wendy has not taken the position that she did not have a formal fee agreement with her counsel.

Indeed, Wendy has not previously claimed that her fee agreement with counsel was based on contingency. If that is the case, it begs the question why she

[2] *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)

would be entitled to anything beyond what she would have to pay under the agreement. That is, Wendy was awarded $15,000 in damages after the jury trial and no damages as a result of the decision on the equitable issues by the district court. If she has a contingency fee agreement with her counsel, her fees owed would necessarily be some amount less than the $15,000 award. Wendy provides no legal basis for a fee award beyond what she is legally obligated to pay her attorneys.

While Wendy would like to bootstrap the district court's analysis of the *Brunzell* factors in support of Todd's fees to her own request for fees, the analysis of the factors for Todd's fees are necessarily distinguishable from the analysis for Wendy's fees. That is, the analysis concerns the *qualities* of two different *advocates*, it concerns different work *actually performed by the lawyer*, and there are two very different *results*. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

To be clear, the *result* obtained on behalf of Wendy resulted in her prevailing on two of thirty-one claims before the jury (and where the jury awarded a mere $15,000 in damages in response to a demand in excess of $80,000,000) and where she did not prevail on a single substantive claim before the judge in the equitable trial. The district court must provide sufficient reasoning and findings relied upon for this award of fees, and support such a finding with substantial evidence. It failed to do so and as such, Appellant Trustees are entitled to a reversal of this award.

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B. Kimmel and Riley are Entitled to an Award of Attorneys' Fees and Costs.

1. Kimmel and Riley are Entitled to Costs Under NRS 18.020.

"An award of costs to the prevailing party is **mandated** where, as here, damages were sought in an amount in excess of $2,500." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994). Wendy cannot deny that the district court was ***required*** to award costs to Kimmel and Riley. Wendy does not deny that Kimmel and Riley were undisputedly prevailing parties on all claims against them asserted by Wendy. As such, pursuant to NRS 18.020, the district court ***must*** award them their reasonable costs. While the district court maintains discretion to determine what is reasonable, it is a violation of NRS 18.020 to deny all costs, as well as an abuse of discretion.

2. Kimmel and Riley are Entitled to Attorneys' Fees and Costs Under NRS 18.010(2)(b).

It is undisputed that NRS 18.010(2)(b) allows a prevailing party to recover attorneys' fees when the district court finds that the opposing party's claims were "brought or maintained without reasonable ground or to harass the prevailing party." While the decision to award attorneys' fees is in the discretion of the district court, when that discretion is exercised in clear disregard of the guiding legal principles, it may constitute an abuse of discretion. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993) (internal citation omitted).

In Wendy's response, she does not dispute that Kimmel was appointed as the third Co-Trustee of the Family Trust on December 23, 2016, a mere seven (7) months prior to the filing of the two petitions forming the basis of this litigation. Likewise, Riley was only a Co-Trustee of the Family Trust for three (3) months following Sam's passing in 2013. Wendy also does not dispute that both Kimmel's and Riley's tenures as Co-Trustee began well after the actions upon which Wendy asserted her breach of fiduciary duty claims. "A trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise of power . . . ." NRS 163.110. Here, neither Kimmel nor Riley was a Co-Trustee during the time frame in which the breaches alleged by Wendy occurred, and as such, neither can be held liable for the actions of the other Co-Trustees. Wendy's claims that "Kimmel vouched for all actions of his predecessors" (*see* Answering and Opening Brief at p. 27) and that Riley and Kimmel were responsible "to ensure that other Co-Trustees did not breach their fiduciary duties" (*see id.* at p. 29) is not supported with any legal authority. Wendy's pursuit of Riley and Kimmel for actions which occurred well outside of their tenure as Co-Trustees was done without regard for Nevada law and without reasonable ground and as such, Kimmel and Riley are entitled to their attorneys' fees.

Rather than focus on the issue, and in a vain attempt to justify her initiating and maintaining these lawsuits against Kimmel and Riley, Wendy makes the false

statement that "the Co-Trustees ***sued Wendy*** to confirm their non-approvable accountings and their mismanagement of the Trusts." *See* Answering and Opening Brief at p. 27. The Co-Trustees did not "sue" Wendy. They merely filed a petition with the district court to approve the accountings and other actions taken by the Co-Trustees. There were no allegations against Wendy. She was not sued by the Co-Trustees. The petitions triggered Wendy's obligation, as a beneficiary, to object to the petition if she did not agree; however, Wendy took it well beyond an objection when she asserted multiple claims against multiple parties in multiple capacities.

3. Kimmel and Riley are Entitled to Attorneys' Fees Under NRCP 68.

Rather than respond to a complete analysis of the *Beattie* factors set forth in the Appellant Trustees' Opening Brief, Wendy focuses solely on the reasonableness of the offer in timing and amount, the second prong of the *Beattie* analysis. *See* Answering and Opening Brief at pp. 30-32. She makes no attempt to provide an analysis of the first prong, whether her claims against Kimmel and Riley were brought in good faith; the third prong, whether her decision to reject the Offers of Judgment and proceed to trial was grossly unreasonable and in bad faith; or the fourth prong, whether the fees sought were reasonable and justified in amount (the *Brunzell* factors).

With respect to the limited analysis Wendy did provide, she calls the offer "silly" based on the amount (*see* Answering and Opening Brief at p. 31), yet she

cannot deny that this "silly" amount was more than what she obtained as a result of the jury and equitable trials. Wendy states that the amount of the offer was less than what she had incurred in legal fees just to respond to the petition filed; however, there is no requirement that an offer contemplate the amount the offeree has expended in legal fees.

Additionally, at the time the Offer was made, Wendy was well aware that Kimmel and Riley were not Co-Trustees at the time of the alleged breaches. Indeed, the jury was able to discern that neither Kimmel nor Riley had any liability for the alleged breached claimed by Wendy and the district court found Kimmel and Riley were prevailing parties with respect to all claims asserted against them by Wendy.

Wendy should have evaluated the legitimacy of her claims against Riley and Kimmel at the time of the Offer, which is the purpose of the burden shifting function of NRCP 68. Wendy failed to look objectively at her claims against Kimmel and Riley and as a result, she utterly failed to achieve a result higher than the Offer. Riley and Kimmel are entitled to fees.

4. Kimmel and Riley are Entitled to Fees under NRS 7.085.

It is unclear how Wendy can call her initial pleadings "defensive" (*see* Answering and Opening Brief at p. 33). Objecting to a petition for approval is defensive. Taking that further by asserting various claims for breaches of fiduciary duty, civil conspiracy, aiding and abetting, and fraud, among others is no longer

"defensive". Wendy's counsel took an unreasonable position with respect to her claims as against Kimmel and Riley, which is shown by her inability to prove them at trial. For all the reasons stated hereinabove, Wendy's counsel "unreasonably and vexatiously extended a civil action" with respect to Kimmel and Riley and the district court should have required her attorneys to pay the costs and fees incurred because of such conduct. NRS 7.085.

II. CONCLUSION

For the reasons set forth above and in Appellant's Opening Brief, Appellant Trustees respectfully request that this Court reverse the award of $300,000 to Wendy's attorneys for fees and costs because such award is not supported by substantial evidence. They further request that this Court find the district court abused its discretion by failing to award costs to Kimmel and Riley as prevailing parties under NRS 18.020. Finally, they request that this Court reverse the district court's denial of attorneys' fees to Kimmel and Riley under NRS 18.010(2) or, alternatively, under NRCP 68 or NRS 7.085.

ANSWERING BRIEF ON CROSS APPEAL

NRAP 26.1 DISCLOSURE STATEMENT

The Appellant Trustees incorporate the *NRAP 26.1 Disclosure Statement* included in their Reply Brief on Appeal set forth hereinabove.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), because it is an appeal from a final judgment. This matter involved a bifurcated trial. The legal claims were resolved by a jury verdict entered on March 4, 2019. The remaining equitable claims were resolved by the district court's Order After Equitable Trial, entered on March 17, 2020. Judgment was then entered on April 1, 2020. All of the parties timely filed various motions to alter or amend the judgment, and those motions were resolved in the district court's Order Resolving Submitted Matters, entered on June 11, 2020. An Amended Judgment was entered on July 6, 2020. Wendy's Notice of Appeal was timely filed on July 13, 2020.

STATEMENT OF THE CASE

The Appellant Trustees incorporate the *Statement of the Case* included in their Opening Brief on Appeal.

STATEMENT OF THE FACTS

The Appellant Trustees incorporate the *Statement of the Facts* included in their Opening Brief on Appeal.

SUMMARY OF THE ARGUMENT

This Answering Brief on Cross Appeal filed on behalf of the Appellant Trustees addresses only those issues within the purview of the Appellant Trustees in the District Court. A number of issues brought up in Wendy's Opening Brief on Cross Appeal ("Wendy's Opening Brief") are best addressed by the law firm of Robison, Sharp, Sullivan & Brust, as counsel for Todd as an individual and as a beneficiary. Thus, the Appellant Trustees have identified, within each section, which sections of Wendy's Opening Brief they will address, and which sections will be addressed by Todd's individual counsel. Specifically, Appellant Trustees will address Wendy's arguments regarding (1) the district court following the jury's factual determinations in deciding the equitable claims related to the accountings and the Agreements and Consents to Proposed Action ("ACPAs"); and (2) the issue of the district court continuing the trial date based on Wendy's allegations concerning discovery.

With regard to the district court following the jury's factual determinations in deciding the equitable claims, a plain reading of the *Order After Equitable Trial* shows that the district court considered all the evidence and made its decision on the equitable claims. TJA002122-002146. There was an extensive overlap of the factual issues between the jury trial and the equitable trial. TJA002124, lines 2-3. In spite of this, the jury did NOT find that Todd's co-trustees had breached their

fiduciary duties, had aided or abetted Todd in his breaches, had engaged in civil conspiracy, or had engaged in fraud. This decision by the jury implies a finding that there were not issues with the accountings or ACPAs as Wendy had consistently alleged that all Co-Trustees were complicit regarding those documents. TJA002134, line 22 – TJA002135, line 3; TJA002135, lines 18-25. "In a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are based on the same facts, in deciding the equitable claims, the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations." TJA002129, lines 13-20. The district court did consider the evidence, followed the jury's implicit factual determinations, and made its decision regarding the accountings and ACPAs. The district court has ruled on these issues and its manner in doing so was not an abuse of discretion.

With regard to the issue of the district court continuing the trial date based on Wendy's allegations concerning discovery, Wendy was not diligent in pursuing discovery and as such she was not entitled to a continuance of the trial date based on alleged "late" discovery. The record is replete with examples of Wendy's failure to comply with discovery deadlines [WJ 0027-0029], unexplained delay in starting her written discovery requests [SA249-261 at p. 3], and her failure to timely move to compel after valid objections to discovery were made [*Id.* at p. 4], among other things. In spite of Wendy's lack of diligence on discovery matters, the district court

granted Wendy's request for a continuance and delayed the start of the trial for nine (9) days. *See* Wendy's Opening Brief at p. 61. Additionally, Wendy admits that the district court stated it would allow Wendy broad latitude in the questioning of witnesses, it would allow her to broaden the scope of her experts, and it would keep the discovery process in mind on its rulings on evidence. *See* Opening Brief at p. 61. Thus, the district court provided Wendy with more accommodation than she was entitled to based on her lack of diligence. The district court did not abuse its discretion.

ARGUMENT

A. The District Court Did Not Abuse its Discretion by Following the Jury's Factual Determinations in Deciding the Equitable Claims.

1. Prefatory Comment

The law firm of Robison, Sharp, Sullivan & Brust, as counsel for Todd as an individual and as beneficiary, will address this section of Wendy's Opening Brief as it applies to the district court's decision on the indemnification agreements. The undersigned, as counsel for the Appellant Trustees, will address this issue as it applies to the district court's decision on the accountings and the Agreements and Consents to Proposed Action ("ACPAs").

2. Standard of Review

District courts have ***full discretion*** to fashion and grant equitable remedies.

American Sterling Bank v. Johnny Management LV, Inc., 126 Nev. 423, 428, 245 P.3d 535, 538-39 (2010). The Nevada Supreme Court will review a district court's decision granting or denying an equitable remedy for abuse of discretion. *See id.* (internal citations omitted). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (internal citations omitted). Based on this broad discretion given to the district court, its decision on these equitable claims should be upheld.

3. Argument

In her Opening Brief, Wendy asserts that the district court did not decide the equitable claims regarding the validity of the accounting and the ACPAs. *See* Opening Brief at p. 41. A plain reading of the *Order After Equitable Trial* shows that the district court did make a decision on these equitable claims, it just wasn't the decision Wendy wanted. TJA002122-002146.

In its *Order After Equitable Trial*, the district court expressly stated as follows:

1. It had considered all briefs and evidence admitted during the equitable trial, including many exhibits previously admitted at jury trial. TJA 002123, lines 17-18.
2. As a factfinder, the district court is authorized to consider its everyday common sense and judgment, and determine what inferences may be

properly drawn from direct and circumstantial evidence. *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 105, 65 P.3d 245, 248 (2003). TJA002123, line 23-TJA 002124, line 1.

3. The facts presented in support of the equitable claims inextricably overlap with the legal claims presented to the jury. TJA002124, lines 2-3.
4. Wendy is attempting to retry her case to obtain a second review of similar facts and an outcome different from the jury verdict. TJA002124, lines 3-5.
5. The district court has no authority to dilute or otherwise modify the jury's verdict. TJA002124, lines 6-7.
6. The district court analyzed every argument presented and carefully studied the cited authorities. TJA002124, lines 14-15.
7. The district court's general findings are substantially supported by the evidence of record. TJA002124, lines 17-18.
8. Wendy's legal and equitable claims are grounded in the same common facts and are exceedingly difficult to segregate. As the district court reviewed the hundreds of pages of written arguments relating to the equitable claims, it was taken back to the evidence and arguments presented to the jury. TJA002128, lines 2-5.
9. No matter how Wendy frames or argues her equitable claims, she asks the

district court to remedy the identical facts and transactions she placed before the jury. The district court must look to the substance of the claims, not just the labels used in the pleading document. *Nev. Power Co. v. District Court*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004). TJA 002128, lines 8-11.

10. The jury found that Todd breached his fiduciary duties but only awarded $15,000 to Wendy. The district court may have been authorized to award additional equitable relief upon the same facts if the jury found for Wendy on more claims and against more counter-respondents. But constitutional and decisional authorities prevent this Court from entering a subsequent order diluting or altering the jury's verdict. TJA002128, line 22-TJA002129, line 3.

Essentially, the district court determined that due to the extensive overlap of the factual issues, the jury heard evidence related to both the legal and equitable claims. In spite of this, the jury did NOT find that Todd's co-trustees had breached their fiduciary duties, had aided and abetted Todd in his breaches, had engaged in civil conspiracy, or had engaged in fraud. This decision by the jury implies a finding that there were no issues with the accountings or ACPAs, as Wendy had consistently alleged that all Co-Trustees were complicit regarding those documents. TJA 002134, line 22 – TJA 002135, line 3; TJA 002135, lines 18-25.

The district court, in its *Order After Equitable Trial*, correctly asserted that it cannot supplant or alter a jury's verdict by relying upon common facts to reach a different outcome. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 197 P.3d 1032, 1038 (2008). TJA 002129, lines 10-13. The district court also relied on *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828-29 (9th Cir. 2013) for its position that "it would be a violation of the Seventh Amendment right to jury trial for the court to disregard a jury's findings of fact. Thus, in a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are based on the same facts, in deciding the equitable claims, the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations." TJA002129, lines 13-20.

The district court abided by the Seventh Amendment and followed the jury's implicit factual determinations regarding the accountings and ACPAs. In doing so, the district court expressly stated that it would "not provide equitable relief regarding the accountings." TJA002135, lines 1-3. The district court also proclaimed that "[a]ll claims involving disputed ACPAs and indemnification agreements shall end with the jury's verdict." TJA002136, lines 5-7. Thus, the district court did consider the evidence, followed the jury's implicit factual determinations, and made its decision regarding the accountings and ACPAs. The district court has ruled on these issues and its manner in doing so was not an abuse of discretion.

B. The District Court's Handling of the Settlement Agreement During the Jury Trial.

The law firm of Robison, Sharp, Sullivan & Brust, as counsel for Todd as an individual and as beneficiary, will address this section of Wendy's Opening Brief.

C. The District Court Granted A Continuance of the Trial Based Upon the Request of Wendy's Counsel.

1. Prefatory Comment

The law firm of Robison, Sharp, Sullivan & Brust, as counsel for Todd as an individual and as beneficiary, was to address the section of Wendy's Opening Brief which applied to the district court's decision related to the Settlement Agreement; however, although Wendy includes this as subsection II of Section C of her Opening Brief, there is no such argument included in the body of the brief itself. As such, no response is required.

The undersigned, as counsel for the Appellant Trustees, will address Wendy's request for a continuance of the trial as it relates to the district court's decision on the discovery issue.

2. Standard of Review

A district court's decision whether to grant a continuance of trial is reviewed on appeal for an abuse of discretion. *See Bongiovi v. Sullivan*, 122 Nev. 556, 570,

138 P.3d 433, 444 (2006).

3. Argument

a. Wendy cannot incorporate arguments from pleadings in the district court by referencing them in her Opening Brief.

Wendy's continuous disregard for the Appellate Court Rules is evident by her attempts to incorporate arguments from her pleadings in district court by citing to them in her Opening Brief. *See* Opening Brief at p. 58 ("Wendy expressly incorporates these pleadings and the evidence, arguments and authorities included therein as if fully set forth herein.") and p. 66 ("As extensively detailed in her pleadings seeking a continuance of trial, Wendy faced similar issues obtaining production from Todd, the Trustees and others controlled by them including Pierre Hascheff, Kevin Riley, and Jessica Clayton. WJ 4427-4763; WJ 0202-0281; WJ 2103-2129. Wendy cannot simply throw an issue out there and direct the Supreme Court to reference literally hundreds of pages in district court pleadings to determine the issue and the argument on appeal. *See* NRAP 28(e)(2) ("Parties ***shall not*** incorporate by reference briefs or memoranda of law submitted to the district court or refer the Supreme Court or Court of Appeals to such briefs or memoranda for the arguments on the merits of the appeal.") (Emphasis added). Any such reference by Wendy should be disregarded.

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b. ***Wendy was not diligent in pursuing discovery.***

The district court has discretion to continue discovery deadlines and trial, however, continuances may only be granted upon a showing of good cause. WDCR 13(1); *Matter of M.M.L., Jr.*, 393 P.3d 1079, 1081 (Nev. 2017). When a party seeks to continue both discovery and trial, they must show that they have been diligent in previously pursuing discovery. *City of Bellevue v. Pine Forest Props., Inc.,* 340 P.3d 938, 950 (Wash. Ct. App. 2014). "Generally a party who does not use the rules of discovery diligently is not entitled to a continuance." *Pape v. Guadalupe-Blanco River Auth.*, 48 S.W. 3d 908, 913 (Tex. App. 2001). Here, Wendy did not diligently pursue discovery. It was not an abuse of discretion for the district court to deny her requested continuance in light of her failure to diligently conduct discovery.

This lawsuit began on August 2, 2017, when Todd filed both of his petitions in this matter. TJA000001-000203; and TJA000204-000401. Rather than file her counter-petition within 20 days after Todd filed his petitions, Wendy filed her counter-petition more than five months later on January 19, 2018, ***after*** the district court ordered her to do so. WJ 000025-000026. Wendy amended her counter-petition on February 23, 2018. TJA000713-000752. So, nearly seven months after the initiation of the lawsuit, Wendy finally filed her claims.

Early on in the discovery process, Wendy failed to comply with discovery deadlines. Wendy provided her initial disclosures one month late, after being

ordered by the district court to do so. WJ 0027.

Immediately after receiving the initial disclosures, Todd served Wendy with written discovery requests in March 2018. SA249-261 at p. 3. Wendy, however, did not serve any written discovery until more than two months after she was served with her first initial disclosures. *Id.* at page 3. On May 25, 2018, Wendy served Todd with four sets of requests for production. *Id.* at p. 3. The number of requests served on Todd was excessive and totaled 1,569. *Id.* The discovery commissioner would later comment that he "cannot recall a case in which one side served another with so many categories of requested documents, even in cases in which the amount at issue was greater." SA230-SA248 at p.4:1-6. The discovery commissioner further stated that the "number of individual categories served upon Todd is problematic." *Id.* at p. 3:11.

Todd responded to Wendy's requests on July 16, 2018, producing some documents but objecting to the vast majority of Wendy's requests as overbroad. SA249-261. The discovery commissioner would later largely uphold Todd's objections. SA230-248. Wendy did not move to compel Todd's responses for four months. SA249-261 at p. 4. During those four months, Wendy took the first two days of Todd's deposition on August 15 and 16, 2018. *Id.* She did not have the documents she had requested and did not move to compel Todd's production of these documents before taking his deposition. *Id.*

Wendy served her subpoena on L. Robert LeGoy and Maupin, Cox & LeGoy (the "MCL Subpoena") on July 31, 2018, more than a year after Todd's initial petitions were filed. SA001-041. Pursuant to NRCP 45, counsel for Mr. LeGoy and the MCL Law Firm served objections to the MCL Subpoena on August 20, 2018. SA042-213. It is important to note that in addition to being voluminous in the sheer number of document requests, Wendy's document requests were consistently vague and overbroad throughout the discovery process in this case. SA001-041.

At the time Wendy filed her first motion to continue trial on September 21, 2018, she ***had not filed one motion to compel discovery***. Wendy finally began filing motions to compel in October 2018. SA249-261 at p. 5. During this time, however, Wendy did not notice a single deposition. *Id.* She joined in Stan's deposition notices of Todd, Kevin Riley, and Pierre Hascheff, and in Todd's deposition of Stan. *Id.* at p. 5.

On November 26, 2018, the district court denied Wendy's Motion to Continue Trial. WJ 0108-0110. The district court did, however, extend the discovery deadlines. Once Wendy knew she wasn't going to be successful in obtaining a continuance of the trial date, she finally started to take discovery seriously. Prior to the district court's ruling, she did not seek to depose key fact witnesses, including Bob LeGoy and Brian McQuaid. Sa249-261 at p. 5.

Wendy did not file her motion to compel the production of documents

pursuant to the MCL Subpoena until December 6, 2018, four months after the initial service of the subpoena. SA001-041. Because of the untimeliness of Wendy's motion to compel, there was no way she would obtain a decision on her motion prior to mid-January 2019, much less the documents, and trial was to begin on February 4, 2019.

In spite of the lack of a court order compelling production of documents and in spite of Wendy's general unwillingness to meet and confer on discovery issues, counsel for Mr. LeGoy and the MCL law firm reached out to Wendy's counsel to attempt to narrow her document requests and produce relevant non-privileged documents, something she should have done months before. SA222-229. As a result, relevant non-privileged documents were produced between December 18, 2018 and January 29, 2019. *See* Opening Brief at p. 64.

On January 29, 2019, the MCL law firm also produced a privilege log, again, despite having no court order compelling production of anything. In her Opening Brief, Wendy complains about the timing of the production of documents pursuant to the MCL subpoena and the timing of the production of the privilege log, but fails to outline the history of her lack of diligence in pursuing resolution of discovery disputes, and that her lack of diligence resulted in the lack of a court order compelling the MCL law firm to produce anything pursuant to the MCL Subpoena.

Despite Wendy's arguments to the contrary, there was a valid dispute regarding the disclosure of privileged documents in response to the MCL Subpoena. SA222-229. Both the Samuel S. Jaksick, Jr. Family Trust (the "Family Trust") and the SSJ's Issue Trust (the "Issue Trust") have provisions in the trust agreement which preserve the confidentiality of attorney-client communications. *See id.* at p. 4.

The relevant provision in the Issue Trust follows:

> M. PRESERVATION OF ATTORNEY-CLIENT PRIVILEGE. The Trustee (and if there is more than one (1) Trustee, each Trustee) may consult legal counsel chosen by the Trustee on any matter relating to the administration of the trust, including, but not limited to, the Trustee's fiduciary duties and responsibilities with respect to the trust. All of the fees and expenses incurred as a result of such consultations are to be charged as an expense of the trust and are not to reduce the Trustee's compensation. ***All consultations and communications between the Trustee and the trustee's attorney in connection with trust matters are to be confidential and are not subject to disclosure to any beneficiary or to any successor Trustee. Any fees or expenses incurred by the Trustee to defend any challenge to such confidentiality are to also be charged as an expense to the trust and are not to reduce the Trustee's compensation.***

See Issue Trust at Article IV, Section M, page 20 (emphasis added).

An identical provision appears in the Family Trust at Article IV, Section M, page 33.

These provisions were added to the trust documents in order to preserve the

attorney-client privilege with regard to the trustees, and they expressly provide that the privileged communication is "not subject to disclosure to any beneficiary."

NRS 163.004 allows the "terms of a trust instrument [to] expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries in any manner . . ." This includes variances with regard to the "fiduciary's powers, duties, standards of care, rights of indemnification and liability to persons whose interests arise from the trust instrument." See NRS 163.004(1)(d) and (e). In addition, NRS163.004 (4) provides that "[t]he rule that statutes in derogation of the common law are to be strictly construed has no application to this section. This section must be liberally construed to give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments." *See* NRS 163.004(4).

Thus, the statute should be liberally construed. The statute allows the terms of a trust instrument to restrict or eliminate the rights and interests of beneficiaries, to give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments. In doing so, the attorney-client privilege with respect to any trustee's communications regarding trust administration matters remains privileged even as to beneficiaries.

This argument was made to the discovery commissioner during one of the many weekly discovery conferences imposed by the district court. SA262-267. The commissioner struggled with this decision, at one point even commenting that

perhaps this was a decision the district judge should make, as it was an issue of first impression for the discovery commissioner. *Id.* at p. 3. He lamented that there was not time to fully brief the issue and further look into the issue himself prior to making his decision. *Id.* at p. 3. In the end, the discovery commissioner required disclosure of the documents previously withheld based on the attorney-client privilege, and those documents were produced. *Id.* at p. 3. The district court never issued a written order on the commissioner's recommendation as the recommendation was made on February 8, 2019, and trial commenced on February 14, 2019.

It is important to note that subsequent to this dispute over disclosure of privileged communication, this Court decided the case of *Canarelli v. Eighth Judicial District Court*, 136 Nev. 247, 464 P.3d 114 (2020) in which it expressly found that Nevada does not recognize the fiduciary exception to the attorney-client privilege. *Id.* at 254. "The fiduciary exception, as adopted in other states, 'provides that a fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege against beneficiaries on matters of trust administration.'" *Id.* (internal citations omitted). This Court held in *Canarelli* that it "refuse[d] to recognize the fiduciary exception." *Id.* Thus, any argument made by Wendy that she was entitled to attorney-client privileged information related to trust administration must fail. Her complaint about any late disclosure of such information is moot as she was never entitled to receive it in the first place.

Notably, Wendy's Opening Brief admits that the district court granted her request to continue the trial date and postponed the start of the trial for nine (9) days. *See* Opening Brief at p. 61. Additionally, Wendy admits that the district court stated it would allow Wendy broad latitude in the questioning of witnesses, it would allow her to broaden the scope of her experts, and it would keep the discovery process in mind on its rulings on evidence. *See* Opening Brief at p. 61. Thus, Wendy's complaints about the late production of documents (which was caused by her lack of diligence in pursuing discovery) were nonetheless accommodated as best as possible given the circumstances. The district court's ruling that the trial date be continued, and the broad latitude given to Wendy during the trial was more than necessary under the law which expressly states that "a party who does not use the rules of discovery diligently is not entitled to a continuance."

Further, Wendy has now had these documents for nearly three (3) years, yet in her Opening Brief, she cites to only one (1) document, a letter from June 17, 2010 from Robert LeGoy in support of her argument. *See* Opening Brief at p. 65. With respect to Wendy's allegations, it is important to note that Sam Jaksick was in charge of his business affairs and his estate planning until his death in 2013. TJA002125 at 4:16-17. Wendy claims in her Opening Brief that "Todd brought in attorney Pierre Hascheff to complete the Option Agreement transactions against the advice of MCL." *See* Opening Brief at p. 65. The citation Wendy provides in her Opening

Brief ***does not support this allegation***. *See id.* The record reflects that Sam Jaksick was in charge of his business affairs and estate planning until his death in 2013. Pierre Hascheff, during his trial testimony, affirmatively stated that Sam wanted these agreements drafted to protect the Incline house from creditor issues. *See* WJ 2518 line 10 to WJ 2521, line 5. The document is irrelevant to Wendy's argument because it doesn't matter if the MCL law firm advised against the option agreement, Sam wanted it and Pierre Hascheff drafted it. There is absolutely no evidence that Todd orchestrated any effort to bypass any advice of the MCL law firm for his own benefit.

Finally, the case cited by Wendy in her brief, *Clark County Sch. Dist. V. Richardson Const., Inc.*, 123 Nev. 382, 168 P.3d 87 (2007) is completely distinguishable from the instant case. It is unclear what parallel Wendy is attempting to make between the *Clark County School District* case and the instant case. Here, there is no affidavit signed by any witness stating that any part of any production was complete and there was no witness on the stand who subsequently testified that there were additional documents in spite of what was set forth in the affidavit. Further, the nearly one week delay in the trial had to do with figuring out the status of the document production while the trial had already started, and delaying that trial while the witness brought in documents and they were reviewed to determine which documents had not previously been produced. There is no part of that factual

scenario at play in the instant case. Additionally, the *Clark County School District* case had no facts showing lack of due diligence in pursuing discovery such as that which is evident in this case.

In this case, the trial court was more than accommodating by delaying the trial for nine (9) days and giving Wendy broad latitude on various evidentiary issues during the trial. Given Wendy's lack of diligence in pursuing discovery, she was not entitled to a continuance, but she received one anyway. The district court's decision regarding the trial continuance should be affirmed.

D. The District Court's Decision to Award Attorney Fees and Costs to Todd Jaksick, in His Individual Capacity, Against Wendy Jaksick.

The law firm of Robison, Sharp, Sullivan & Brust, as counsel for Todd as an individual and as beneficiary, will address this section of Wendy's Opening Brief.

CONCLUSION

Based on the foregoing, Appellant Trustees respectfully request that this Court deny Wendy's request for a new trial. The district court did not abuse its discretion by following the jury's implicit or explicit factual determinations when deciding the equitable issues, and Wendy was not entitled to a further continuance of the jury trial due to her lack of diligence in pursuing discovery

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Dated this 6th day of October, 2021.

MAUPIN, COX & LEGOY

By: _____

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS APPEAL**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font and contains 6,634 words.

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3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

Dated this 6th day of October, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of Maupin, Cox & LeGoy, and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document by electronic service, via the Court's electronic notification system, to:

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