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.

Supreme Court No.: 83491
District Court Case No.: D-17-560757-D

REPLY TO RESPONDENT'S ANSWERING 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. John D. Jones and Michele LoBello represented Appellant in the district court and have appeared in this Court.

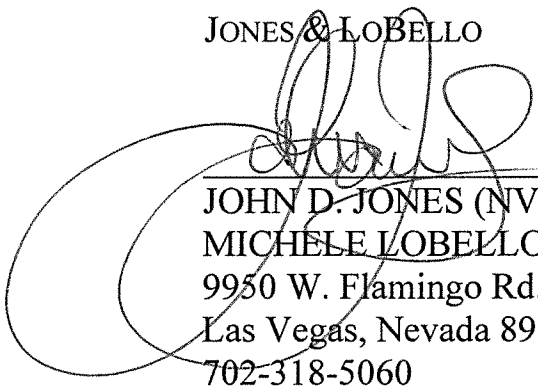
3. No publicly traded company has any interest in this appeal.

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

DATED this 26 day of May, 2022.

Respectfully submitted,

JONES & LOBELLO



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REPLY TO RESPONDENT'S ANSWERING BRIEF

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. ARGUMENT

A. The District Court Abused Its Discretion When It Ordered That An Implied-In-Fact Agreement To Hold Property As Community Property Under *Michoff* And *Hay* Did Not Exist, Despite Its Findings That The Parties Held Themselves Out As Married And Pooled Their Assets, Income And Liabilities

i. Respondent's Answering Brief confuses the "putative spouse" doctrine for the "community property by analogy" doctrine established under *Michoff* and *Hay*

Appellant's Opening Brief argued that because the district court found that 1) the parties held themselves out as a married couple and 2) made substantial factual findings that the parties' conduct regarding their financial affairs demonstrated their intent to pool their assets, financial support and management skills, the finding that there was no implied-in-fact agreement under the *Michoff*[1] and *Hay*[2] "community property by analogy" doctrine constituted an abuse of discretion.

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[1] *Western States Construction, Inc.* v. *Michoff*, 108 Nev. 931, 804 P.2d 1220 (1992).
[2] *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).

Page 13 through Page 18 of Respondent's Brief focuses solely on whether Appellant believed he was married to Respondent. Respondent cites many facts to support that Appellant did not have a good-faith belief the parties were married, such as the parties' filing their tax returns as single and unmarried; Appellant's own statements that he was not married; and testimony from the parties' accountant and their estate planning attorney that Appellant knew he was not married to Respondent.

Appellant does not dispute any of these findings or Respondent's argument that Appellant knew the parties were not actually married. **This is because Appellant never made any such claim or argument in his Opening Brief. While he did make a putative spouse claim before the district court, he has not appealed the district court's ruling under the "putative spouse" doctrine.** Instead, he has done so under the "community property by analogy" doctrine established by *Michoff* and *Hay*.

The "putative spouse" doctrine and the "community property by analogy" doctrine are entirely distinct from each other. The *Michoff* and *Hay* courts stand for the "community property by analogy" doctrine regarding the existence of an implied-in-fact agreement between the parties to hold property as if they were married. The "putative spouse" doctrine is based on whether one spouse had a good-faith belief that the parties were married when they were not actually married. While both doctrines may lead to the same end result that the property at issue should be treated

as if it were community, they are distinct doctrines based on different factors and legal principles.[3] The facts cited by Respondent to show that Appellant did not actually believe the parties were married are only material to a putative spouse claim and are virtually irrelevant to a "community property by analogy" claim for the existence of an implied-in-fact agreement under *Michoff*. A couple does not need to believe they are legally married in order to hold themselves out as married to family and friends. The question before the Court in a *Michoff* analysis is if the parties held themselves out as a married couple to family and friends. Here, the district court made substantial factual findings that they did.

ii. Respondent's attempt to distinguish *Michoff* from the instant matter fails to consider that the parties' conduct here—while not identical to the *Michoff* parties' conduct—established even greater evidence of an implied-in-fact agreement to hold property as if they were married

Respondent cites the district court's finding that "the parties did behave as partners with regard to *some properties and investments*" and that they "intended to pool their assets, financial support and management skill *when they saw fit to do so* (Living expense, residential needs, business with regard to Patience One, LLC and for a limited time Blue Point Development and Consulting, Corp.)."[4] Respondent

[3] The *Hay* court does not make a single mention of the "putative spouse" doctrine or whether one party had a good-faith belief they were married. The *Michoff* dissent makes a brief reference in Footnote 3: "The concept of a putative spouse, which is distinct from a common law spouse, is derived from the Spanish civil law of community property, which was adopted by California and by Nevada."

[4] (I/AA 07941-07942).

then goes on to argue that "otherwise, they kept their finances quite separate"—as if the pooling of assets, income and debts with respect to living expenses, residential needs and the parties' businesses does not constitute the type of financial conduct indicative of a married couple.

Regardless of the vague qualifiers denoted in italics above, the district court made numerous findings supporting the existence of an implied-in-fact agreement between the parties to hold their property as if they were married. In fact, as outlined below, there were even more of these findings than there were in *Michoff*.

When making its ruling, the *Michoff* court specifically cited the following financial conduct as "substantial evidence to support the district court's finding that Lois and Max impliedly agreed to hold their property as though they were married":

1. The parties filed joint federal tax returns as husband and wife;[5]
2. The parties designated that they held the Western States stock as community property in their Subchapter S election;[6]
3. Max had Lois sign a "consent of spouse" when entering into a partnership agreement with another individual.[7]

Other supporting facts, which were mentioned in the opinion but not specifically cited when the Court gave its reasoning, were the following:

4. The parties started a construction equipment rental business together which they held as co-equal owners. Max contributed a large portion of the funds to start the business.[8]

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[5] *Michoff*, 108 Nev. at 935, 804 P.2d at 1222.
[6] Id.
[7] Id.
[8] Id. at 934-935, 1221.

5. Lois provided skill and labor necessary for the business' success, such as administrative work and assisting in the maintenance, service and running of the equipment.[9]
6. Lois personally guaranteed contractor's bonds so that the company could obtain same from the Contractor's Board.[10]

In the instant matter, the following findings were made with respect to the parties' financial conduct:

1. The parties acquired two residential real properties jointly. The deeds listed them as "Dr. Danka Michaels, a married woman and Thomas Pickens, a married man" and in joint tenancy as wife and husband, respectively.[11]
2. The parties held a joint checking account for the purposes of paying household bills, mortgages and business expenses. The parties deposited their respective incomes into this joint checking account.[12]
3. The parties shared at least one credit card account.[13]
4. After earning a $1,000,000 bonus in 2014, Appellant deposited $200,000 said bonus into the parties' joint checking account and these funds were then used to pay for renovations and improvements on one of the parties' real properties.[14]
5. The parties founded Blue Point Development, a construction business, in which Respondent viewed them be to be 50-50 owners. Respondent also contributed $30,000 funds to start the business.[15]
6. The parties later formed Patience One, LLC together as co-equal members.[16]

[9] Id. at 934-935, 1221-1222.
[10] Id.
[11] (I/AA 08233).
[12] (I/AA 08231).
[13] (I/AA 08232).
[14] (I/AA 08232).
[15] (I/AA 08233-08234).
[16] (I/AA 08234).

7. The parties were joint obligors on the mortgages for both the residential and commercial purchases and refinances totaling in the millions of dollars.[17]

While the findings supporting a financial pooling agreement here are not identical to those in *Michoff*, they likely provide even more evidence of an implied-in-fact agreement to hold property as community. The parties here purchased multiple real properties on which the deeds listed them as a married couple; they had a joint checking account which they both deposited into and used to pay their daily living expenses, mortgages and business expenses; and they had at least one joint credit card. **These are fundamental ways in which married couples pool their assets and income.** Moreover, the joint obligation on three different mortgages is conclusive of the parties' agreement to pool income, assets and liabilities. Even further, the vast majority of the *Michoff* findings were confined to the couple's joint business venture, while the findings regarding the parties' financial conduct here involved both their personal finances and business ventures.

Respondent cites other facts from *Michoff* in attempting to distinguish it from this case, first emphasizing that the parties here did not file joint tax returns like the ones in *Michoff* did. While this is true, this fact should not be given significant weight as the parties chose not to based on the advice of their accountant, Robert

[17] (I/AA 08233).

Semonian. That the *Michoff* couple filed their taxes as married, when they were clearly not, should be viewed as anomalous.[18] Moreover, such a filing in the absence of a marriage technically constitutes tax fraud. Respondent also points out that the parties in *Michoff* shared a last name while the parties here did not. Sharing a last name speaks to the "holding out as a married couple" aspect of the *Michoff* analysis, though. The district court made multiple findings that the parties here held themselves out as husband and wife, so this is a moot point. Respondent further argues that the parties here ran separate businesses—Appellant ran a construction business while Respondent ran a medical business. This distinction is immaterial, however, as the community property character of a business does not depend on whether the parties operated it together, but rather when and how it was acquired.

iii. Respondent's Answering Brief misreads the *Michoff* and *Hay* factors for determining whether there was an implied-in-fact contract to acquire and hold property as if the parties were married

Respondent argues that the parties "held themselves out as a married couple for social purposes only" as if to suggest there is a distinction between holding out as a married couple for "social purposes" as opposed to financial ones. Even if Respondent's reading were correct, which it is not, the uncontested facts show that

[18] The case law and fact patterns following *Michoff* remain relatively scarce. Oral argument in this appellate matter would thus be instructive in further fleshing out which facts—such as filing joint tax returns or holding joint bank accounts—are most material to a *Michoff* claim.

the parties held themselves out as married to title and mortgage companies (in addition to having joint bank accounts and credit cards). Moreover and contrary to Respondent's reading, *Michoff* and *Hay* treat 1) "holding out" as husband and wife and 2) pooling assets, income and debts as separate factors. The former can be viewed as the socially-orientated aspect of the implied-in-fact agreement, while the latter can be viewed as the financially-orientated one.

The *Michoff* court implied this distinction when it addressed the financial conduct of the parties.[19] The Court first stated that "**in addition to living together and holding themselves out to be a married couple**, this [financial] evidence included the parties filing federal tax returns as husband and wife, the parties designating that they held the Western States stock as community property in their Subchapter S election, and Max's insistence that Lois sign a consent of spouse to effectuate a partnership he wanted to enter."[20]

The *Hay* court's language also implies the distinction between the holding out factor and the financial conduct factor. The pertinent facts before the *Hay* court were that the parties "**had been holding themselves out as husband and wife** and had pooled all monies earned by either of them and purchased assets and incurred

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[19] *Michoff* also made this distinction when citing *Hay*: "In that case, Virginia Hay alleged that she and Tom Hay had held themselves out as husband and wife, although they were not married. She further alleged that they had pooled their money as though they were a "marital community or a general partner." Id. at 936, 1223.

[20] Id. at 939, 1225.

liabilities as if they were a marital community or a general partnership."[21] That both the *Hay* and *Michoff* courts distinguish the "holding out" findings from the financial findings speaks to the inherently social nature of the former.

Here, the district court made numerous findings establishing that the parties held themselves out as married:

1. They referred to each other as spouses to multiple individuals.[22]
2. They celebrated their anniversary every April 7th thereafter until they separated in September 2016.[23]
3. There was a joint effort to appear married in social settings.[24]
4. The testimony of the parties' accountant, Robert Semonian, corroborated that the parties held themselves out as husband and wife for social purposes.[25]
5. The testimony of Shannon Evans, Esq., who represented both parties in their estate plans and represented Respondent in the September 13, 2016 transaction, was "credible when she testified that Mr. Pickens informed her that he and Dr. Michaels were not legally married, even though they held themselves out to be a married couple."[26]
6. The district court found the testimony of Dara Lesmeister, who worked with Mr. Pickens and knew Dr. Michaels, that she believed the parties were husband and wife, to be plausible.[27]

In conclusion, a couple holding themselves out as married to family and friends is inherently social, and the district court's findings established a plethora of

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[21] *Hay*, 100 Nev. at 198, 678 P.2d at 673.
[22] (I/AA 08223).
[23] (I/AA 08223).
[24] (I/AA 08224).
[25] (I/AA 08225).
[26] (I/AA 08226).
[27] (I/AA 08225).

evidence to satisfy this aspect of the *Michoff* and *Hay* analysis. In any event, the multiple deeds and deeds of trust held jointly by the parties also conclusively established the parties' agreement to pool their income, assets and liabilities.

Respondent's Brief also cites *Michoff* to stand for the proposition that "adults who voluntarily live together may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property." It should be noted, however, that the *Michoff* court itself did not state this language in its opinion; this language was a citation to *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal.Rptr 815, 819, 557 P.2d 106, 110 (1976), a California case. The dicta in *Michoff* was "that unmarried cohabiting adults **may agree to hold property that they acquire as though it were community property**."[28]

Neither *Hay*[29] nor *Michoff* held that all property must be pooled as community property. This is only natural given that married couples are not required to hold all property as community property, either. Thus, Respondent's emphasis on the parties pooling **all** of their property is misplaced. The issue before this Court is whether the financial conduct between the parties established an implied-in-fact agreement to hold their property as if they were married.

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[28] *Michoff*, 108 Nev. at 938, 804 P.2d at 1224.
[29] *Hay*, 100 Nev. at 199, 678 P.2d at 675.

Respondent's Brief also cites *Sack v. Tomlin* and *Langevin v. York* to stand for the proposition that "when unmarried cohabiting couples purchase property title in both parties' names, with or without the right of survivorship, they own the property in proportion to the amounts they each contributed to the purchase price." The district court also cited these cases to stand for this proposition in one of its rulings.[30] These cases do not fall under the *Michoff* and *Hay* doctrine, however, as they involved materially different facts.

The *Langevin* court explicitly found that the parties in that case did not hold themselves out as married and that the nature of their relationship was "unclear."[31] The parties were never married, nor did they ever hold themselves out as being married.[32] Each of the deeds also designated the parties as unmarried[33] and there were no joint bank accounts between them.[34] The facts in *Langevin* were clearly outside the bounds of the *Michoff* doctrine.

Respondent's and the district court's reliance on *Sack* is also misguided. Like *Langevin*, the *Sack* court explicitly found that the parties did not hold themselves out as married.[35] They also prepared separate loan applications for a mortgage, unlike

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[30] (I/AA 08244).
[31] *Langevin v. York*, 111 Nev. 1481, 1485, 907 P.2d 981, 983 (1995).
[32] Id. at 1485, 983.
[33] Id. at 1484, 983.
[34] Id. at 1485, 983.
[35] *Sack v. Tomlin*, 110 Nev. 204, 209, 871 P.2d 298, 302 (1994).

the parties in this case who were on all of the mortgages together.[36] The *Sack* court thus found that the apportionment dispute there was more analogous to a situation where cotenants unevenly contribute to the purchase price of real property.

To be clear, both the *Sack* and *Langevin* courts found that the parties in those cases did not hold themselves out as married. These findings alone are enough to render these cases inapplicable to *Michoff, Hay* and the instant matter.

iv. The district court exercised its discretion in clear disregard of the guiding legal principles established by *Michoff* and *Hay*

In reviewing divorce proceedings on appeal, the Nevada Supreme Court has upheld district court rulings that were supported by substantial evidence and were otherwise free of a plainly appearing abuse of discretion.[37] However, where a trial court exercises its discretion in clear disregard of the guiding legal principles, this may constitute an abuse of discretion.[38] In reaching a determination, the district court must apply the correct legal standard.[39]

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[36] Id. at Fn. 6.

[37] *Buchanan v. Buchanan,* 90 Nev. 209, 216, 523 P.2d 1, 5 (1974).

[38] *Bergmann v. Boyce,* 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (finding an abuse of discretion when district court erroneously applied legal standard for a motion to dismiss instead of proper standard for a post-judgment motion for attorney's fees).

[39] *Lubbe v. Barba*, 91 Nev. 956, 540 P.2d 115, 118 (1975) (reversing district court ruling as it was "apparent that some of the elements necessary to establish a cause of action for intentional misrepresentation are absent, and that the trial court did not require respondents to prove the alleged fraud by clear and convincing evidence"). Also see *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, P.2d

Despite the *Michoff* claim being one of Appellant's main arguments at trial, the district court's FFCL briefly addressed the issue in one paragraph (out of 24) in its "Conclusion of Law" section. In its entirety, the paragraph reads as follows:

> "11. Nevada law recognizes the rights of parties who voluntarily agree to pool their assets and become implied partners to an equal division of the property acquired during their relationship. (See *Western States Construction v. Michoff*, 108 Nev. 931 (1987). There was no quasimarital relationship found by the court. Further, the transfers were for satisfactory value to both parties. Parties, married or not may engage in contracts with each other."[40]

Just as in *Lubbe*, the district court's ruling on the *Michoff* issue deviated so greatly from its factual findings that it is apparent the district court did not consider the guiding legal principles established by *Michoff*. The language of the ruling itself further confirms this as it did not address the "holding out" as married factor whatsoever. This omission constitutes the basis for an abuse of discretion in itself, just as the *Franklin* court's failure to address whether the appellants had legally "appeared" in that case did. Moreover, and in spite of the record containing clear and convincing evidence of an asset pooling agreement, the district court's ruling did not provide any findings or reasoning as to how the parties' financial conduct

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1147, 1149 (1979) (finding an abuse of discretion when district court made no findings as to whether appellants had "appeared" in the action so as to preclude entry of a default judgment against them).

[40] (I/AA 08232).

was not indicative of a pooling agreement. It simply rested on the circular statement that "there was no quasimarital relationship," a term neither *Hay* nor *Michoff* refer to.

In sum, the district court's factual findings; its disparate holdings on the applicability thereof under *Michoff*; the language of the pertinent rulings themselves and the district court's misplaced reliance on *Sack* and *Langevin* all make it apparent that it disregarded the established legal principles under *Michoff* and *Hay*. This Court should thus be inclined to find an abuse of discretion and thereby reverse the district court's ruling under *Michoff* and *Hay* or, in the alternative, remand to the district court for a determination under *Michoff* and *Hay* which sufficiently considers their guiding legal principles.

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

Respondent argues that the district court did not make findings that guilt or the release thereof may be consideration in a valid and enforceable contract but this is directly contradicted by the FFCL:[41]

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[41] The district court found "Mr. Pickens also able to assuage his self-imposed guilt for engaging in an affair with a woman, impregnating her, and revealing a significant secret about Dr. Michaels' childhood to his new significant other. Consideration is a legal term of art. The record does not reflect that the parties shared a meeting of the minds on this point. Additionally, there was no testimony than an attempt for reconciliation had been initiated by either party." (I/AA 08237).

> "15. Nevada law recognizes that consideration is a requirement of any valid contract. (*See Manning v. Coryell*, 130 Nev. 1213 (2014). Consideration can come in tangible and non-tangible forms. Mr. Pickens testimony that he wanted to be able (sic) start fresh in his new life was important to him, as well as his need to assuage his guilty feelings due to his conduct."[42]

The language of this holding and the findings throughout the FFCL demonstrate that the district court viewed Appellant's infidelity and any of his related guilt as consideration in a valid and enforceable contract. This runs counter to long-established doctrines of contract law such as "past consideration" and "moral obligation" and the public policy of Nevada as a no-fault state. The policy considerations behind no-fault laws apply just the same here, as courts should not be inclined to regulate the private and intimate affairs of individuals, whether they are married or not. Appellant's Opening Brief cited *Diosdado* and *Parker* along these lines.[43]

Respondent focuses on the district court's other findings on consideration, specifically that Appellant "received valuable consideration when he was indemnified from a great deal of debt as to the transfer of his interest in Patience One, LLC to [Respondent]." By executing the Assignment...there is no more legal

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[42] (I/AA 08243).

[43] *Diosdado v. Diosdado*, 97 Cal.App.4th 470, 118 Cal.Rptr.2d 494 (2002); *Parker v. Green*, 134 Nev. 993 (2018) (unpublished) No. 73174, June 25, 2018.

basis under which [Appellant] could be held personally liable for the responsibility for the Patience One, LLC debts."[44] The record, however, is bereft of any evidence that any debt was assumed by Respondent after the transaction and prior to the filing of the underlying lawsuit. This finding, however, ignored that the value of the business was significantly greater than its debt and that Appellant effectively gave up his equity in the property for nothing in return.

Respondent then cites *Charleston Hill Nat'l Mines v. Clough*[45] to stand for the proposition that "when the consideration is embraced in the terms of the document, it cannot be disputed or denied that the promise as made was based upon the consideration thus expressed." This is an overbroad reading of the case, however, and neglects the distinctions between the specific language contained in the Assignment of Interest here compared to the contract terms in *Charleston Hill.* This position is also counter to the record which establishes that no consideration was given to Appellant in the transaction. In *Charleston Hill*, the provision regarding consideration specifically referred to the terms of the loan between the parties.[46] Here, the provision regarding consideration in the Assignment of Interest was

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[44] (I/AA 08237).
[45] *Charleston Hill Nat'l Mines v. Clough*, 79 Nev. 182, 380 P.2d 458 (1963).
[46] Id. at 185, 459.

generic and did not refer to the nature or details of any specific duties, obligations or interests.[47]

Unlike the district court's ruling in Paragraph No. 15 of its FFCL cited above, the remaining rulings on consideration only made conclusory findings that there had been good and sufficient consideration.[48] This suggests that it court relied on its holding that the release of one's guilt may constitute consideration as opposed to the other possible forms of consideration it cited.

Respondent further argues that even if no valid consideration were to be found, the transfers from Appellant to Respondent could be considered as gifts. The district court made similar holdings.[49] The facts and circumstances surrounding the transaction, however, bely any notion that it was a gift. The district court here also made scant findings regarding donative intent[50] by Appellant, however, which distinguishes it from the court in *In re Irrevocable Tr. Agreement of 1979*.[51] Its only mention of such an intent was its reference to Appellant conveying title to the

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[47] The Assignment of Interest's provision regarding consideration stated, in its entirety, as follows: "Assignor desires to assign for good and valuable consideration, all of its right, title, duties, obligations, and interest in and to the 50% interest in the LLC to Assignee." (XXXVII/AA 09103).

[48] See Paragraphs No. 12, No. 23, and No. 24 of the FFCL's "Conclusions of Law" section. (I/AA 08242-08245).

[49] See Paragraph No. 13 of the FFCL's "Conclusions of Law" section. (I/AA 08242).

[50] *Schmanski v. Schmanski,* 115 Nev. 247, 252, 984 P.2d 752, 756 (1999).

[51] *In re Irrevocable Trust Agreement of 1979*, 130 Nev. 597, 603, 331 P.3d 881 (2014) (finding that genuine issues of fact remained as to donor's intent at time of transaction, thereby precluding grant of summary judgment).

properties for the purpose of making Respondent "less unhappy about his conduct in revealing her most personal strategy to a significant other", which is the same finding the district court cited when it held there had been valid consideration in an enforceable contract. Using the same set of facts to argue that a transaction was both a contract and a gift is inherently contradictory and has the effect of weakening each respective holding under the doctrine of judicial estoppel.

iv. Standard of Review

The district court's holding that the release of one's guilt as consideration should be viewed as a question of law and thus reviewed on a *de novo* basis. The questions of whether a contract or gift exists are both questions of fact which requires the Court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.[52] However, where a trial court exercises its discretion in clear disregard of the guiding legal principles, this may constitute an abuse of discretion.[53]

The district court's holding regarding guilt as consideration should be struck down on a *de novo* basis as no authority supports such a proposition. The district court further disregarded principles of Nevada law when it held that the September 13, 2016 transaction could be both a valid, enforceable contract and a gift at the same

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[52] *Edmonds v. Perry,* 62 Nev. 41, 61, 140 P.2d 566, 576 (1943).
[53] *Bergmann*, 109 Nev. at 674, 856 P.2d at 563.

time. It also did not address whether Respondent proved by clear and convincing evidence that the property being transferred into her trust was transmuted from community property to separate property under NRS 123.125.

This Court should be inclined to reverse the district court's holding that the release of one's guilt may constitute consideration and also reverse the district court's findings that the transaction could be both a contract and a gift. In the alternative it should be inclined to remand to the district court on the issue of whether there was clear and convincing evidence that the property being transferred into Respondent's trust was transmuted from community property to separate property under NRS 123.125.

C. Taken In Conjunction, The Parties' Personal, Business And Doctor-Patient Relationships Established A Fiduciary And/Or Confidential Relationship And Duty Between Them And The District Court's Finding To The Contrary Constituted An Abuse Of Discretion

In Nevada, a claim for breach of fiduciary duty has three elements: (1) existence of a fiduciary duty; (2) breach of the duty; and (3) the breach proximately caused the damages.[54] The existence of a fiduciary or confidential relationship necessitating such a duty is a question of fact which depends on the circumstances of each case.[55]

[54] *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp.2d 1234, 1245 (D.Nev.2008)
[55] *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614, Fn. 4 (1992).

While fiduciary duties arise as a matter of law in certain categories of relationships, Nevada also recognizes a duty owed in confidential relationships falling outside these categories.[56] 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.[57]

The district court did not make any findings on the existence of a confidential relationship between the parties. It did, however, make multiple holdings that there was no fiduciary relationship or duty owed by Respondent to Appellant:

> "4. Pursuant to Nevada law, spouses owe a fiduciary duty to one another. See *Williams v. Waldman*, 108 Nev. 466 (1992). Since the parties were not legally married, this duty does not apply."[58]
> ...
> "5. Mr. Pickens must prove the existence of a physician-patient relationship before a fiduciary duty can be established...Mr. Pickens failed to establish that he and Dr. Michaels were in a physician-patient relationship at the time of the execution of the transfer of such documents."[59]
> ...
> "22. Mr. Pickens failed to prove any credible theory of Dr. Michaels having breached any fiduciary duty owed from her to him. As a matter of law, the transfers of the Lowe Avenue and Queen Charlotte properties are not void based on a breach of fiduciary duty."[60]

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[56] *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 881 (9th Cir. 2007).
[57] Id.
[58] (I/AA 08240).
[59] (I/AA 08240).
[60] (I/AA 08245).

Each of the above holdings is problematic in different ways, but they all support that the district court disregarded guiding legal principles of fiduciary relationships and duties in Nevada when it made these rulings.

For one, the first holding above mistakes the sufficiency of a spousal relationship in establishing a fiduciary duty for its necessity in establishing one. The district court's ruling posits the following: 1) spouses owe each other a fiduciary duty 2) the parties here were not spouses and 3) because they were not spouses, they did not owe each other a fiduciary duty. This line of reasoning would result in fiduciary relationships and duties being confined to spousal relationships. It also disregards fact patterns where a fiduciary or confidential relationship was found to exist between fiancés[61] or friends.[62]

The FFCL's second holding postulates that there was no physician-client relationship between the parties at the time of the transaction in question. Even if this were correct, such a finding would not necessarily preclude a fiduciary relationship. That there was any physician-patient relationship between them at all—in addition to their relationship in which they held themselves out as married and their business partnership which was subject to fiduciary duties under NRS

[61] *Fick v. Fick*, 109 Nev. 458, 464, 851 P.2d 445, 449-50 (1993) (holding that fiancés share a confidential, fiduciary relationship entailing a responsibility to act with good faith and fairness to the other)
[62] *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337-338 (1995).

87.4336(1)-(2)—further supports that the totality of the circumstances established a fiduciary, or at a minimum, a confidential relationship between them.

Respondent also cites *Western Medical Consultants, Inc. v. Johnson, 80 F.3d 1331, 1335 (9th Cir. 1996)* to stand for the proposition that after the relationship between parties has ended, the fiduciary duties between the parties largely ceases, and they may behave going forward as if there no duties between them. The *W. Med. Consultants, Inc.* court, however, did not find there was no fiduciary duty between the parties, as Respondent's reading seems to suggest, but rather, that a former employee had not actually breached her fiduciary duties.[63]

Respondent also cites *Applebaum v. Applebaum* for the holding that once parties are on notice that their interests are adverse, there is no fiduciary duty between them.[64] While Respondent's description of this holding is more or less accurate, case and statutory law have since fleshed out the law on circumstances where fiduciary relationships may exist. For instance, *Williams v. Waldman* explicitly referred to the holding in *Applebaum* and deviated from same when it held that the fiduciary duties between the spouses in its case continued after they had been

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[64] *Applebaum v. Applebaum*, 93 Nev. 382, 384-385, 566 P.2d 85, 87 (1977) (finding that husband's continued residence in the family home did not impose on him a fiduciary duty to his estranged wife and that once he announced his intention to seek a divorce, wife was on notice that interests were adverse).

put on notice that their interests were adverse.[65] Like many of the cases cited above, *Williams v. Waldman* further confirmed that the existence of a fiduciary or confidential relationship depends on the specific circumstances. Other cases have also touched on the fiduciary nature of a spousal relationship continuing even after the parties are involved in divorce proceedings.[66] The duties of disclosure in statutes such as NRCP 16.2 further establish that the fiduciary duties between spouses do not necessarily end upon notice of their adverse interests.

iii. Standard of Review

Because the existence of a fiduciary duty involves a question of fact, a district court's ruling will be upheld when it is supported by substantial evidence and is otherwise free of a plainly appearing abuse of discretion.[67] However, where a trial court exercises its discretion in clear disregard of the guiding legal principles, this may constitute an abuse of discretion.[68]

Because there were facts demonstrating multiple and substantial fiduciary relationships—personal, business and even medical—between them, the district court committed an abuse of discretion in finding there was no fiduciary relationship.

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[65] *Williams v. Waldman*, 108 Nev. 466, 834 P.2d 614, Fn. 4 (holding that the issue of whether a confidential relationship survives an announcement of intention to seek a divorce necessarily depends on the circumstances of each case).
[66] *Vai v. Bank of America*, 56 Cal. 2d 329, 337, 364 P.2d 247 (1961) (holding that one spouse normally has a fiduciary duty to account to the other while negotiating a property settlement agreement, and that the duty is neither terminated by commencement of an action for dissolution nor by retention of counsel).
[67] *Buchanan,* 90 Nev. 209, 216, 523 P.2d 1, 5 (1974).
[68] *Bergmann*, 109 Nev. at 674, 856 P.2d at 563.

The district court further erred when it did not address the issue of the existence of a confidential relationship. This Court should be inclined to reverse the finding that there was no fiduciary relationship and remand to the district court to determine the existence of a breach and the damages resulting therefrom.[69] In the alternative, the Court should be inclined to remand to the district court determine the existence of a confidential relationship and any breach or damages resulting therefrom.

D. The District Court Erred By Not Considering The Presumption Of Undue Influence Based On The Parties' Fiduciary Relationship

Respondent does not address or attempt to refute the presumption of undue influence that arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction.

Instead, Respondent cites the doctrine of ratification to argue that even if undue influence were to have occurred, the contract was later upheld by the subsequent conduct of the parties. Respondent's references to Nevada's annulment statutes have minimal bearing or applicability to the instant matter, however. Respondent cites *Shelton v. Shelton* as a case where the Nevada Supreme Court upheld the terms of a marital settlement agreement when one party performed his obligations for a period of two years. This case, however, involved the specific

[69] Appellant contends Respondent breached her duty by virtue of the one-sided transaction of September 13, 2016 and Appellant was damaged by receiving a substantially smaller portion of the parties' property he would have otherwise been entitled to.

terms of a divorce settlement between the parties requiring the obligated party to make $577 in monthly payments to the other party $577.[70] Here, there were no such obligations or benefits on the part of Appellant aside from the broad language in the Assignment of Interest which assigned all of his "right, title, duties, obligations and interest in and to the 50% interest in Patience One, LLC."[71]

Respondent also cites *Whiston v. McDonald* to stand for the same proposition. This case, however, involved a subsequent contract between the parties which explicitly superseded all prior agreements and for which the Appellant executed a memorandum more than a year later acknowledging and ratifying same.[72] No such facts exist here.

Lastly, Respondent cites a New York case, *Hoskins v. Skojec* to further its argument regarding ratification. *Hoskins* involved parties who were both represented by counsel and where the terms of the agreement in question had been complied with for more than four years.[73] Here, Appellant was not only unrepresented in the transaction and during the 13 months when he allegedly ratified the transaction, but he was at arms-length with and adverse to Respondent's attorney,

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[70] *Shelton v. Shelton*, 119 Nev. 492, 494, 78 P.3d 507, 508 (2003).
[71] (XXXVII/AA 09103).
[72] *Whiston v. McDonald*, 85 Nev. 508, 510, 458 P.2d 107, 108 (1969).
[73] *Hoskins v. Skojec*, 265 A.D. 2d 706, 696 N.Y.S.2d 303, 304 (1999).

the very same attorney who had once represented Appellant in his own estate-planning affairs.

Because the district court did not consider whether there was undue influence and did not consider the presumption of undue influence arising when a fiduciary benefits from a transaction, this Court should be inclined to find that it disregarded guiding legal principles, thereby constituting an abuse of discretion. This Court should thus be inclined to remand this issue to the district court for a finding on the existence of undue influence under the presumption that such undue influence existed based on the parties' fiduciary relationship and the benefit Respondent received in the September 13, 2016 transaction.

E. The District Court Erred By Finding That Respondent Was Not Unjustly Enriched Despite Evidence Establishing The Massive Contributions By Appellant To The Assets Awarded To Respondent

The district court's holding that there was no unjust enrichment[74] overlooked the findings and testimony that Appellant deposited hundreds of thousands of dollars into the parties' joint account prior to the September 13, 2016 transaction and that these funds were used to pay for extension renovations and improvements on the Queen Charlotte residence. The district court's reasoning that there was no unjust enrichment due to there no being forensic accounting[75] does not carry weight when

[74] (I/AA 08243).
[75] (I/AA 08243).

the contribution amounts in question were self-evident based on the evidence and testimony of the parties.

Respondent further argues that Appellant himself called the transfer of the properties "fair" and the "right" thing to do but this characterization is highly devoid of the requisite context and does not capture the tone of Appellant's responses. Appellant also made statements in his deposition directly refuting any sort of representation he believed the transaction was "fair."

A determination on the existence of unjust enrichment is a question of fact and district court's ruling will be upheld when it is supported by substantial evidence. The district court's reasoning that it could not find unjust enrichment on the grounds that no forensic accounting was presented at trial, when there was no need for one based on the documentation and evidence brought forth, should constitute an abuse of discretion. This Court should thus be inclined to reverse the district court's holding on the issue and award the demonstrable financial contributions Appellant made to Respondent during their relationship.

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

Respondent argues that the district court did not abuse its discretion in ordering reformation of the Assignment of Interest and cites *NOLM, LLC v. County of Clark* in supporting same. *NOLM, LLC*, however, involved a case of unilateral mistake where the opposing party was aware of the mistake and sought to use it

against the mistaken party.[76] These circumstances clearly did not exist here, and Respondent does not contend that Appellant was either aware of the mistake or that he sought to use it against her. Appellant provided extensive testimony that he was extremely distraught by his life circumstances at the time—which included the passing of his dog, parents, his unborn child and the breakdown of his relationship with Respondent—which only further supports that he was not aware of the Assignment's misstatement.

Respondent's purported reliance on the representations in the September 13, 2016 transaction is not justifiable, as she refinanced the property in question after receiving notice of Appellant's Complaint. Further, the district court's holding[77] that Respondent could not have been aware that the Assignment of Interest misstated the actual owner of the 50% interest in Patience One, LLC is not supported by the tax returns and K-1s admitted into evidence at trial.

In these respects, the district court's holding constituted an abuse of discretion as it was not supported by substantial evidence: The facts demonstrate that any alleged reliance by Respondent was not justified based on the timing of events, and that Respondent absolutely could have been aware that the Assignment of Interest misstated the actual owner of Patience One, LLC based on the tax documents

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[76] *NOLM, LLC v. County of Clark*, 120 Nev. 736, 100 P.3d 658 (2004).
[77] See Paragraph 20 of the FFCL's "Conclusions of Law" section. (I/AA 08237).

available to her. This Court should thus be inclined to reverse the district court's ruling that the transfer of the 50% interest in Patience One, LLC was valid and enforceable.

III. CONCLUSION

Based upon the foregoing, this Court should be inclined to grant Appellant's appeal and reverse and/or remand the above issues to the district court as it may deem appropriate.

RESPECTFULLY SUBMITTED this 25 day of May, 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 2016 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), it contains 5,970 words and is thus in compliance with NRAP 32(a)(7)(A)(ii). 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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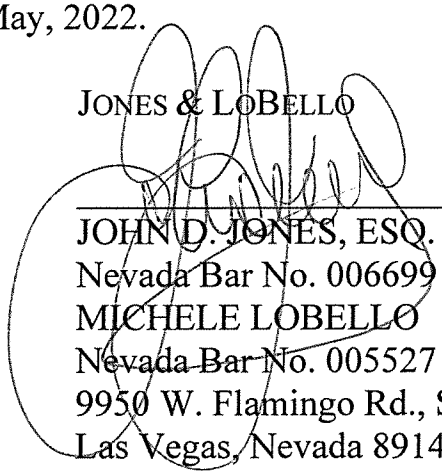
I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NEVADA RULES OF APPELLATE PROCEDURE.

DATED this 26 day of May, 2022.

JONES & LOBELLO



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PROOF OF SERVICE

I, Heather Ritchie, 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 West Flamingo Blvd., Ste. 100, Las Vegas, NV 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 May 26 2022, I served the following document:

APPELLANT'S REPLY TO RESPONDENT'S ANSWERING 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 May 26 2022, at Las Vegas, Nevada.

Heather Ritchie