IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ERICH M. MARTIN S.C. NO. 81810/82517

Appellant, D.C. NO: D-15-509045-D

vs.

RAINA L. MARTIN,

Respondent.

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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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 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. In the course of these proceedings leading up to this appeal, Respondent has been represented by the following attorneys:

a. Ramir M. Hernandez, Esq., Brooks Hubley, LLP.

b. Matthew Friedman, Esq., Ford & Friedman.

c. Marshal S. Willick, Esq., Willick Law Group, attorney of record for Respondent/Defendant.

d. Richard L. Crane, Esq., Willick Law Group, attorney of record for Respondent/Defendant.

There are no corporations, entities, or publicly-held companies that own 10% or more of Defendant's stock, or business interests.

DATED this 16th day of May, 2022.

Respectfully Submitted By:
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//s// Marshal S. Willick
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

ROUTING STATEMENT

This case was heard by the Court of Appeals per NRAP 17(b)(5) and a decision was made based on what we believe was a misreading of the *Howell*[1] decision and the flawed *Byrd*[2] decision. Respondent requested that the case be reviewed by the Nevada Supreme Court.[3] That request was granted.

[1] *Howell v. Howell*, 581 US __, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017).

[2] *Byrd v. Byrd*, 137 Nev. ___, ___ P.3d ___ (COA Adv. Opn. No. 60, Sept. 30, 2021).

[3] See NRAP 40B, Petition for Review by the Supreme Court.

STATEMENT OF THE ISSUES[4]

1. Did the Court of Appeals err in determining that *res judicata* "does not apply" to the final, unappealed, *Divorce Decree*?

2. Did the Court of Appeals err in not enforcing a contract that was mutually agreed to by both parties?

3. Should the Court of Appeal decision in *Byrd* be overturned based on this Court's holdings regarding *res judicata* and contract theory?

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[4] Erich chose not to file an *Opening Brief* for this Court's review; the "issues" listed in the Appellant's Opening Brief in the Court of Appeals were either issues not decided by the lower court or assumed false "facts"; where necessary, they are addressed below in footnotes or subheadings beneath the actual issues presented. References to "AOB" are to Erich's brief filed in the Court of Appeals.

JURISDICTIONAL STATEMENT

Pursuant to NRS chapter 125, the Family Court in Clark County had original jurisdiction to hear the divorce action filed by Appellant (Erich) against Respondent (Raina), and post-divorce litigation between those parties.

This Court is the appellate court for the district courts, and has subject matter jurisdiction to review the final decisions of those courts and, in its discretion, of the Court of Appeals. Jurisdiction in this Court is pursuant to NRAP 3A(b)(1) and 3A(b)(8), under which an appeal may be taken from a district court final judgment, decree, or a special order after final judgment.

STATEMENT OF CASE

Appeal from an *Order* enforcing and finding as *res judicata* a stipulated contractual term in an integrated *Decree of Divorce* in which Appellant agreed to

indemnify Respondent for any funds that he later waived from his military retirement pay in favor of receiving disability payments. This is a review of the Court of Appeals decision reversing the district court's order.

A consolidated appeal in the Court of Appeals was from an *Order* granting Respondent *pendente lite* fees to assist her in defending this appeal. No petition was filed for review of the Court of Appeals decision upholding that award, so it is not further addressed here.

STATEMENT OF FACTS[5]

Erich and Raina were married on April 1, 2002, in North Carolina; they have one minor child, Nathan L. Martin, born August 24, 2010.[6]

The parties separated while stationed in Colorado.[7] They filled out and signed a military "Separation Agreement Worksheet" setting out all intended terms of their separation and intended divorce.[8] Those terms included Raina's sole custody of their child Nathan, supervised visitation by Erich, and that Raina was to receive 50% of all

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[5] NRAP 28(b) provides that Respondent may provide a Statement of Facts if "dissatisfied" with that of the Appellant. The Statement of Facts in the *Opening Brief* filed in the Court of Appeals was deficient for including mis-statements of the record, some false "facts," and omissions of critical material, including failing to even mention the parties' comprehensive Marital Settlement Agreement, while interjecting subjective opinion, alleged personal motivations not found in the record, many misleading and unsupported adjectives (e.g., "grudgingly," "involuntarily") and several unsubstantiated and irrelevant assertions. Accordingly, we request that this Court refer to this Statement of Facts instead.

[6] I RA 2; II RA 235.

[7] I RA 46-48.

[8] I RA 52-67.

military retirement benefits and be named beneficiary of the military Survivor's Benefit Plan ("SBP").[9] In July, 2012, Raina moved to Las Vegas, Nevada, to be with her family.[10]

Erich filed his *Complaint for Divorce* in Clark County, Nevada, on February 2, 2015.[11] Raina filed an *Answer and Counterclaim*[12] and the parties litigated custody and support matters.[13]

In the filings, Erich argued that the military separation agreement was "not enforceable" while Raina contended that by its own terms the military separation agreement was to be "binding and lasting."[14]

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[9] I RA 54, 56, 60, 65-66.

[10] I RA 49.

[11] I RA 1-6.

[12] I RA 22-29.

[13] I RA 31-77, 80-94, 110-118.

[14] I RA 84, 114.

At the resulting hearing, the family court acknowledged the military separation agreement, but found that it was executed in Colorado, did not appear to be "final," and was not dated or notarized, and so elected not to rely on it.[15] The family court ordered separate mediation of child custody and financial issues.[16]

Both parties and their counsel participated in mediation on June 1, 2015, to resolve the financial and property issues of their divorce.[17] They discussed Erich's military benefits at length, including his intention to apply for a future disability rating from the military, resulting in an explicit promise by Erich that he would pay Raina any sums that the military did not pay her if and when he claimed that disability rating:

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[15] I RA 126.

[16] I RA 121-123, 125-129, 127.

[17] In the Court of Appeals, Erich falsely claims that it is "unclear" what happened at mediation. AOB at 7. Nothing is unclear; the parties and their counsel met, discussed all issues, and signed written agreements on all parenting issues (I RA 174-177) and all financial issues (I RA 169-172).

> Should Dad elect to accept military disability payments, Dad shall reimburse Mom for any amount her amount of his pension is reduced due to the disability status from what it otherwise would be.[18]

All of the terms of the Marital Settlement Agreement ("MSA") were reduced to writing and signed by the parties and their counsel.[19]

The next day (June 2), at the scheduled Case Management Conference, only Erich's attorney Frencesca Resch appeared. She informed the Court that "the parties reached an agreement resolving all issues and a *Decree of Divorce* is forthcoming."[20] The court required the *Decree* to be submitted within 30 days.[21]

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[18] I RA 171 (Paragraph 8).

[19] I RA 169-172. Erich appeared remotely, and asked the mediator to sign the agreement on his behalf, noting his consent to all terms. I RA 172, 164.

[20] I RA 148.

[21] *Id*.

The *Decree* drafted by Erich's counsel put the terms of the MSA in court order form, detailing Raina's interest in Erich's military pension and the effect of any potential future disability award:

> One-half (½) of the marital interest in the Erich's military retirement, pursuant to the time rule established in Nevada Supreme Court cases *Gemma v. Gemma*. 105 Nev. 458, 778 P.2d 429 (1989) and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). The parties shall use Marshal S. Willick, Esq. to prepare a QDRO, or similar instrument to divide the pension. The parties shall equally divide the costs of preparing such an instrument. ***Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status.***[22]

Other *Decree* terms relevant to this appeal include that alimony was expressly made modifiable, and that all of the terms recited were explicitly integrated, stating

[22] II RA 246 [Emphasis added].

"each provision herein is made in consideration of all the terms in the Decree of Divorce as a whole."[23]

After the court's deadline to submit the decree had passed, the family court issued an *Order to Show Cause*.[24] Erich's counsel filed a *Motion to Withdraw as Counsel of Record*.[25] The supporting *Affidavit of Francesca Resch, Esq.*, stated that:

> Plaintiff [Erich] has refused to execute the *Decree of Divorce* resulting from an agreement reached at the settlement conference that took place on June 1, 2015, which was subsequently put on the record in the instant Court on June 2, 2015. In addition, Plaintiff has not responded to any recent communication attempts made to him by our firm regarding the execution of the same."[26]

Erich did not file an objection to his counsel's motion.

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[23] II RA 248, 250.

[24] I RA 150-151.

[25] I RA 152-157.

[26] I RA 155.

On October 15, Raina filed a *Motion to Enforce Settlement Agreement* which included a copy of the signed MSA and a copy of the draft *Decree of Divorce* prepared by Erich's counsel and already signed by Raina.[27] On October 20, Erich signed the *Decree of Divorce*.[28]

On October 28, the family court held a consolidated hearing on its *Order to Show Cause*, Raina's *Motion to Enforce*, and Erich's lawyer's *Motion to Withdraw*.[29] At this hearing, all sides agreed that the only issue arising after mediation was as to custody, since the parties' minor child had been moved to year-round school.[30]

Erich asked to speak to the court, and stated that his only problem with the mediated divorce terms related to custody and child support: "With regards to like the

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[27] I RA 161-197.

[28] II RA 277, 279.

[29] II RA 227; X RA 1760-1772.

[30] X RA 1763.

setup (indiscernible) the mediation, I – I feel like that kind of went completely the wrong way because there are several things such as like the timeshares and like how . . . we would pay for . . . ."[31]

When asked why he waited until Raina filed a motion before he signed the *Decree*, Erich claimed that he thought he had previously signed and returned it: "And – and that – and I didn't realize that they hadn't signed, and that's my fault. I can – I thought I had signed it and sent it back."[32] Erich then blamed his lawyers for supposedly not telling him that the *Decree* remained outstanding, claiming he "never received anything" until getting the court's *Order to Show Cause*, before again claiming that "I didn't even realize that I hadn't signed it. I'm – I'm sorry."[33]

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[31] X RA 1768.

[32] X RA 1769.

[33] X RA 1770.

The family court reviewed and approved the *Decree* with one change relating to custody.[34] The only disputed issue at the hearing was whether and how much Erich should pay in fees for not signing the *Decree* until after a motion was filed; no issue with the military retirement benefit terms was raised by any attorney or party.[35]

Since the *Decree* had been signed, Erich's counsel was allowed to withdraw.[36] *Notice of Entry* of the *Decree* was filed on November 10, 2015, by Erich's outgoing counsel.[37] No one filed a motion or appealed, and the *Decree* is long-since final and unappealable.

About six months later, on May 5, 2016, Erich filed a *Motion for Order to Show Cause*,[38] mainly addressing child visitation and travel issues. On June 28,

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[34] II RA 251, 240.

[35] X RA 1770.

[36] II RA 229.

[37] II RA 258-280.

[38] II RA 281-304.

Raina filed her *Opposition*,[39] and a countermotion claiming that Erich had not cooperated in getting the necessary military retirement order filed.[40]

Erich filed a *Reply* on July 6,[41] claiming that the military does not require a "QDRO" to divide military retirement,[42] and falsely claiming that the *Decree* did not specify who was to prepare the pension division order, but explicitly confirming his agreement to "abide by the Decree" and "effectuate" the military retirement division.[43]

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[39] II RA 312-391.

[40] II RA 318.

[41] II RA 392-404.

[42] II RA 397. This is *partially* true as an order dividing a military pension is not called a "QDRO." It is called a Military Benefits Division Order (MBDO) or, in statutory language, an Order Incident to Decree ("OID"). *See* 10 U.S.C. § 1408(a). However labeled, a specific *Order* dividing the pension *is* required.

[43] II RA 397; see II RA 245.

At the hearing on July 12, the court ordered both parties to submit all necessary information to QDRO Masters to prepare an *Order Incident to Decree* ("OID"), and to pay half the cost of preparation of the order, as required by the *Decree*.[44]

They did so, and the OID[45] included the following provisions in accordance with the terms of the MSA and the stipulated *Decree of Divorce*:

> [Military retirement benefits] also includes all amounts of retired pay Erich actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any post-divorce waiver made in order to qualify for Veterans Administration benefits, or reduction in pay or benefits because of other federal employment, and any waiver arising from Erich electing not to retire despite being qualified to retire.[46]
>
> . . . .
>
> If Erich takes any action that prevents, decreases, or limits the collection by Raina of the sums to be paid hereunder (by application for or award of

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[44] III RA 406-407, 480.

[45] III RA 470-478.

[46] RA 473.

> disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other federal service, or in any other way), he shall make payments to Raina directly in an amount sufficient to neutralize, as to Raina, the effects of the action taken by Erich. Any sums paid to Erich that this court Order provides are to be paid to Raina shall be held by Erich in constructive trust until actual payment to Raina.[47]

The OID explicitly reserved jurisdiction for the district court to issue "such further orders as are necessary to enforce the award to Raina," including an award of alimony.[48] There is a long line of authority upholding such alimony reservations.[49]

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[47] III RA 474.

[48] III RA 475. These explicit reservations of jurisdiction are important, since some courts have held that where parties do ***not*** provide for mechanisms through which to address a waiver of retirement benefits, trial courts are unable to do so. *See*, *e.g.*, *Stojka v. Stojka*, 2017 Md. App. LEXIS 1095, 2017 WL 5036322 (even after *Hurt v. Hurt-Jones*, 168 A.3d 992 (Md. 2017) (compensation to wife through other property or support should be considered), trial court could not indemnify wife if the parties *waived* their right to have a court adjust the equities between them by way of monetary award or the transfer of ownership interest in other assets or benefits).

[49] *See*, *e.g.*, *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978); *In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982); *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

At the return hearing on September 22, Raina's counsel complained that Erich had not yet signed and returned the OID.[50] Erich's counsel, Mr. Kelleher, promised to promptly do so:

> The other issue that we have, Your Honor, which is – and – and are housekeeping. We are – are very clear about them. First of all, as to the QDRO, my client's paid – he – he has paid QDRO Masters for his half of that. I don't know where the order is, ***but we're happy to – you know, we'll sign off.*** We'll review it and then obviously sign off on it."[51]

When the court directly asked Erich if he had signed the OID, he confirmed that he had not yet done so based on his unrelated concerns about Raina's boyfriend:

> Oh, I haven't signed off yet, Your Honor, because I wanting to discuss with Raina during the – the mediation proceedings in regards to the fact that she has been living with Tony (ph) for like years prior to us actually even being divorced. And based on the fact that she was in a domestic partnership and has

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[50] III RA 419-420.

[51] IX RA 1715 [Emphasis added].

> kind have been, you know, drawing from both pots, both mine and her boyfriend, Anthony Rickards (ph), along with the fact that I've provided like a hundred thousand dollars' worth of like money towards her college, and I have paid like $3,500 a month for almost three years – that she should be willing to . . . back down."[52]

The court was unimpressed by Erich's holding up the stipulated order based on unrelated matters:

> Hold on. Those are all issues that are – you had a decree. This is a piece of the decree, the divorce decree. It needs to be completed. I want it postmarked in the mail no later than 5:00 p.m. Friday signed. We need to get that QDRO executed, okay?[53]

Erich responded: "Understood, Your Honor."[54]

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[52] IX RA 1754-1755.

[53] IX RA 1755; III RA 420. The OID was erroneously referred to as a "QDRO" throughout the proceedings by various participants in the proceedings.

[54] IX RA 1755.

Erich returned the signed OID, which was filed on November 14, 2016.[55] At no time during the hearings of July 12 or September 22 was there any argument of any kind from anyone concerning the military retirement benefit ***terms*** of the MSA, the *Decree*, or the OID.[56] Neither party filed a motion to alter or appeal the orders from July 12 or September 22, 2016, or from the *Decree* or the OID, all of which are long since final and unappealable.

From 2016 through 2019, the parties returned to court repeatedly, mainly in continuing squabbles over child custody and support terms, but there were no proceedings related to the division of the military retirement.[57]

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[55] III RA 470-478.

[56] Despite this history, Erich repeats on appeal (AOB at 11) the false assertion that he "did not voluntarily assent" to the terms spelled out in all three documents he negotiated, signed, and never contradicted or complained about in any filing or hearing over several years.

[57] See RA volumes IV, V, VI.

Erich retired from the military in late 2019, and Raina received her first payment from the Defense Finance and Accounting Service (DFAS) in November 2019, in the amount of $844.08. She received the same payment in December 2019, and in January of 2020 she received $845.43, which included an annual COLA.[58]

In mid-January 2020, DFAS contacted Raina explaining that since Erich was no longer receiving retired pay, she would not be receiving any further money.[59]

Raina then contacted Erich about the retirement, but in violation of court orders[60] he refused to provide any information to her. Raina contacted DFAS, which responded by verifying that Erich had opted for full disability under the Combat Related Special Compensation (CRSC) program, which meant that he had waived all

[58] VI RA 1046; VII RA 1317-1318.

[59] VI RA 1046.

[60] III RA 474.

retirement pay in exchange for tax free payments from the Veteran's Administration, and that DFAS would no longer be sending Raina any further funds.[61]

After receiving the response from DFAS, Raina contacted Erich in March and asked how retirement payments would be paid moving forward and how the back payments would be made-up. Erich responded that under the decision in *Howell v. Howell*[62] he was not required to pay her and he would not be paying.[63] Raina sent Erich a copy of the *Decree* and reminded him that they had agreed that he would pay any difference if he opted for a disability. He ignored her.[64]

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[61] VI RA 1046-1047.

[62] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017).

[63] VI RA 1046; VII RA 1318.

[64] VI RA 1047.

On May 1, 2020, Raina filed a *Motion to Enforce*,[65] which Erich opposed "in proper person"[66] making a number of false assertions of fact and law.[67] Raina filed a *Reply* pointing out the plentiful law around the country by which a contract to make payments in the event a disability award is taken is enforceable, and that these parties explicitly made and repeatedly confirmed such a contract in their MSA, *Decree*, and OID.[68]

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[65] VI RA 1043-1060.

[66] VI RA 1107-1119. The filing was obviously ghost-written without disclosure in violation of Nevada Formal Ethics Opinion #34. On appeal, his counsel called the submission "impressive." AOB at 11.

[67] For example, denying (at RA 1113) that the MSA and the *Decree* included terms requiring Erich to compensate Raina if he elected to take disability compensation. See I RA 171; II RA 245.

[68] VII RA 1196-1210.

On June 12, Mr. Kelleher filed a *Notice of Appearance of Counsel*,[69] followed by a "Supplement" the day before the hearing re-arguing Erich's position on all matters, including the military retirement benefits issue.[70]

The district court entertained argument from counsel concerning the unresolved military retirement pay. Upon court inquiry, Erich's counsel advised that Erich was fully satisfied with the existing briefing on this issue,[71] but Raina's counsel asked for an opportunity to respond to Erich's late-filed *Supplement*, was given permission to file a *Reply* to it,[72] and did so.[73] No further argument was held.

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[69] VII RA 1254-1255.

[70] VII RA 1256-1269.

[71] X RA 1801.

[72] VII RA 1272; X RA 1803.

[73] VII RA 1280-1291.

On August 11, 2020, the family court entered its *Order Regarding Enforcement of Military Retirement Benefits*.[74] *Notice of Entry* of that order and of the OID was filed the same day.[75]

The *Order Regarding Enforcement* started with the words of the stipulated *Decree* and OID, going over the language in both documents, and noting the explicit reservation of jurisdiction to compensate Raina by way of an award of alimony or otherwise if Raina's share of the military retirement benefits was lost by reason of Erich's election of disability benefits.[76]

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[74] VII RA 1315-1340.

[75] VIII RA 1341, 1367. For no reason apparent from the record, Erich filed another *Notice of Entry* of the OID about two months later. VIII RA 1456.

[76] VII RA 1315-1317. Erich falsely claims (AOB at 12) that permanent alimony was "denied"; the family court was clear that its order was a temporary, without prejudice denial of the mechanism of alimony based solely on the lack of a Notice of Entry, which was remedied the same day.

The court squarely addressed Erich's claim that he did not sign the OID "voluntarily," rejecting the contention on the basis of the court's review of the hearing video during which Erich had no objection to the terms of the order, but had not signed and returned it because of his unhappiness with "other unrelated unresolved matters."[77]

The court provided a summary of the development of the law governing military retirement benefits from 1981 to the present, detailing the analogy of this case to the facts of *Mansell*,[78] in which the parties' divorce had pre-dated both the *McCarty* decision[79] and the Uniformed Services Former Spouses Protection Act.[80]

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[77] VII RA 1317.

[78] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

[79] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[80] 10 U.S.C. § 1408, *et seq*. VII RA 1318-1321.

As the family court noted, in the *Mansell* case itself, the United States Supreme Court held that state courts could not divide military retired pay, but on remand Mr. Mansell was required to continue making payments to Mrs. Mansell under the terms of their final, unappealed *Decree of Divorce* as a matter of *res judicata*.[81]

The United States Supreme Court had footnoted in the *Mansell* decision that the issue of *res judicata* is a matter of state law "over which we have no jurisdiction,"[82] and the Court rejected Mr. Mansell's petition for certiorari challenging the order that he was required to continue making payments as he had stipulated to do in his final, unappealed divorce decree.[83] The family court noted that neither

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[81] VII RA 1320-1321.

[82] VII RA 1321, *quoting Mansell*, 490 U.S. at 586 n.5.

[83] VII RA 1321, quoting *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 230, 265 Cal Rptr. 227, 233 (Ct. App. 1989), on remand from 490 U.S. 581, 109 S.Ct. 2023 (1989).

Mansell nor *Howell* involved an explicit contractual indemnification provision, "leaving enforceability of such a provision unresolved."[84]

The family court noted that the Martins negotiated their divorce long after *McCarty*, the USFSPA, and *Mansell*, and their lawyers were familiar with the decades-old statutory and case law. The court found that the parties explicitly "contemplated the probability that Erich would eventually waive his military retired pay for veteran's disability benefits" and contracted for indemnification in both their stipulated *Decree* and in their stipulated OID, specifically agreeing that the form of reimbursement could be by way of alimony.[85]

Turning to *Howell*, the family court noted that the decision dealt with court-imposed indemnification, not the agreement of parties or a reservation of jurisdiction

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[84] VII RA 1321.

[85] VII RA 1322.

to award alimony, and quoted the United States Supreme Court's specific invitation to do exactly that in such circumstances:

> [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.[86]

The family court found that the Martins' express agreement for contractual alimony was consistent with what the United States Supreme Court directed parties and courts to do.[87]

The family court then turned to the national case law issued after *Howell*, and noted the few cases cited by Erich in which courts had interpreted *Howell* "broadly" so as to disallow "a remedy in any form if the purpose of that remedy is to replace in

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[86] VII RA 1323, quoting *Howell*, 137 S.Ct. At 1406.

[87] VII RA 1323-1324.

full lost military retired pay,"[88] but also noted that those minority opinions had been roundly criticized by legal scholars as "unnecessarily overbroad."[89]

As noted by the family court, the weight of published authority agrees with the academic literature that the actual holding in *Howell* is "quite narrow," allowing courts to "take the suggestion of the U.S. Supreme Court by becoming creative in their remedies after *Howell* or finding alternative theories to avoid an unfair result."[90]

Going over those cases, the family court noted the line of authority under *Rose*,[91] which was cited and specifically re-affirmed in *Howell*, under which a state court can enforce support orders, by contempt or otherwise, even if the only known source of funds of the obligor is disability pay.[92] The court noted other post-*Howell*

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[88] VII RA 1324-1325.

[89] VII RA 1325 n.1, citing law review articles collecting and analyzing the cases.

[90] VII RA 1325.

[91] *Rose v. Rose*, 481 U.S. 619, 630–634, and n.6 (1987).

[92] VII RA 1326.

cases approving the award of compensatory alimony, vacating and reallocating assets, and enforcing contractual indemnification or payment orders because "nothing in the USFSPA or *Mansell* prevents a veteran from voluntarily contracting to pay a former spouse a sum of money that may originate from disability payments."[93]

The family court noted that several of the cases cited by Erich included instructions on remand for trial courts to determine whether payment provisions in final, un-appealed decrees, were *res judicata* like the decree was found to be in *Mansell*, so that payment under the terms of those orders would be required regardless of a later change in the law.[94]

Turning to the specific facts of this case, the family court found that the stipulated *Decree* was a contract enforceable under the line of authority established

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[93] VII RA 1326-1327.

[94] VII RA 1325-1329.

by this Court, the terms of which were not ambiguous nor unconscionable, illegal, or in violation of public policy, and that the parties did exactly what *Howell* suggested and took precautions to "consider and address the possibility of waiver" by way of a contractual indemnification agreement.[95]

The family court rejected Erich's claim that the contracted term was unenforceable, noting that the cases he cited all concerned Social Security, which is ***not*** community property—not military retired pay, which ***is*** community property—that had been waived to receive benefits that could not be divided.[96] The court found this Court's opinion in *Shelton*[97] controlling, "because it expressly embraced the contract theory in military disability indemnification cases."

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[95] VII RA 1330.

[96] VII RA 1329-1332.

[97] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), *cert. denied*, 541 U.S. 960, 124 S.Ct. 1716, 158 L.Ed.2d 401 (2004).

The family court found the agreement that Erich reimburse Raina for all sums she lost to be enforceable under both the line of the authority enforcing such contracts,[98] ***and*** the line of authority that a final, unappealed divorce decree requiring such payments is *res judicata* of the payment obligation that can and should be enforced, finding that the issue was identical to that in the prior litigation, the initial ruling was final and on the merits, the parties were the same, and the issue was necessarily litigated.[99]

Finally, the family court found that it could not immediately order the payments paid by way of alimony because at that time there was no notice of entry on file for

[98] VII RA 1325-1329.

[99] VII RA 1333-1335.

the OID, but that Erich owed the arrears for all sums he had not paid to date, and to pay the contractually-stipulated sum from that date forward.[100]

On September 9, 2020, Erich filed a timely *Notice of Appeal* from only the *Order Regarding Enforcement*.[101]

On September 30, Raina filed a *Motion for Attorney's Fees and Costs Pendente Lite*.[102] It included a complete discussion of the disparity of income between the parties (essentially three to one), Erich's ability to pay,[103] argument as to the basis for the award of fees,[104] and a *Brunzell* factor analysis.[105]

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[100] VII RA 1336-1338. The Notice of Entry of the OID was filed on August 11, 2020. VIII RA 1367.

[101] VIII RA 1398.

[102] VIII RA1444-1454.

[103] VIII RA1447. See *Miller v. Wilfong,* 121 Nev. 619, 119 P.3d 727 (2005); *Wright v. Osburn,* 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998).

[104] *Id*. See *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005); NRS 125.150.

[105] VIII RA 1448-1450.

Erich filed a *Motion for Stay Pursuant to NRCP 62(d)*,[106] asserting that his express promises as set out in the MSA, the stipulated *Decree*, and the OID, were somehow "not comparable to a settlement agreement and certainly no [*sic*] the product of mutual assent" and that Raina should not receive her promised and ordered share of the community property given "the support Raina receives from her domestic partner."[107] He opposed Raina's request for fees *pendente lite*.[108] Raina filed a *Reply* and opposed Erich's request for a stay,[109] to which Erich filed a *Reply*.[110]

The district court held a hearing on November 3, 2020, on the cross-requests for a stay and for fees and issued an order on December 31.[111] The court found that

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[106] VIII RA 1469-1479.

[107] VIII RA 1475, 1488.

[108] VIII RA 1485-1542.

[109] IX RA 1551-1559, 1560-1572.

[110] IX RA 1575-1585.

[111] X RA 1831.

fees *pendente lite* were warranted because the costs of appeal was less of a financial burden for Erich than for Raina and the parties had a significant disparity of income.[112] The court granted the stay of ongoing payments during the appeal, on condition that the sums owed to Raina be paid into Erich's counsel's trust account with a monthly report to Raina's counsel that the amounts had been paid.[113]

On February 12, 2021, Erich filed a *Notice of Appeal* claiming to be appealing the *pendente lite* fees order, but attached the wrong order.[114] On March 8, Erich filed an *Amended Notice of Appeal*.[115]

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[112] X RA 1833, 1835-1836.

[113] X RA 1834, 1837; XI RA 2069, 2071.

[114] X RA 1927-1937.

[115] XI RA 1992-2034.

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

Errors of law are reviewed *de novo*.[116] Questions of constitutional or statutory construction are also reviewed *de novo*.[117]

As to any discretionary rulings, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous."[118] An open and obvious error of law can also be an abuse of discretion.[119] A court can err in the exercise of personal judgment and does so to a level meriting reversal when ***no*** reasonable judge could reach the conclusion reached under the circumstances.[120]

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[116] *Moseley v. Dist. Ct.*, 124 Nev. 654, 188 P.3d 1136 (2008); *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 197 P.3d 1051 (2008).

[117] *See Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 998 P.2d 1186 (2000).

[118] *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982).

[119] *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979).

[120] *Leavitt v. Siems*, 130 Nev. 503, 330 P.3d 1 (2014); *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P. 2d 1147 (1979); *Delno v. Market Street Railway*, 124 F.2d 965,

This Court will reverse for abuse of discretion a decision that "lacks support in the form of substantial evidence,"[121] which is "evidence that a reasonable person may accept as adequate to sustain a judgment."[122]

Here, after retirement, Erich applied for and was granted a 100% disability from his service in the United States Army. On his further application, Erich was awarded Combat Related Special Compensation (CRSC), resulting in his full waiver of disposable retired pay from the Defense Finance and Accounting Service (DFAS) that was to be divided in accordance with the terms of the parties' stipulated *Decree of Divorce*.

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967 (9th Cir. 1942).

[121] *Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

[122] *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007).

When Erich refused to pay to Raina the funds as promised in the MSA, and the *Decree*, and the OID, she filed a motion to enforce. The family court found that Erich and Raina were free to contract for any payments they wished between themselves and ruled that the terms of the *Decree* were *res judicata* as they were never appealed from or modified.

The United States Supreme Court expressly suggested in *Howell* that lawyers and courts should do exactly what was done here—provide for the contingency that military retired pay might be waived for disability in the future, by providing for an initial award or recalculation of alimony to take into account that potential waiver. This Court has repeatedly approved exactly that methodology in cases for 40 years, in line with the majority of cases from other jurisdictions and the entirety of expert legal commentary on the question.[123]

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[123] *See* Note, *A Change in Military Pension Division: The End of Court-Adjudicated Indemnification — Howell v. Howell*, 44 Mitchell Hamline L.R. 1064, 1089 (2018);

Even if somehow the contracted payments were inappropriate under *Howell*—and they are not—the final, unappealed *Decree* is *res judicata* as to these parties and just as was the result in the *Mansell* case itself, the payments as promised and ordered should be made.[124]

The Court of Appeals (COA) *Order Affirming in Part, Reversing in Part, and Remanding* on November 17, 2021, was based on that court's decision in *Byrd*[125] a couple of months earlier, but *Byrd* misread the *Howell*[126] decision and improperly sought to invalidate this Court's decision in *Shelton*, and should be disapproved.

Military Pension Division Cases Post-Howell: Missing the Mark, or Hitting the Target? Journal of the American Academy of Matrimonial Lawyers, Vol. 31, Mar 13, 2019, pg 513 ["AAML Journal"].

[124] The existence of a prior final unappealed decree can be important, as there are some courts that have indicated that if *Howell* already existed during current divorce litigation, they would have the court consider its impact on an agreement in that litigation. *See Russ v. Russ*, 2021-NMSC-014, 485 P.3d 223, 2021 N.M. LEXIS 12, 2021 WL 1220719, reversing 456 P.3d 1100 (N.M. Ct. App. 2019).

[125] *Byrd v. Byrd*, 137 Nev. ___, ___ P.3d ___ (COA Adv. Opn. No. 60, Sept. 30, 2021).

[126] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017).

I. ARGUMENT

Analysis of VA waivers after *Howell* requires understanding the underlying factual context of the case. *Howell* did ***not*** involve an agreement by the parties for the husband to pay back any waived money, and the opinion said nothing about the enforceability of any such agreement. The decision also did not address *res judicata* in any way, or disturb the prior law on the subject as set out in *Mansell I* and *Mansell II*.

Nationally, Courts have addressed what the "scope of preemption" actually means, and the great majority of cases have concluded that *Howell* does not alter state's power under the doctrine of *res judicata* to enforce final, unappealed divorce decrees. They also have upheld contractual indemnification.

A. It Is *Res Judicata* That Erich Owes Reimbursement Payments to Raina

This Court has faced exactly this issue several times, and it should be resolved here the same way it was resolved in the prior cases, for exactly the same reasons.

In *Duke v. Duke*, the parties had divorced in 1980 and the Decree called for the wife to receive 35% of the husband's military retired pay.[127] After the decision in *McCarty*, the husband refused to make any payments to the wife, claiming that federal law stated that she was not entitled to anything.

At the district court, the wife moved to enforce arrearages, and the husband claimed that the court was powerless to enforce the Decree in light of the federal case law stating that military retirement benefits belonged to the veteran alone. The district court disagreed, and the husband appealed.

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[127] *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982).

This Court, noting that the husband had not appealed from the Decree, was direct and explicit:

> Nothing in *McCarty* . . . suggests that the Supreme Court intended its decision to apply retroactively to invalidate, or otherwise render unenforceable, prior valid and unappealed state court decrees. . . . *McCarty* does not alter the *res judicata* consequences of a divorce decree which was final before *McCarty* was filed.

In 1989, the United States Supreme Court decided *Mansell*,[128] holding that disability benefits were not part of disposable retired pay and therefore not divisible marital property. It had no effect on this Court's string of decisions following *Duke*.

In 1998, this Court issued an unpublished order in *Krone v. Krone*,[129] requiring a husband to continue making the payments to the former spouse contracted for in the

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[128] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

[129] *Krone v. Krone*, No. 27235, *Order Dismissing Appeal and Cross-Appeal* (Unpublished disposition, May 20, 1998).

parties' marital settlement agreement, which was ratified by their final, unappealed divorce decree, as a matter of *res judicata*.

The *Shelton*[130] case in 2003 involved a couple who divorced after *McCarty* and passage of the USFSPA, in which the husband ceased making the stipulated payments to the wife and claimed that *Mansell I* prevented the courts from enforcing the payment term.[131] This Court, citing *Mansell II*,[132] noted that "states are not preempted from enforcing orders that are *res judicata*," and enforced the contracted-for equal

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[130] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), *cert. denied*, 541 U.S. 960, 124 S.Ct. 1716, 158 L.Ed.2d 401 (2004).

[131] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

[132] *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (Ct. App.1989) (Mansell II), *cert. denied*, 498 U.S. 806, 111 S.Ct. 237, 112 L.Ed.2d 197 (1990).

division of payments received by the husband.[133] Mr. Shelton petitioned for certiorari.

The United States Supreme Court denied certiorari in *Shelton*, as it had done in *Mansell II*, apparently for the reason explained in *Mansell I* and noted by the family court in *this* case: "the issue of res judicata is a matter of state law over which [federal courts] have no jurisdiction."

In 2017, *Howell* affirmed *Mansell*, and said nothing whatsoever about the *Mansell I* holding about *res judicata*; no known federal decision has issued criticizing the reasoning of or legal bases relied upon by this Court in *Shelton*. During the past

[133] The same day it issued *Shelton*, this Court issued a decision in *Olvera v. Olvera*, No. 38233, *Order of Remand* (Unpublished disposition, Oct. 29, 2003), holding that where a former spouse received benefits for many years until the member applied for and received disability 25 years later and so eliminated the spousal share, the member had waived any right to challenge the division or its amount as set out in an unappealed 1988 order despite the *Mansell* holding in 1989).

20 years, this Court has repeatedly stressed the importance of *res judicata* in divorce actions.[134]

Over the years there have been many efforts by military members to stop making payments required by final, unappealed divorce decrees based on later federal cases; they have failed, with fair uniformity, on *res judicata* grounds. In one particularly notable 1988 federal case (referencing many such cases from throughout the country), the United States Claims Court carefully examined a class action brought by groups of former military members divorced before or after the relevant cases, whose divorce decrees divided the military retirement benefits, and who sought to reduce or eliminate payments to their former spouses.[135]

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[134] *Duke v. Duke*, *supra*; *Doan v. Wilkerson*, 130 Nev. 449, 328 P.3d 498 (2014) (legislatively overruled on other grounds by NRS 125.150(3)).

[135] *Fern v. United States*, 15 Client. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

The federal Claims Court soundly rejected all such contentions, and the federal Circuit Court affirmed with equal unanimity, despite the decision in *Mansell I* issuing during the appeal. The opinion recounted the retirees' "odysseys through the state and federal courts challenging state court decrees dividing their retired pay" and noted that the retirees "were unable, as a final matter, to convince any of these courts that division of their retirement pay was unconstitutional or legally improper."

Erich argues (AOB at 22-23) that *Howell* applies "retroactively," but that false "issue" is sophistry. The actual question is whether *Howell* said anything to alter the holding in *Mansell I* that issues of *res judicata* are outside the scope of its holdings, which is why Mr. Mansell was required to continue making payments to Mrs. Mansell after the Supreme Court's decision in the *Mansell* case itself. None of the cases cited by Erich involved a military member who, years after a final, unappealed divorce decree, stopped making payments required by that decree.

Several of the reported cases upholding contractual indemnification in unappealed divorce decrees as *res judicata* are virtually identical to this case. For example, in *In re Marriage of Weiser*,[136] the Washington court found—exactly as Judge Burton did in this case—that the husband was barred from attacking the unappealed final decree because his motion involved (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made, as did a prior adjudication. All required findings were made by Judge Burton.

Similarly, in *Boutte*, the court in Louisiana (also a community property state), found the parties came to court for trial but entered a stipulated consent judgment which meant that the matter had actually been adjudicated.[137]

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[136] *In re Marriage of Weiser*, 475 P.3d 237 (Wash Ct. App. 2020).

[137] *Boutte v. Boutte*, 304 So.3d 467 (La. Ct. App. 2020).

The Court of Appeals, however, gave short shrift to any consideration of *res judicata*, not even discussing any of the recent appellate cases discussing it, and only mentioning the doctrine in footnote 4, incorrectly stating that the indemnification provision "could not have fully litigated until Erich waived his disability pay" and was therefore "not ripe for adjudication," citing this Court's decision in *Alcantara*.[138]

Respectfully, the Court of Appeals missed the point and misapplied the doctrine. *Alacantra* was a tort suit questioning whether an heir was bound by the actions of a predecessor; the relevant portion of the case actually leads to the opposite conclusion than that reached by the Court of Appeals. It holds that whether an issue was "actually and necessarily litigated" turns on whether "the common issue was necessary to the judgment in the earlier suit."[139]

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[138] *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 262, 321 P.3d 912, 918 (2014).

[139] 130 Nev. at 262.

Here, the indemnification clause for future disability was actually raised, negotiated, and stipulated, and the parties agreed that the various terms were integrated, stating "each provision herein is made in consideration of all the terms in the Decree of Divorce as a whole."[140] In other words, the contingency that the military retirement might be waived for a future disability award and indemnification for that contingency was an explicit consideration of the rest of the property and support terms, and therefore was "necessary to the [divorce] judgment." It was the creation of the ***contingency*** that was necessary to litigation of the divorce, not the actual disability application anticipated to occur in the future.

The Court of Appeals recited (at 7) that *Shelton* was issued before *Howell*. That is true, but irrelevant. *Shelton* was decided ***after*** *Mansell*, and discussed *Mansell* at length, and *Howell* simply affirmed *Mansell*.

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[140] II RA 248, 250.

Erich makes the unsupported claim (AOB at 37) that *Shelton* is "outdated and unworkable," but makes no showing of any kind how or why that is true. As detailed in the cases reviewed above, *res judicata* enforcement of final, unappealed divorce decrees has been applied to properly prevent unjust deprivation and unjust enrichment for more than 20 years.

B. Federal Pre-emption Does Not Bar Application of *Res Judicata* to Enforce Final, Unappealed Decrees

The Court of Appeals (at 7) cited its own recent opinion in *Byrd* as the basis for the general statement that "federal preemption" bars courts from enforcing final unappealed divorce decrees regarding indemnification provisions for military disability, and on that basis sought to overrule this Court's holding in *Shelton*. The Court of Appeals was mistaken.

As noted in the recent, comprehensive, and well-reasoned decision by the Michigan Supreme Court in *Foster*,[141] there is a critical distinction between a judgment that is void for a total lack of jurisdiction, and a judgment that is voidable for a "mistake in the exercise of undoubted jurisdiction," the latter of which may be challenged on appeal but is not subject to collateral attack.[142]

Foster involved a "consent judgment" (stipulated decree) dividing military retirement benefits and stating that if the member waived a portion of the retirement to receive disability benefits, he would continue to pay the spouse the same amount, a term that court labeled "the offset provision." As anticipated and contracted for, the member subsequently elected to receive increased disability benefits, including

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[141] *Foster v. Foster*, ___ N.W.3d ___ (Mich. No. 161892, Apr. 3, 2022).

[142] *Id*. at 11-12. This Court has noted the same distinction. *See Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002).

Combat-Related Special Compensation ("CRSC") under 10 U.S.C. § 1413a. These facts are identical to the *Martin* case.

As that court explained, only judgments entered without personal jurisdiction or subject-matter jurisdiction are ***void*** and subject to collateral attack, and it is a sloppy use of the word "jurisdiction" to confuse substantive law with a court's general authority to take action.[143] "Federal pre-emption" as to military disability benefits did nothing to remove cases involving that subject from state courts to a federal forum, and did not limit a state court's power to hear divorce cases involving a party's military or disability benefits.[144]

Turning to its law of *res judicata*, which is the same as the law this Court applied in *Shelton*, the Michigan Supreme Court held:

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[143] *Id*. at 11-13.

[144] *Id*.

> The doctrine of *res judicata* bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. A judgment of divorce dividing marital property is *res judicata* and not subject to collateral attack even if the judgment may be have been wrong or rested on a subsequently overruled legal principle; in other words, the doctrine of *res judicata* applies to a valid but erroneous judgment. A divorce decree that has become final may not have its property-settlement provisions modified except for fraud or for other such causes as any other final decree may be modified. The doctrine of *res judicata* in this context is an issue of state law. Thus, a provision in a consent judgment of divorce that divides a veteran's military retirement and disability benefits is generally enforceable under the doctrine of *res judicata* even though it is preempted by federal law.

The Michigan Supreme Court explained why that result was proper given the distinction between void and voidable judgments:

> In this case, even though the offset provision in the consent judgment was contrary to federal law, the judgment was not void or subject to collateral attack, because the type of federal preemption at issue does not deprive

> Michigan courts of subject-matter jurisdiction and there was no other justification for a collateral attack on the consent judgment. Accordingly, the Court of Appeals erred when it concluded that the type of federal preemption at issue in this case deprived state courts of subject-matter jurisdiction.

Those procedural facts, and the holding at issue, are also identical to this case. The Michigan court noted the same holding from *Mansell I* noted by the district court here: application of the doctrine of *res judicata* is a matter of state law over which the federal courts have no jurisdiction, and the indemnification provision should be enforced accordingly.[145]

The Michigan court observed that its "holding places us in good company because the majority of state courts have held that 'military benefits of all sorts can

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[145] *Id*. at 9, noting that the Supreme Court had dismissed *Sheldon v. Sheldon*, 456 US 941 (1982), for want of a substantial federal question; it was a petition raising the issue of whether "federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law") and that such a dismissal is binding precedent under stare decisis.

be divided under the law of res judicata.'"[146] In fact, Judge Burton's decision is in accord with the great majority of cases and ***all*** of the expert commentary.

The Michigan court noted that its holding was also in accordance with the seminal United States Supreme Court decision in *Rose*[147] which had rejected similar attacks on state court judgments holding veterans in contempt for non-payment of child support when their only income was military disability benefits. In that case, like these indemnification cases, the state court is not intruding on a federal administrator's decision whether to award disability benefits, and the federal statute "does not refer to, restrict, or displace state court jurisdiction."[148] *Rose* was specifically cited to and reaffirmed by the United States Supreme Court in *Howell*.

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[146] *Id*. at 10, n.6, quoting and citing 2 Turner, EQUITABLE DISTRIBUTION OF PROPERTY (4th ed.), § 6:9 at 72-73, listing cases, and noting that none of the known contrary authority cites either *Sheldon* or footnote 5 in *Mansell* and "[n]one have showed any awareness of the post-remand history of *Mansell*."

[147] *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029 (1987).

[148] *Foster*, *supra*, at 16.

Here, the Court of Appeals reversed Judge Burton's decision under *Byrd*, which decision purported to invalidate this Court's opinion in *Shelton* based on a mistaken reading of the law of "federal pre-emption." This Court should reverse the Court of Appeals' decision in this case, and hold that *Byrd* is overruled to the extent that it holds that *Shelton* is not valid authority for enforcing under *res judicata* the terms of a final, unappealed, divorce decree involving an indemnification provision for military disability benefits.

C. The Family Court Properly Enforced the Parties' Stipulated Contract

Erich specifically contemplated paying to Raina any amounts that were waived due to disability. Specifically, the *Decree of Divorce* states:

> Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status.

The contractual agreement between Raina and Erich is unambiguous and not subject to any other interpretation. He has the obligation to make payments directly to Raina in any amount that she loses as a result of his unilateral action. Where he gets the money is immaterial to the question as to whether he is required to pay.

Indemnity is "(1) A duty to make good any loss, damage, or liability another has incurred. (2) The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. (3) Reimbursement or compensation for loss, damage, or liability."[149] Contractual indemnification never came up in the *Howell* case because there was no agreement to indemnify involved in that case, just a property settlement for a 50/50 division of the pension.

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[149] *Black's Law Dictionary* 308 (Bryan A. Garner ed., Pocket ed., West 1996).

The distinction is important. In *Mansell*, cited in *Howell*, the husband had argued that federal law did not allow for agreement by the parties to divide those benefits, but the Court declined to consider or address those arguments. As detailed above, on remand, the husband was ordered to continue paying the contracted-for portion of the disability pay.

In other words, the Supreme Court left open the ability of parties to contract for indemnification of the spouse by an agreement to pay the spouse for any waived retired pay. In fact, *Howell* itself instructs attorneys and courts to take that "contingency" into account and draft decrees of divorce accordingly:

> Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support.

That sentence contains the disjunctive "or" in its center – "take account of the contingency" is one option, and "calculating or recalculating alimony" (addressed

below) is the other.[150] The Court of Appeals (at 7, fn.6) failed to recognize that *either* mechanism could be used under *Howell*.

Howell on its face allows parties and courts to consider the potential loss of the military retirement benefits and to provide for remedial action in decrees. This is completely compatible with Nevada law, which has long expressly embraced the contract theory in military disability indemnification cases.

Here, Raina and Erich ***did*** expressly contemplate the possibility of Erich taking some disability at the time he was to retire, and created a contract that provided for the direct indemnification by Erich to Raina if the contingency actually arose. In other words, they "took account of this contingency" at the time of divorce, just as the United States Supreme Court said that they should.

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[150] *See*, *e.g.*, *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996) (noting that a provision with an "or" is in the disjunctive); *Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (a sentence using "the disjunctive 'or,' and not the conjunctive 'and,' requir[es] one or the other, but not necessarily both").

Specifically, their agreement and decree includes the specific contract that, "Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." This contractual agreement did not exist in the decree at issue in *Howell*, and provides a specific contractual remedy agreed by the parties, not imposed by a court.

This issue has been studied in depth by members of the American Academy of Matrimonial Lawyers (AAML); the issue of contractual agreement was thoroughly analyzed in a recent volume of its Journal, in which the *Howell* decision was dissected and determined to be actually a very narrow decision which applies only to cases in which there is no underlying agreement, and leaves open the possibility of contractual agreements. In other words, *Howell* does not apply to this case.

A Texas court explained why such contracts do not run afoul of *Howell*:

> A property settlement agreement incorporated into a divorce decree is treated as a contract in Texas, and its meaning is governed by the law of contracts. *McGoodwin*, 671 S.W.2d at 882. Rudolph has not pleaded any theory in avoidance of the contract's provision for alternative distributions to Jamieson in the event of his waiver of retired pay or receipt of other separation compensation.[151]

In Nevada as well, a property settlement agreement is a contract and enforcement of such a contract is governed by normal principles of contract law. As such, when a party contracts to pay a certain amount to another person, the source of the funds to be used has no bearing on the requirement to pay, as this Court held in *Shelton*, and in keeping with the United States Supreme Court holding in *Rose*.

The Alaska Supreme Court very recently upheld contractual indemnification for waiver of military retirement in favor of disability on exactly those grounds.[152]

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[151] *Rudolph v. Jamieson*, No. 03-17-00693-CV, 2018 Tex. App. LEXIS 3983 (Memorandum Decision).

[152] *Jones v. Jones*, ___ P.3d ___ (Supreme Court No. S-17977, No. 7586, 2022 Alas. LEXIS 25, Mar. 4, 2022), holding that federal law does not preclude enforcing one

The Decree language at issue in *Jones*, found to have created valid contractual indemnification regardless of *Mansell* or *Howell*, is ***identical*** to that at issue in this case.[153]

As the Alaska Court held, "*Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement. Nor does *Howell* preclude courts from enforcing such an agreement."[154] The better-reasoned cases

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spouse's promise to pay another a sum of money each month, even if the source of the money is military disability pay).

[153] I created the "standard form" for military retirement which was printed nationally by the ABA in 1995 and has been in use throughout the country since that time. *See*, *e.g.*, *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002) (noting as "standard language" the form paragraphs created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity of the intent to contractually indemnify, first published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses" in 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30).

[154] *Jones v. Jones*, *supra*, noting that "A treatise on military divorces concurs, observing that "[i]t's one thing to argue about a judge's power to require . . . a duty to indemnify," but "another matter entirely to require a litigant to perform what he has promised in a contract." 2 Mark E. Sullivan, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES 691 (3d ed. 2019) (explaining that the *Howell* decision "magnifies the importance of using an indemnification provision in the property settlement" for parties negotiating division of marital property).

throughout the United States that have considered the issue have come to same conclusion.[155]

There are a few jurisdictions which have come to the opposite conclusion and elected, as did the Court of Appeals here, to read *Howell* superficially and over-broadly so as to prohibit contractual (and even *res judicata*) enforcement of indemnification terms, but they are in the minority and as noted in the cases and expert commentary quoted above disregard the relevant federal holdings about *res judicata* and whether federal pre-emption addresses substantive law or subject matter jurisdiction.

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[155] *Boutte v. Boutte*, *supra* (if matter had been tried, *Howell* would have applied, but parties came entered a compromise which meant that the matter had "actually been adjudicated"); *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018) (this is simply enforcement of "a contractual obligation requiring Gross to pay Wilson a specific amount from any of his resources. . . . even if the payments originated from Gross's disability pay, nothing in the USFSPA or *Mansell* prevents a veteran from voluntarily contracting to pay a former spouse a sum of money that may originate from disability payments"); *Rudolph v. Jamieson*, *supra*; *Berberich v. Mattson*, 903 N.W.2d 233 (Minn. Ct. App. 2017) ("In reality, neither express contractual indemnification nor res judicata was present in the *Howell* case, and the Supreme Court did not rule on those two issues").

The Court of Appeals (at 7) summarily found the contractual analysis of *Shelton* superseded by its decision in *Byrd*; that error is addressed above, and if *Byrd* is disapproved as requested, little need be added to enforcement of *Shelton's* holding.

In passing, the Court of Appeals attempted to distinguish *Shelton* because it dealt with a decree entered by joint petition "whereas here we only have a decree and an order incident to divorce that merged all agreements."

The attempted distinction is erroneous because a joint petition decree is legally identical to a stipulated decree entered into pursuant to a MSA.[156] Both are merged decrees, and both contain readily-identifiable contractually-agreed terms. They analyze identically. The contractual indemnification by Erich of the payments to Raina should be enforced.

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[156] *Compare* NRS 125.130 *with* NRS 125.184.

D. Public Policy Supports Upholding Parties' Agreements

Erich's brief suggests (AOB 31) the remarkable proposition that "public policy" supports permitting him to lie in repeated sworn promises, cheat his former spouse out of her half of benefits earned during marriage, and steal her property for himself. Erich claims (AOB 31) that it is "wholly unfair" to require him to honor his multiple specific sworn promises and agreements.

Erich was represented by competent counsel throughout the mediation, and his attorney drafted the explicit promises Erich made to compensate Raina for any losses she would suffer if he chose to waive the divisible retirement benefits in favor of non-divisible disability benefits, after Erich extracted in exchange a reduced term of alimony in an integrated agreement.

Of course, it is a fundamental part of Nevada law that parties are free to contract and the Court is required to enforce contracts so long as the terms are not

unconscionable, illegal, or against public policy.[157] Requiring parties to actually honor their promises and not lie, cheat, and steal is not against public policy.

In fact, it is the public policy of Nevada that parties' agreements are to be given full legal effect, and that "An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."[158] This record, read without selective deletions, contains at least four written promises by Erich, both when *pro se* and when represented by multiple attorneys, to fully indemnify Raina from any loss of benefits if he waived retirement benefits in favor of disability benefits.

Erich makes many other misrepresentations of both fact and law, as when he claims that this Court's case law states that if there is any kind of disability, it is

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[157] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009); *Grisham v. Grisham*, 128 Nev. 679, 289 P.3d 230 (2012); *Phung v. Doan*, No. 69030, Order Affirming in Part, Reversing in Part, and Remanding (Unpublished Disposition May 10, 2018).

[158] *Shelton*, *supra*, 119 Nev. at 497, 78 P.3d at 510.

"categorized as separate property." Actually the very case he cites[159] states on its face that the retirement component of any benefits marked "disability" are community property, with only benefits received in *excess* of the retirement payable based on the same service properly designated as separate property.

Every U.S. Supreme Court opinion finding any level of preemption has warned of the harm to both individuals and society of depriving spouses of their share of the community property, and in *Howell* the Court urged counsel and courts to take steps to anticipate the possibility of such a waiver and build in protections for a spouse like Raina.

These parties did so—at least four times—and if there is a public policy to be served here, it is honesty and the avoidance of wrongful enrichment. Jingoism and

[159] *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

flag-waving appeals for unequal justice, wrongful deprivation, and unjust enrichment have no place in this, or any other, appeal.

E. An Alimony Form of Compensation Is Also Proper

In *Shelton*, alimony was unavailable to the district court because it had been explicitly waived upon divorce, leaving the parties solely to the contract theory for property. Other states have dealt with this problem by allowing alimony even when it *was* waived in the Decree.[160] In this case, however, the agreement for limited-term alimony was part of an expressly-integrated divorce decree requiring Erich to make reimbursement payments to Raina, and his violation of that condition permits the trial

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[160] *See*, *e.g.*, *Fattore v. Fattore,* 203 A.3d 151 (N.J. App. Divorce. 2019); *IRMO Perkins*, 26 P.3d 989 (Wisc. App. 2001); *Jennings v. Jennings*, No. 16AP-711, 2017 Ohio App. Lexis 5406 ("the United States Supreme Court's comments in *Howell* ... support the conclusion that a court may include VA disability benefits as a source of income to be considered in awarding spousal support"); *In re Marriage of Moss*, No. 21-0307, 2022 Iowa App. LEXIS 350 (Iowa Ct. App. Apr. 27, 2022) (where retirement is waived for disability, courts may reinstate a finite award of alimony that has already terminated).

court to make further awards of alimony under the explicit terms of the *Decree* and OID, and as the United States Supreme Court explicitly recommended in the *Howell* decision itself.

Specifically, the final and unappealed OID in this case explicitly reserved jurisdiction to the family court to make a further award of alimony as a remedy in the event that payments were not made, and that order can be entered on remand, since the *Notice of Entry* of the OID was filed. An explicit reservation of jurisdiction has no time limit or expiration; there are at least 32 Nevada opinions involving such reservations of jurisdiction, going back to at least the 1940s.[161]

[161] *See*, *e.g.*, *Winn v. Winn*, 86 Nev. 18, 467 P.2d 601 (1970); *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428 (1984).

Nevada law has long held that an award of compensatory permanent alimony to make up for military retirement that cannot be paid directly is perfectly acceptable and such alimony awards are even unaffected by the remarriage of the recipient.[162]

Many appellate courts have held that *Howell* does not affect the state courts' consideration of disability benefits for the purpose of determining or re-determining child or spousal support, or to make awards of other property. A California court directly stated the observation post-*Howell* in *In re Marriage of Cassinelli*[163]:

> [T]he United States Supreme Court's comments in *Howell* … support the conclusion that a court may include VA disability benefits as a source of income to be considered in awarding spousal support.

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[162] *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

[163] *Cassinelli v. Cassinelli*, 20 Cal. App. 5th 1267, 229 Cal. Rptr. 3d 801 (Cal. Ct. App., Mar. 2, 2018), vacating *In re Marriage of Cassinelli*, 4 Cal. App. 5th 1285 (Cal. Ct. App. 2016); *see also Jennings v. Jennings*, 2017 Ohio 8974 [2017 Ohio App. Lexis 5406] (2017).

Erich claims (AOB 31) that spousal support is "unavailable" because Raina's short term of regular alimony was terminated when she entered into a domestic partnership, but the very face of the alimony statute notes that there can be multiple forms of alimony in a single case,[164] and the expiration of "regular" alimony had no effect on the explicit reservation of jurisdiction to award alimony based on a future contingency.

The parties stipulated to a reservation of jurisdiction for a further award of alimony in the event of a retirement benefits waiver, exactly as the United States Supreme Court said could and should be done as a precaution in cases like this one. The Court of Appeals correctly noted (at 7, fn.7) that alimony could be addressed on remand.

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[164] *See* NRS 125.150(5), (8)-(10); *see gen'ly* Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015).

In light of the above analysis, contractual indemnification should be found due under *Shelton* as a matter of *res judicata*, and the Court of Appeals decision in *Byrd* should be disapproved. If for any reason contractual indemnification under *Shelton* is not the resulting order from this appeal, an order for permanent alimony should be entered upon remand as the parties stipulated would be done.

F. *Byrd* Should Be Expressly Disapproved

When this Court concludes that a prior decision, or a portion of a prior decision, was erroneously decided, it has disapproved that opinion so as to harmonize the case law.[165]

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[165] *See*, *e.g.*, *Romano v. Romano*, 138 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 1, Jan. 13, 2022) (overruling *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) to the extent the prior case required a district court to first determine what type of physical custody arrangement exists before considering whether to modify that arrangement); *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001) (disapproving cases suggesting that fees were awarded as damages).

The Court of Appeals looked at the *Howell* case in broad, simplistic terms. It ignored that there was an agreement between the parties that the payments would be made, and that *Howell* did not address contractual indemnification, or *res judicata*. *Howell* affirmed the decision in *Mansell*, and *Mansell* specifically held that *res judicata* was left to the state courts' determination.

As detailed above, the Court of Appeals did not consider or address the authority from around the country on the issue that even if the judgment was or could be voidable under federal law, it was to be enforced as a matter of both contractual indemnification and under the doctrine of *res judicata*.

There is a long string of cases from around the country addressing the retroactivity of cases like *Howell*, and holding that they do not apply to judgments

that have long ago become unappealable, such as those in *Byrd* and *Martin*.[166] It was error for the Court of Appeals to disregard that authority.

In *Byrd*, the Court of Appeals attempted to distinguish *Shelton*[167] from *Howell* and *Mansell* by focusing on the line of the district court order requiring the member to pay the former spouse "from" the disability payments. That misstatement by the lower court should not be dispositive, however, since the decision was actually the right one and this Court has always held that it will uphold the decision of the lower court if it reaches the right conclusion even if for the wrong reasons.[168]

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[166] Res judicata effects of a decision are not altered by the fact that the decision rests on case law overruled in a later case. This doctrine applies to United States Supreme Court opinions interpreting federal statutes, as well as to other types of opinions. See *United States v. Estate of Donnelly*, 397 U.S. 286, 90 S.Ct. 1033, 25 L.Ed.2d 312 (1970) (giving retroactive effect to a decision interpreting a federal statute but stating that such a result would not occur in cases in which parties are bound to a contrary result by a final judgment). The trial court's decision apportioning military retirement benefits, including disability retirement benefits, constitutes a final decision that should be given res judicata effect. *Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990).

[167] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003).

[168] *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court

The casual over-ruling in *Byrd* of this Court's decades of holdings enforcing contractual indemnification and *res judicata* should be expressly disapproved.

II. CONCLUSION

Even in the absence of express contractual indemnification clauses, *Howell* allows state courts to review and alter property distributions or to award alimony as a result of a member's waiver of retirement benefits in favor of disability benefits. However, what a court might do in the absence of an express agreement is not relevant here because in *this* case the parties anticipated the issue and entered into a contract specifying exactly how to protect Raina's interest.

That final, unappealed, stipulation for express indemnification was stated in the parties' MSA, and in their stipulated Decree, and in their OID. The application of *res*

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reached the correct result, even if for the wrong reason"); *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (2003) (same).

judicata to enforce such agreements was upheld in both *Shelton* and *Mansell II*, and no legal, equitable, or other principal has been suggested, in *Howell* or anywhere else, questioning the legitimacy of those precedents.

The Court of Appeals decision should be reversed, the district court decision upholding enforcement of the *Decree* should be affirmed, and this matter should be remanded for enforcement of the contracted indemnification payments, characterized as such or as alimony, so as to make Raina whole as the parties long ago agreed.

The *Byrd* decision that was the basis of the Court of Appeals' decision should be disapproved as conflicting with the holdings of this Court.

Dated this 16th day of May, 2022.

Respectfully submitted,
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//s// Marshal S. Willick
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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:

[X] This brief has been prepared in a proportionally spaced typeface using Corel WordPerfect Office 2021, Standard Edition in font size 14, and the type style of Times New Roman; or

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2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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

DATED this 15th day of May, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Willick Law Group and that on this 16th day of March, 2022, documents entitled Respondent's Answering Brief were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

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