IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS A. PICKENS, INDIVIDUALLY AND AS TRUSTEE OF THE LV BLUE TRUST,

Appellant,

vs.

DR. DANKA MICHAELS, INDIVIDUALLY AND AS TRUSTEE OF THE MICH-MICH TRUST,

Respondent.

S.C. DOCKET NO.: 83491
District Court Case No.
D-17-560737-D

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PER NRAP 26.1

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Appellant, THOMAS A. PICKENS, is an individual.

2. Jennifer V. Abrams and Shawn M. Goldstein represented Respondent, DR. DANKA MICHAELS, in the district court and have appeared in this Court.

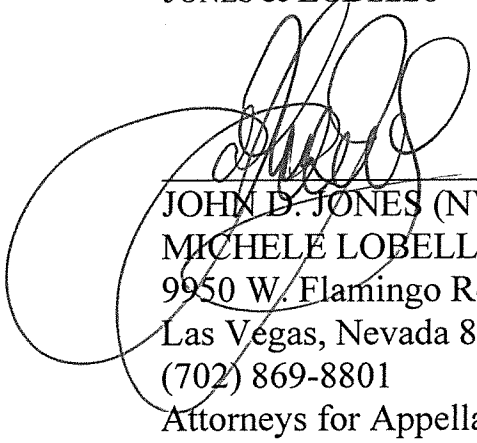
3. No publicly traded company has any interest in this appeal.

These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

DATED this 25th day of February, 2022.

Respectfully submitted,

JONES & LOBELLO



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JURISDICTION STATEMENT

This appeal from a final judgment pursuant to NRAP 3A(b)(1). The Order to be appealed is the Findings of Facts, Conclusions of Law, and Custody and Relocation Order filed on August 3, 2021, and for which Notice of Entry was filed on August 5, 2021.[1] The appeal from that Order was filed on September 2, 2021.[2]

ROUTING STATEMENT

Pursuant to NRAP 17(b)(5) this is an appeal from a family law decision which is presumptively assigned to the Court of Appeals. However, pursuant to NRAP 17(a)(11) it is a matter of first impression and also pursuant to NRAP 17(a)(12) this appeal involves an issue of public importance. Appellant does believe that the case could be retained by the Supreme Court, but that assignment to the Court of Appeals is also appropriate.

STATEMENT OF THE ISSUES

A. The District Court Abused Its Discretion When It Ordered That Community Property By Analogy Under Michoff Did Not Apply Despite The Parties' Pooling of Assets and Implied and Actual Partnership

B. The District Court Erred In Finding That Guilt Or The Release Thereof Constitutes Sufficient Consideration In A Valid, Enforceable Contract

C. The District Court Erred In Finding That There Was Not A Fiduciary Or Confidential Relationship Between Appellant And Respondent

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[1] (1/AA 07965-07967)
[2] (1/AA 08203-08209)

D. The District Court Erred in Ordering that the Appellant was not Under Undue Influence When He Transferred the Properties in Question to Respondent

E. The Court Erred In Finding That The Transaction Transferring Appellant's Apparent Interest In Patience One, LLC at Issue Was Valid

F. The District Court Erred In Finding That The Respondent Was Not Unjustly Enriched Despite Evidence Pricing the Massive Contributions by Appellant to the Assets Awarded to Respondent

STATEMENT OF THE CASE

On October 24, 2017, Appellant filed the Complaint for Divorce. In the Second Amended Complaint filed October 15, 2018, Appellant made claims for equitable relief under the 1) the putative spouse doctrine and/or 2) an implied agreement to hold property as if the parties were married under *Michoff*. Appellant further requested that the court set aside the deeds of real property and the assignment of the interest in Patience One, LLC on both legal and equitable grounds.

On August 3, 2021, the district court issued its Findings of Fact, Conclusions of Law and Judgment. The district court denied all of Appellant's requested relief under all legal theories presented at trial. Appellant is not challenging the district court's ruling on the validity of his marriage to respondent or its conclusions regarding the application of the putative spouse doctrine. Appellant, is, however, appealing the Court's findings and orders on the issues of the implied and actual agreement to pool assets as if the parties were married under *Michoff*, the district

court's findings that there was a valid, enforceable contract entered into between the parties on September 13, 2016 when Appellant signed over the deeds to the two real properties and his interest in Patience One, LLC on multiple grounds. Appellant also appeals on the grounds that even if this Court were to ignore the legal impediments to the District Court's conclusions, that equitable principles, including unjust enrichment, require a different result that that reached in the District Court judgement. In the end, the uncontroverted evidence presented at trial and the application of well-established Nevada law, require a different, more equitable result than that contained in the judgement below.

I. PRELIMINARY STATEMENT REGARDING REFERENCES TO THE RECORD ON APPEAL

In the following Statement of Facts and Argument, references to matters in the record on appeal will be in the form VV/AA where "AA" represents "Appellant's Appendix" and "VV" represents the volume number of "Appellant's Appendix."

II. STATEMENT OF THE FACTS

The parties met in 2000 when Respondent became the treating physician for Appellant as a result of a hospitalization.[3] The parties began dating in 2001 after Appellant's divorce from his then wife and began cohabiting in or around September of 2001. It is uncontroverted and set forth in the findings of fact of the

[3] (1/AA 07938)

District Court discussed hereinafter, that Respondent at all times relevant to the "transactions" at issue in this case, was the primary care physician to Appellant. Seven months later, on April 7, 2002, the parties had a catholic wedding ceremony in Bratislava, Slovakia, Respondent's home town. Despite the existence of a marriage certificate[4], said certificate was never registered with the government of Slovakia.

Thereafter, the parties cohabited and held themselves out as husband and wife to friends, family, and business associates until September 8, 2016, when it was revealed to Respondent that Appellant had been unfaithful to Respondent.[5] During the course of the parties 15 year relationship, the opened joint bank accounts, purchased two homes together as husband and wife, and jointly formed an LLC (with each for the purposes of purchasing a commercial building. It is uncontroverted that for all transactions by which the parties borrowed money for the purchase of the two homes and commercial building, that Appellant was an obligor or personal guarantor for the loans). Also during the course of the parties partnership, Appellant's American Express card was used to purchase the medical supplies for Respondent's medical practice.

[4] (IX/AA01825)
[5] (1/AA 07942)

Upon Respondent finding out about Appellant's indiscretion with another woman, contacted the parties' estate planning attorney, Shannon Evans's Esq. in order to have her prepare documents by which Appellant would transfer all joint assets to Respondent. On September 9, 2016, Shannon Evans, Esq. who had represented both parties individually in the past regarding their estate-planning matters, drafted deeds for the parties two residences and a document purporting to transfer the parties joint LLC interest in Patience One LLC from Appellant and Respondent jointly, to Respondent. This appeal will not address the propriety of attorney Wilson's actions in doing so. In a note to her staff that day, Attorney Evans wrote that "they do not need a divorce, and he will agree asset being Danka's since she pays for the properties, and he is guilty."[6]

On September 13, 2016, the parties met with Attorney Evans and, after signing a conflict waiver due to Attorney Evans' prior representation of him in his estate-planning matters, Appellant signed deeds to the parties two real properties, the Queen Charlotte and Lowe properties, and a document purporting to transfer his interest in Patience One, LLC.[7] The document purporting to transfer Appellant's interest in Patience One LLC identifies the grantor of the interest as "LV Blue

[6] (1/AA 07935)
[7] (1/AA 07935-07936)

Trust".[8] It is uncontroverted that LV Blue Trust was not the owner of Appellant's 50% interest in Patience One LLC.

Appellant filed the Complaint for Divorce on October 24, 2017.[9] Appellant's Second Amended Complaint filed October 15, 2018 made claims for equitable relief under the 1) the putative spouse doctrine and/or 2) an implied agreement to hold property as if the parties were married under *Michoff*.[10] Appellant further requested that the court set aside the deeds of real property and the assignment of the interest in Patience One, LLC.

After several years of litigation, the first two days of trial took place on February 14, 2020 and February 21, 2020. Due to the circumstances of the pandemic, however, the remaining three days of trial did not take place until March 5, 2021; March 12, 2021 and April 2, 2021.

At trial, in addition to uncontroverted testimony supporting the relief sought by Appellant, the following important documents, which are dispositive of this appeal were admitted into evidence:

1. The deeds to the parties two residential properties which were purchased by the parties as wife and husband.[11] These documents the nature of the parties implied and actual partnership with regard to these properties. These documents also establish that the parties held them out as husband and wife so well and to such

[8] (XXXVII/AA 09103).
[9] (1/AA 00001-00015)
[10] (1/AA 00288-00305)
[11] (X/AA02067-AA02070 & X/AA02083-AA02086)

a degree that two separate title companies believed they were wife and husband.

2. The deeds of trust by which Appellant became a co-borrower for the purchase of the parties two residential properties.[12] These documents further establish the depth of the parties partnership and the benefits conferred upon the parties partnership by Appellant's credit and credit worthiness. They also establish the detriment incurred by Appellant in furtherance of the parties partnership.

3. The deed of trust by which Appellant became a co-borrower for the loan to purchase the Patience One LLC building.[13] This document establishes, not only the parties partnership, but the detriment incurred by Appellant in furtherance of the parties partnership. This Deed of trust also establishes Appellant and individual, and not "The LV Blue Trust" as the obligor on the note and deed of trust.

4. Wells Fargo statement for the parties joint checking account.[14] These documents establish the parties actual and implied partnership. These documents also establish the hundreds of thousands of dollars contributed to the joint account by Appellant and the payment of all living expenses including the mortgages on both residential properties from this joint account. These documents contradict certain findings of the District Court as discussed hereinafter.

5. American Express statements showing that Appellant added Respondent to his credit account and Respondent's use of Appellant's American Express account to purchase supplies for her medical practice even after the effective date of the "transaction" in question.[15] These documents further establish the depth of the parties implied and actual partnership.

6. Tax returns for Patience One LLC establishing the parties as each holding their 50% interest in the LLC as individuals and not in

[12] (X/AA02094-AA02113 & X/AA02128-AA02143)
[13] (XXX/AA 6267-6299)
[14] (XV-XVI AA/03495-03823)
[15] (XIX-XX/AA 04483-04755)

their respective trusts.[16] Because an LLC interest in Nevada is an interest personal to only the named owner,[17] These documents establish that a transfer of the LLC interest by any person or entity, other than Tom Pickens as an individual, could not have affected a transfer of Appellant's interest in the LLC.

7. Medical records for Appellant which establish that at the time of the purported transfers in September of 2016, that Respondent, was, in fact, Appellant's primary care physician.[18] This document, which bears a date three weeks after the purported transfers of millions of dollars in assets, reveals that Respondent was in fact the PCP (Primary Care Physician) of Appellant at the time of the purported transfers and had, in fact made a referral for Appellant to a specialist 10 days prior to the purported transfers.

8. A document purporting to transfer Appellant's individual interest in Patience One LLC from the LV Blue Trust to Respondent's trust.[19] This document establishes that the transfer of an LLC interest by a non-owner of that interest cannot be deemed to be a valid transfer under Nevada law.

On August 3, 2021, the district court entered Findings of Fact, Conclusions of Law and Judgement (hereinafter "FFCL").[20] On September 2, 2021, Appellant filed his Notice of Appeal.[21]

III. STANDARD OF REVIEW

Questions of law are subject to *de novo* review, "without deference to the district court".[22] "The district court's factual findings are given deference and will

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[16] (XIV/AA03091)
[17] (NRS 86.351)
[18] (IX/AA02049-AA02051)
[19] (XXXVIII/AA09103-AA09106)
[20] (1/AA 07934-07964).
[21] (1/AA 08210-08247).
[22] *Mitchell v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 131 Nev. 163, 168, 359 P.3d 1096, 1099 (2015).

be upheld if not clearly erroneous and if supported by substantial evidence."[23] Substantial evidence is defined as "that which a reasonable mind might accept as adequate to support a conclusion."[24]

A district court has wide discretion in cases involving the equitable issues brought forth by the Appellant. An abuse of discretion occurs when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.[25]

IV. ARGUMENT

A. The District Court Abused Its Discretion When It Ordered That Community Property By Analogy Under *Michoff* Did Not Apply Despite The Parties' Pooling of Assets and Implied and Actual Partnership

Where it is alleged and proven that there was an agreement to acquire and hold property as if the couple was married, the community property laws of the state will apply by analogy.[26] The *Hay* court established that a couple 1) pooling their money as if they were a marital community or general partners and 2) holding themselves out as husband and wife, even if they were not actually married, were

[23] *Ogawa v. Ogawa,* 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).
[24] *United Exposition Serv. Co. v. State Indus. Ins. Sys.,* 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993).
[25] *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).
[26] *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) (holding that there were sufficient facts to state a cause of action for breach of an implied-in-fact contract to acquire and hold property as if the parties were married when a cohabiting couple, despite not being married, held themselves out as husband and wife and had pooled their money as though they were a "marital community or a general partner.")

sufficient to state a cause of action for an implied-in-fact contract to acquire and hold property as if the parties were married.[27]

The *Michoff* court extended the ruling in *Hay* and made clear that parties did not need to expressly agree to hold their property as though they were married in order for there to be an implied agreement for them to do so. The *Michoff* court found that there was substantial evidence to support the district court's finding that a couple had an implied agreement to hold their property as though they were married based on the evidence that they held themselves out to be husband and wife and that they held an S-corporation together as co-equal owners and as community property.[28] Other Nevada cases have extended the rulings in *Michoff* and *Hay.*[29]

In the FFCL, **the district court made the finding that Appellant and Respondent held themselves out to be a married couple.**[30] [Emphasis added.] It made further findings that "credible evidence was presented demonstrating that the parties did behave as partners with regard to some properties and investments" and that "the conduct of the parties regarding their financial affairs provides evidence

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[27] Id. at 198, 199.
[28] *Western States Construction, Inc. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992)
[29] See *Bumb v. Young*, 131 Nev. 1258 (2015)(unpublished) No. 63825, Aug. 4, 2015 (holding that community property by analogy doctrine applied when unmarried couple lived with each other for 22 years and owned real property together through an LLC; also see *Estate of Shapiro v. United States*, 634 F. 3d 1055 (Ninth Circuit) (2011) (holding that community property by analogy applied even when one party did not make any financial contributions to the other but made household contributions instead as consideration in the implied agreement between the parties)
[30] (1/AA 07943); (1/AA 07942)

that the parties intended to pool their assets, financial support and management skills when they saw fit to do so."[31] This is demonstrated by the following findings in the district court's FFCL:

1. The parties acquired two residential real properties together.[32]

   (a) They acquired the residential real property where they lived together located at 9517 Queen Charlotte Drive, Las Vegas, NV 89145 ("the Queen Charlotte residence"), in 2004. The deed stated the parties as "Dr. Danka Michaels, a married woman and Thomas Pickens, a married man." The mortgage was in both parties' names.[33]

   (b) The parties later purchased an investment property located at 7608 Lowe Avenue, Las Vegas, NV 89131 as Husband and Wife. Once again, the mortgage was in both parties' names. The mortgage was paid in full before the parties' separation.[34]

2. The parties' founded Blue Point Development as an "S" Corp. in 2002, with Respondent providing $30,000 in seed money to help start the business. Both parties held a 50% interest in the business.[35]

3. In 2012, the parties formed Patience One, LLC and placed the investment property located at 3320 N. Buffalo, Las Vegas, NV 89129, as an asset of the LLC.[36]

   (a) Each party operated their respective businesses out of the building (with each in different suites). Respondent operated her medical practice and health spa while Appellant operated Blue Point Development, Inc.

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[31] (1/AA 07948).
[32] (1/AA 07950).
[33] (1/AA 07950).
[34] (1/AA 07950).
[35] (1/AA 07950).
[36] (1/AA 07951).

(b) The parties each held a 50% membership in the LLC and acted as if it was a joint venture. Evidence of their intent to form a joint venture is found by the Schedule K-1s, the Deed of Trust for a 2014 Loan and an email by Respondent in which she tells the parties' attorney that she and her husband were partners in Patience One, LLC which held and managed the "buffalo" building.

4. At all times relevant to the September 13, 2016 transaction, the parties were equal members of the Nevada Limited Liability Company, Patience One, LLC.[37]

5. The parties held a joint account together for the purpose of paying household bills, mortgages and business expenses.[38]

6. Appellant deposited his income from his business, and the income paid to him by Respondent's business, into the parties' joint account at Wells Fargo. Respondent deposited her income from her medical practice into the same joint checking account.[39]

7. After receiving a $1,000,000 bonus on a project in 2014, Appellant deposited over $200,000 of said bonus into the parties' joint bank account, and further testified that those funds were used to pay for extensive renovations and improvements on the Queen Charlotte residence.[40]

8. During the course of the parties' relationship, Appellant paid off, from his earnings or from the funds in the parties' joint account, the mortgage on the Lowe residence.[41]

9. Both parties testified that they paid their joint household bills and mortgages from the joint account, and that they both placed funds into the joint account from their earnings.[42]

10. The parties shared at least one credit card account.[43]

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[37] (1/AA 07951-07952).
[38] (1/AA 07948).
[39] (1/AA 07948).
[40] (1/AA 07948).
[41] (1/AA 07949).
[42] (1/AA 07949).
[43] (1/AA 07949).

These findings alone required a determination, as a matter of law, that a "Michoff marriage" existed and that the Court was required to apply community property law by analogy. Moreover, the evidence established by these findings alone, confirms the fiduciary and confidential nature of the parties' relationship. As demonstrated by the enumerated facts above, the district court made a substantial number of factual findings which constitute a far greater level of evidence than that found to be controlling in either Michoff or Hay. The district court found that the parties purchased multiple real properties together; formed businesses together as co-equal owners; shared income and expenses in pooled accounts and held themselves out as husband and wife to family and friends. Respondent also confirmed that she is pursuing claims to a 50% ownership in Blue Point Development a business managed and operated by Appellant which suggests she believed there was an asset pooling agreement between the parties.[44]

The uncontroverted evidence in the instant case could not be more appropriate in following the community property by analogy standards set out in *Hay* and *Michoff* (even down to the very type of business the parties were involved in, albeit coincidental). Despite these numerous factual findings supporting the application of community property by analogy to the instant case, the district court somehow found that *Michoff* did not apply and that there was "no quasi-marital

[44] (XXXVI/AA0806)

relationship found by the court."[45] The district court did not specifically comment on whether it found that community property by analogy should apply under *Michoff*, and in doing so it committed an abuse of discretion in a case which could not have been more analogous to *Hay* and *Michoff*. The District Court's findings on this issue were not only NOT supported by substantial evidence, they were completely contrary to the uncontroverted substantial evidenced referenced above. The obvious existence of an implied and actual partnership under Hay and Michoff also impacts the analysis of Respondent's fiduciary duty to Appellant at the time of the September of 2016 purported transactions.

B. The District Court Erred In Finding That Guilt Or The Release Thereof Constitutes Sufficient Consideration In A Valid, Enforceable Contract

After ignoring the community property by analogy doctrine in its ruling, the district court reasoned that the parties had been free to contract with each other as unmarried couples and that, under the totality of the circumstances, the parties engaged in a lawful, valid and enforceable contract on September 13, 2016.[46] While this finding ignores the parties' multiple levels of fiduciary duty to one another, it also ignores black letter contracts law.

[45] (1/AA 07959).
[46] (1/AA 07959).

As outlined in §71 of the Restatement (Second) of Contracts (1981) any valid and enforceable contract requires an exchange between parties[47]:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
> (3) The performance may consist of
> - (a) an act other than a promise, or
> - (b) a forbearance, or
> - (c) the creation, modification, or destruction of a legal relation.
>
> (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

The district court reasoned that "consideration can come in tangible and non-tangible forms. Mr. Pickens' testimony that he wanted to be able [to] start fresh in his new life was important to him, as well as his need to assuage his guilty feelings due to his conduct."[48] The district court held that the release of guilt was thus the consideration bargained for by the Appellant in the contract between he and Respondent on September 13, 2016.

As a matter of law, however, guilt or the release thereof as consideration is in violation of public policy. This is because an agreement which attempts to impose a penalty on one of the parties as a result of that party's "fault" in a relationship is contrary to the public policy underlying no-fault laws. This was first

[47] Restatement (Second) of Contracts, §71 (1981)
[48] (1/AA 07960).

outlined in *Diosdado*, a California case where a court held that a written agreement between the parties requiring that one party must forfeit assets if he were to commit infidelity was against the state's no-fault policy.[49] Nevada courts have followed *Diosdado*. In particular, *Parker v. Green* held that an agreement which regulates the details of a person's daily life in order to prevent infidelity with excessive "damages" stemming from causes of action not recognized within this state, is not an enforceable contract."[50]

In making its ruling, the district court held that there was a contract between the parties in which the benefit received and bargained for by Appellant was the absolving of his guilt for his infidelity. According to the reasoning of the district court's ruling, there was a contract between the parties where Appellant's infidelity justified his forfeiture of the substantial amount of assets he owned jointly with the Respondent. This type of contract runs contrary to the public policies of no-fault states where one party's infidelity may not form the basis for awarding property to another.

The district court's ruling also goes against the well-established principles of contract law that past consideration and moral obligation are not adequate consideration for a present bargain. "A benefit conferred or detriment incurred in

[49] *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 474 (2002)
[50] *Parker v.* Green, 134 Nev. 993 (2018) (unpublished) No. 73176, June 25, 2018.

the past is not adequate consideration for a present bargain."[51] "Past consideration is the legal equivalent to no consideration."[52] In finding that the hypothesized release of Appellant's guilt constituted consideration, the district court's reasoning suggests that the detriment incurred by Respondent having suffered from Appellant's infidelity constituted a moral obligation on the part of the Appellant to effectively repay her for his transgressions. This type of ruling by the district court is not only contrary to the public policy of a no-fault state such as Nevada, but also does not comport with the long-established doctrines of contract law which do not allow for moral obligation or past consideration as sufficient consideration in a present bargain.

It must also be noted that the district court made the contradictory ruling that the transferring of the real properties from Appellant to Respondent was a gift: "a spouse-to-spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence...As Mr. Pickens conveyed title to the properties to Dr. Michaels for the purpose of making her less unhappy about the discovery of his conduct in revealing her most personal tragedy to a new significant other, the transfers could be considered as gifts."[53] This finding is contrary to the finding that the parties were not spouses. Moreover, a finding of

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[51] *Clark County v. Bonanza No. 1*, 96 Nev. 643, 615 P.2d 939 (1980).
[52] *Smith v. Recrion Corp.*, 91 Nev. 666, 541 P.2d 663 (1975).
[53] (1/AA 07959-07960)

gift is also contrary to the evidence and the prior finding of the Court that there was a valid, enforceable contract between the parties. These contradictory findings cannot be reconciled and calls into question the validity of each of them.

Ultimately, the district court's finding that the release of Appellant's guilt constituted sufficient consideration does not comport with either the no-fault policies of Nevada or the long-established doctrines of contract law. Moreover, the district court's inconsistent position that there either a valid, enforceable contract or that the transaction between the parties was a gift from Appellant to Respondent undermines the validity of both positions on their own merits.

C. The District Court Erred In Finding That There Was Not A Fiduciary Or Confidential Relationship Between Appellant And Respondent

A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.[54] "A fiduciary relationship arises as a matter of law from particular legal relationships, such as that of attorney and client, while a confidential relationship may result from a moral, social, domestic, or merely personal relationship as well as a legal relationship.[55] It is also generally recognized that joint venturers owe to one another the duty of loyalty for the duration of their

[54] *Stalk v. Mushkin*, 125 Nev. 21, 199 P.3d 838 (2009)
[55] *Barbara A v. John G.*, 145 Cal.App.3d 369, 193 Cal. Rptr. 422 (1983)

venture.[56] The relationship between joint venturers is fiduciary in character and imposes on the venturers the obligation of loyalty to the enterprise and a duty of good faith, fairness, and honesty in their dealings with each other with respect to property belonging to the venture.[57]

In the instant matter, the district court found that Respondent testified she was Appellant's primary care physician from 2000 to 2017. The district court also took judicial notice of NAC 630.620, which prohibits physicians from failing to adequately supervise advanced practice registered nurses in their employ, and NRS 630.301 which establishes grounds for discipline for a physician to engage in sexual relations with a patient for financial or other personal gain. The district court made additional findings regarding the doctor-patient relationship between the parties as follows:

1. The district court found that Respondent testified that the parties engaged in a romantic relationship after the doctor-patient relationship began and that she continued being Appellants' physician after the romantic relationship commenced.[58]

2. The district court found that as a result of the doctor-patient relationship, Respondent could have been held a fiduciary duty to Appellant as long as the doctor/patient relationship existed under certain circumstances. Testimony revealed that Respondent advised Appellant that she would no longer be his primary care physician once an intimate relationship had

[56] *Leavitt v. Leisure Sports Incorporation*, 103 Nev. 81, 734 P.2d 1221 (1987)
[57] *Rhine v. Miller*, 94 Nev. 647, 853 P.2d 458 (1978)
[58] (1/AA 07944).

developed.[59]

3. The district court also found that the crux of the relationship between the parties was their partnership and business pursuit, and not on the need of the patient for the doctor.[60]

4. The district court found that Respondent transferred the responsibility of his medical coverage to the nurse practitioner, Robert Carrillo, working in Respondent's practice as his medical provider. Mr. Carrillo was responsible for Appellant's care and prescriptions and is able to independently see and treat patients, and prescribe for them under his license.[61]

5. The district court further found that under Nevada law, Respondent was required to supervise Mr. Carrillo. Respondent confirmed that she in fact did so.[62]

6. The district court found that Respondent refilled a prescription for Appellant in May 2016 and referred him to a specialist in September of 2017.[63]

7. The district court found that Respondent had no duty owed to Appellant, neither doctor/patient nor spousal, when considering his request to set aside the property transfers from September 13, 2016.[64]

Despite all of the above findings, the district held that Appellant "failed to establish that he and [Respondent] were in a physician-patient relationship at the time of the execution of the transfer of documents. As such, [Respondent] did not owe Appellant any fiduciary duty."[65] Moreover, Appellant's medical record from

[59] (1/AA 07945).
[60] (1/AA 07945).
[61] (1/AA 07945-07946).
[62] (1/AA 07946).
[63] (1/AA 07946).
[64] (1/AA 07947-07948).
[65] (1/AA 07957).

September of 2016 , which is partially referenced in the Court's findings as revealing a referral by Respondent for Appellant to see a new specialist specifically identifies Respondent as Appellant's PCP (primary care physician). The district court further found that [Respondent] had no duty owed to [Appellant], neither doctor/patient, nor spousal, when considering his request to set aside the property transfer and the 'Assignment' on September 13, 2016."[66] These findings constitute an abuse of discretion based on the numerous facts demonstrating the doctor/patient relationship between the parties. Moreover, as a matter of law, the district court also erred when it did not consider whether there was a fiduciary duty between the parties based on their status as co-equal owners and partners in Patience One LLC.

The district court also erred when it did not consider whether there was any confidential relationship which could have arisen by virtue of the parties' medical, personal and business relationships.

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient

[66] (1/AA 07947-07948).

or priest and penitent.'[67] Nevada law recognizes a duty owed in "confidential relationships," where "one party gains the confidence of the other and purports to act or advise with the other's interests in mind.[68] When a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party."[69] A confidential relationship "may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship."[70]

As stated in *Vai*, the relationship between family and friends alone is enough to establish a confidential relationship. As stated in *Leavitt*, a joint venture generally establishes a duty of loyalty between parties. In the instant matter, the parties were not only tied to each other through their doctor/patient relationship but also their personal and business relationships as an unmarried cohabiting couple (despite holding themselves out to family and friends as married) who owned a business together as co-equal partners. There were both fiduciary and confidential aspects of their multi-faceted relationships, and the district court erred in its

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[67] *Vai v. Bank of America*, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961)
[68] *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995) (finding a confidential relationship between two "close friends and neighbors," where an experienced and well-educated businesswoman sold a business to her friend, who had only an eighth-grade education and who entrusted her friend, the experienced businesswoman, with managing the business)
[69] Id. at 338.
[70] Id.

discretion by finding that there was no fiduciary relationship between them and erred as a matter of law by not even considering whether there was a confidential relationship between them based on their business and personal relationships.

D. The District Court Erred in Ordering that the Appellant was not Under Undue Influence When He Transferred the Properties in Question to Respondent

As outlined in the sections above, the district court made an error of law when it held that guilt or the release thereof may be considered consideration in a valid and enforceable contract that is not in violation of public policy. It also made an error of law when it did not consider whether the Appellant was under undue influence at the time he signed the contract on September 13, 2016. The parties' multiple levels of fiduciary duty make the issue of undue influence even more compelling.

According to the Restatement, courts do not generally inquire into the adequacy of consideration because the values exchanged are often difficult to measure and the parties are thought to be better at evaluating the circumstances of particular transactions.[71] Yet, courts may inquire into the adequacy of consideration when it is relevant to ascertaining whether fraud, lack of capacity, mistake, duress or *undue influence exist.*"[72]

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[71] Restatement (Second) of Contracts, §79 (1979)
[72] *Oh v. Wilson*, 112 Nev. 38, 910 P.2d 276, 279 (1996)

Courts have held that a presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction.[73] Once a fiduciary relationship has been established, the presumption of undue influence by a beneficiary exists and must be overcome by clear and convincing evidence.[74] In absence of any presumption (fiduciary relationship or lack of mental vigor), undue influence must be demonstrated by a preponderance of the evidence. Demonstrating a confidential relationship may also fulfill the fiduciary duty element of actions for undue influence.[75]

While the district court did consider (albeit erroneously) whether there was a fiduciary breach of duty based on the doctor/patient relationship, it did not make any findings with respect to whether the September 13, 2016 "transaction" between the parties was made under undue influence. As stated above, there is a presumption of undue influence when there is a fiduciary relationship and the fiduciary benefits from the transaction in question. A confidential relationship may establish this presumption as well (yet the district court did not consider whether there was a confidential relationship between the parties).

The district court's failure to consider the issue of undue influence with respect to the September 13, 2016 transaction is an error of law and especially so in

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[73] *In re Estate of Bethurem*, 129 Nev. 869, 313 P.3d 237 (2013).
[74] Id. at 874.
[75] *Peardon v. Peardon*, 65 Nev. 717, 201 P.2d 309 (1948)

light of the facts surrounding this case as there were multiple fiduciary and confidential aspects of the parties' relationship based on their medical, personal and business ties. The district court should have also considered the issue of undue influence given the insufficient consideration cited in the form of Appellant's release of guilt. This is because the issue of adequate consideration becomes much more pertinent in cases involving undue influence. The transaction was also effected without independent counsel on behalf of the Appellant, and was prepared an attorney who had previously represented Appellant in his estate-planning matters. When this Court considers that a fiduciary and confidential relationship existed, the particular circumstances in which Respondent who owed a fiduciary duty to Appellant used guilt to procure millions of dollars of assets to her partner and patient to who she owed a fiduciary duty, undue influenced must be found to have existed as a matter of law.

E. The Court Erred In Finding That The Transaction Transferring Appellant's Apparent Interest In Patience One, LLC at Issue Was Valid

The district court made the following findings with respect to the transfer of Appellant's interest in the real properties at issue:

1. "On or about September 13, 2016, Mr. Pickens signed documents transferring his interest in the two residential real properties owned jointly by the parties. The transfers involved two steps. First the parties had to change the titles to the real properties from being held incorrectly as husband and wife, to being held by two single unmarried persons, then a second signing changing the

properties from held as two single unmarried persons jointly, to Dr. Michaels as a single unmarried woman."[76]

2. The district court found that Appellant voluntarily executed an Assignment and Assumption of Membership Interest in the LLC from his LV Blue Trust (his estate planning trust to the Mich-Mich Trust (Respondent's estate planning trust) regarding his 50% interest in Patience One LLC.[77]

3. The district court also found that the transfer of Appellant's interest in Patience One, LLC, by the Assignment prepared by Shannon Evans, Esq. on September 13, 2016 reflected Appellant's Trust, LV Blue Trust, as the Transferor. **The district court further found that testimony by Appellant indicated that the LV Blue Trust did not own his personal 50% interest in Patience One LLC when he signed the transfer document.**[78] (emphasis added)

4. The district court ultimately ruled that that "the document misstated the actual owner, a fact which could not have been evident to Dr. Michaels at the time of the transfer. Mr. Pickens did not correct the over-sight and led Dr. Michaels to believe he had placed his 50% ownership into his personal trust sometime prior to transferring it to her Mich-Mich trust. Dr. Michaels then re-financed the building under her authority as the 100% Member of the LLC."[79]

Before discussing the ways in which these findings are not supported by Nevada law, it is important to note that no refinance of the Patience One Mortgage occurred prior to the filing of the underlying lawsuit by Appellant. Moreover, the finding that Respondent could not have known the actual owner of the LLC interest is contradicted by the tax returns and K1s entered into evidence.

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[76] (1/AA 07950).
[77] (1/AA 07952).
[78] (1/AA 07953).
[79] (1/AA 07961)

As a general rule, a vendor or pledgor can convey no greater right or title than he has.[80] Here, the district court found that there was a valid transfer between the parties despite Appellant's trust not owning the 50% interest in Patience One LLC at the time it was transferred. This finding was made despite the fact that NRS 86.351 defines an LLC interest as an interest that is personal property and personal to the owner of record. LV Blue Trust has never been the owner of an interest in Patience One LLC.

The district court further reasoned that even if the transfer was not valid, that Respondent had relied on the representations of Appellant that the LV Blue Trust owned the interest in Patience One LLC when she decided to take refinance the property owned by the LLC. The evidence, however, was that no refinance by Respondent was even attempted at any time relevant to the September 2016 "transaction". In fact, Respondent testified that she did not start the process until AFTER she was sued to set aside the transaction. As such, there was no detrimental reliance by Respondent.

The uncontroverted evidence establishes that LV Blue trust was not the owner of Appellant's 50% interest in Patience One. As such, the LV Blue trust could not have conveyed the LLC interest. As a matter of law and as a matter of fact, Appellant continues to be the owner of 50% of Patience One LLC by virtue of

[80] *Gass v. Hampton*, 16 Nev. 185 (1881).

the failure of the transfer document. The only thing that remains is for this Court to reverse the ruling below with instructions to enter orders consistent with this correct analysis of the purported transfer.

F. The District Court Erred In Finding That The Respondent Was Not Unjustly Enriched Despite Evidence Pricing the Massive Contributions by Appellant to the Assets Awarded to Respondent

Unjust enrichment exists when a party confers a benefit on the other, the other party appreciates the benefit, and there is "acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof. Such a 'benefit' in the unjust enrichment can include 'services beneficial to or at the request of the other,' 'denotes any form of advantage,' and is not confined to retention of money or property."[81]

In the FFCL, the district court found that "testimony and evidence satisfied the court that there was no unjust enrichment by Respondent. In light of the fact that she supported the couple, without question, off on and on throughout the relationship, and that Appellant ended the relationship on his own terms, the court finds the resolution of their partnership equitable. This finding is not intended to reflect a division based on 'dollar-for-dollar,' as there was no forensic accountant hired to provide such evidence to the court."[82] Such a finding, in light of

[81] *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, P.2d 1272 (1981)
[82] (1/AA 07960).

Respondent's receipt of millions in dollars of assets and Appellant's receipt of nothing in exchange can only be the result of an abuse of discretion. Moreover, the factual finding that Respondent "supported the couple" is proven to be in error by the parties' joint bank account statements, Appellant's American Express statements and Appellant being a co-obligor on three mortgages with Respondent. The bank records reveal that in the year prior to the purported transaction between partners, Appellant deposited hundreds of thousands of dollars into the joint account. The conclusion that one partner receiving all of the assets of the partnership for no consideration was "equitable" cannot be sustained under any analysis of the uncontroverted evidence.

The district court's finding that there was no unjust enrichment is in direct contrast to its factual finding that Appellant deposited his income from his business and the income paid to him by Respondent's business into their parties' joint accounts. More specifically, it runs counter to the court's finding that Appellant deposited over $200,000 of his $1,000,000 bonus into the parties' joint bank account, and that he further testified these funds were used to pay for extensive renovations and improvements on the Queen Charlotte home owned by the parties.[83] The district court stated that there had not been a forensic accounting evidencing the exact amount of the unjust enrichment, but no expert is needed when

[83] (1/AA 07949)

the evidence of Appellants massive contributions to the partnership is so evident in the financial records of the parties. It was an abuse of discretion for the court to not find that there was no unjust enrichment on the grounds that a forensic accounting report was not provided when the court itself had already found that the Appellant had made the above payments in question towards the parties' former joint property.[84]

V. CONCLUSION

An objective review of the forgoing evidence, legal authority, and argument reveals that the District Court ignored the evidence and Nevada law in favor of a result which would punish Appellant for his infidelity. Because this is not a permissible justification for a judgement, because the transfer of the LLC interest is invalid, because of the multiple levels of fiduciary duty owed by respondent to Appellant, because the parties clearly had an asset pooling agreement/"Michoff marriage", and because of just how unjustly Respondent has been enriched by the judgement below, a reversal of said judgement is not only appropriate, but required in order for there to be a just result consistent with Nevada law.

Based upon the foregoing, and because the evidence which requires reversal is not in dispute, this Court should reverse the judgement entered in the district

[84] (1/AA 07948-07949)

Court and give instructions for a judgement to be entered consistent with the analysis set forth herein.

RESPECTFULLY SUBMITTED this 25 day of February ___, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because the brief is proportionally spaced, has a typeface of 14, and excluding the parts of the brief exempted by NRAP 32(1)(7)(C), contains 7407 words.

I further 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 Rule 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.

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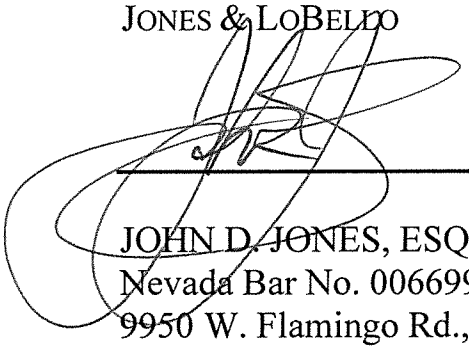
I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NEVADA RULES OF APPELLATE PROCEDURE.

DATED this 25th day of February, 2022.

JONES & LOBELLO



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PROOF OF SERVICE

I, Cheryl Berdahl, declare:

I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed at Jones & LoBello, 9950 W. Flamingo Rd., Ste. 100 Avenue, Las Vegas, Nevada 89147. I am readily familiar with Jones & LoBello's practice for collection and processing of documents for delivery by way of the service indicated below.

On February 25, 2022, I served the following document:

APPELLANT'S OPENING BRIEF

On the interested parties in this action as follows:

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By Mail. By placing said document in an envelope or package for collection and mailing, addressed to the person(s) at the address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing of mail. Under that practice, on the same date that mail is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on February 25, 2022, at Las Vegas, Nevada.

Cheryl Berdahl