Electronically Filed
Jul 13 2022 04:54 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH JANEEN ROSE

Appellant,

vs.

DAVID JOHN ROSE

Respondent.

CASE NO. 84295

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Kainen Law Group, PLLC (Appellant)

Law Office of Shelly Lubritz, PLLC (Respondent)

The Cooley Law Firm (Sarah Rose)

McConnell Law, LTD. (David Rose)

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3. If litigant is using a pseudonym, the litigant's true name: None.

Dated this 13 day of July, 2022.

By: ______________________

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

<u>Statutes</u>

JURISDICTION STATEMENT

This is an appeal from a final judgment pursuant to NRAP 3A(b)(1). The Order to be appealed is the *Findings of Fact, Conclusions of Law, and Order*, which was filed on January 31, 2022 (**APPX VIII:1516-1532**), and for which Notice of Entry was done on January 31, 2022. **APPX VIII:1533-1550**. Also being appealed is a non-final Order denying Sarah's *Motion for Judgment Pursuant to NRCP 52(c) or in the Alternative Motion for Summary Judgment*, which was filed June 25, 2021 (**APPX VI:1105-1124**), and for which Notice of Entry was done on June 30, 2021. **APPX VI:1125-1147**. The appeal from that Order was timely filed on February 15, 2022. **APPX IX:1600-1643.**

ROUTING STATEMENT

Pursuant to NRAP 17(b)(10) 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) and (12), there are issues within this appeal which should be heard by the Supreme Court, including the issues related to the duty spouses owe to each as adversaries in a divorce, the application of contract law to stipulated Decrees, the effect of signing a document and thereafter claiming the same was not read, the ability of a court to decide a NRCP 52(c) Motion on the transcript of the trial, and the application of *Day v. Day,* 80 Nev. 386, 389-390, 395 P.2d 321, 322-323 (1964).

STATEMENT OF ISSUES

Appellant (hereinafter "Sarah") has identified three (3) issues to be addressed within this opening brief, under which she believes the District Court's Order was in error.

1. Whether the district court erred in finding that the survivorship benefit option is not community property;
2. Whether the district court erred in setting aside the survivorship benefit provision of the decree;
3. Whether the district court erred in denying the NRCP 52(c) motion.

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STATEMENT OF THE CASE AND FACTS

The parties were married in Las Vegas on June 17, 2006. **APPX I:0001**. On February 22, 2017, David filed his Complaint for Divorce. **APPX I:0001-0006.** Sarah filed her Answer and Counterclaim on September 26, 2017. **APPX I:0007-0014.** In March 2018, the parties participated in mediation with Judge Rhonda Forsberg, prior to her appointment the bench. **APPX IX:1703.** At the time, Sarah was represented by Shelly Cooley, Esq., and David was represented by Regina McConnell, Esq. **APPX I:0032-0033.** Although Ms. Cooley began drafting a Decree during the mediation, due to time constraints resulting from Judge Forsberg's schedule, the parties concluded the mediation with a short two-and-a-half page Memorandum Of Understanding ("MOU"). **APPX X:1870-1871, II:0298-0300**. The MOU was silent as to the survivor benefit provision, merely addressing the division of the retirement as a whole. **APPX II:0298-0300.** After signing the MOU, the parties remained at Judge Forsberg's office to continue to work on the Decree. **APPX X:1870-1871.** Unfortunately, Ms. Cooley's laptop lost power. **APPX X:1871.** The parties immediately relocated to Pecos Law Group, which was nearby, to utilize a computer to finalize the Decree. **APPX X:1871.** Sarah, Ms. Cooley and Ms. McConnell were standing in the office, and David was by the door. **APPX V:0882-0885, 0890-0893; IX:1717-1718.** Ms. McConnell was standing behind Ms. Cooley at the computer. **APPX V:0892.** The final drafted Decree was 39 pages, addressed the survivor benefit provision, and was silent on the question of merger. **APPX I:0032-0070.** Sarah, David, Ms. McConnell, and Ms. Cooley signed the Decree that day. **APPX V:0895-0896, VI:0952.**

Thereafter, Ms. McConnell reached out to Ms. Cooley, indicating that David did not agree to the survivor benefit provision in the Decree which he had signed. **APPX IX:1723-1724.** Ms. Cooley and Ms. McConnell discussed that any failing to address the provision in the Decree would have been malpractice, and Ms. McConnell asked for time to discuss the same with David. **APPX IX:1724; X:1872-1873, 1890-1893.** After hearing nothing from Ms. McConnell for several days, reaching out to her for answer and receiving no response, Ms. Cooley ultimately submitted the Decree to the

Court. **APPX X:1873.** The Decree was entered on April 11, 2018. **APPX I:0123.**

On April 25, 2018, David filed a Motion to set aside the survivor benefit option, claiming that he had made a "mistake," because he did not read the Decree before signing. **APPX I:0188-0197.** Judge Cheryl Moss set a trial on the matter, to determine the parties' intent, and what needed to be done with the provision, *if* she set it aside. **APPX II:0277.** Although the Court initially requested that Mr. Willick be an independent expert, because Sarah's counsel had previously spoken to him about the case, she directed that Sarah retain him, and left the option open for David to retain a rebuttal expert. **APPX II:0278, 0376.**

Thereafter, David fired Ms. McConnell and retained Shelley Lubritz, Esq. **APPX II:0285-0288.** On May 8, 2019, David filed a Motion to Enforce the MOU. **APPX II:0289-0301.** The Motion argued that the MOU was the only valid contract between the parties and because it did not mention the survivor benefit option at all, the Decree could not do so. **APPX II:0292-0293.** On September 5, 2019, David filed a Motion to exclude Mr. Willick's testimony, which was denied. **APPX II:0365-0374.** The first day of trial occurred on January 27, 2020. **APPX V:0768.** At that time, David presented his case, *and rested.* **APPX V:0768-0941; VI:1005.** Before Sarah could present her case, David renewed his Motion in Limine to exclude Mr. Willick's testimony. **APPX VI:1007-1037.**

Judge Moss proposed attempting settlement discussions, which occurred off the record. **APPX II:0439-0440.** Unfortunately, because of calendaring issues, the Court was unable to hold the second day of trial before the mandatory 2020 COVID-19 shut down. **APPX II:0439-0440.** The trial was not concluded before Judge Moss retired in December 2020. **APPX IX:1686-1687.**

Sarah filed a 52(c) Motion, as David had rested on the first day of trial. **APPX III:0657-0670.** A hearing was held on April 9, 2021. **APPX IX:1674-1696.** The District Court made several statements and findings. Among the most critical findings was that Judge Steel was "uncomfortable" making a decision based on the trial transcript (**APPX VI:1113; IX:1686-1687**); and also that she believed making a decision based on the transcript put her in the position of being akin to an "appellate judge." **APPX IX:1677.** She also found that the MOU was a "binding contract," although it was silent on certain terms, that there was a "fiduciary duty" to point out "material changes" between the MOU and the Decree despite the fact that the documents were prepared within a few hours of each other and all parties were present for the drafting of the Decree (which was more than 30 pages longer than the MOU) (**APPX VI:1114, 1119; IX:1687-1689**), that granting a survivorship benefit could constitute "additional alimony payments," and striking the prior testimony and resetting the trial *de novo.* **APPX VI:1120; IX:1687-1689, 1691.**

The new *de novo* trial was set for September 23, 2021. **APPX IX:1697.** A second day of trial was held on November 15, 2021. **APPX X:1843.** Once again, David objected to Mr. Willick's testimony. **APPX IX:1825-1837.** Once again, the Motion was denied. **APPX IX:1836-1837.** Thereafter, the parties filed closing briefs. **APPX VII:1375-1391; VIII 1392-1441, 1450-1489, 1490-1515.** In David's closing brief he again objected to Mr. Willick's testimony. **APPX VII:1379-1386.** In its final

Order, the district court reconsidered David's request to strike Mr. Willick's testimony and granted it. **APPX VIII:1519.**

Ultimately the Court concluded that 1) the MOU is an enforceable contract despite a subsequent written "contract" (the Decree); 2) that no term(s) may be changed or added from an MOU in the final drafting; 3) that there was no "meeting of the minds," with respect to the Decree; 4) that Ms. McConnell's testimony (despite contradicting itself and despite the fact that David was suing her) was more credible than Ms. Cooley's; and 5) that because "survivor benefits" have never been declared to be community property, they cannot be an "omitted asset." **APPX VIII:1522-1530.** As such, Sarah filed her Notice of Appeal on February 15, 2022. **APPX IX:1600-1601.**

SUMMARY OF THE ARGUMENT

The District Court improperly denied Sarah's 52(c) Motion, despite the fact that David had presented all of his evidence. Further, the District Court erred in finding, after the trial, that the MOU was not merged or superseded by the Decree pursuant to *Day*, supra; and that David's signature on the

Decree was "voided" by his belief that the Decree would be reviewed after it was signed, despite case law that the signatory bears the responsibility for reading the document being signed. The Court further erred in allowing David to present parol evidence on the issue, and by applying "contract law" to determine the validity of the *signed* Decree. Finally the Court erred in finding that Sarah had a "fiduciary duty" to David to point out that the provision had been added, in contradiction of existing law, and in determining that the survivor benefit option is not community property.

ARGUMENT

I. The District Court Erred in Determining That the Survivor Benefits Were Not Community Property

A. Standard of Review

"Conclusions of law, including the interpretation and construction of statutes, are reviewed de novo. Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction. Conversely, when a statute is ambiguous, this court construes the statute by looking at the Legislature's intent and conforming the construction to public policy. A statute is ambiguous if it is capable of being understood in two or more senses by reasonably informed persons, or is one that otherwise does not speak to the issue before the court." *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019). Internal citations omitted.

B. The District Court Erred in Determining That Survivor Benefits Are Not Community Property.

Retirement benefits have long been considered community property. *Kilgore v. Kilgore*, 135 Nev. 357, 360, 449 P.3d 843, 846 (2019). As such, those benefits are subject to the Court's division under NRS 125.150. This Court has consistently held that an employee spouse's options in controlling their retirement are subject to the rights of the non-employee spouse and cannot be used to defeat their community property interests. *See O'Hara v. State ex. rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 644, 764 P.2d 489 (1988) (stating, "An employee spouse may select among retirement options so long as the community property interest of the nonemployee spouse is not defeated."), *Kilgore,* supra (stating, "an employee spouse should not be able to defeat the non-employee spouses' interest in the community property by relying on a condition solely within the employee spouses's control). *See also Carlson v. Carlson,* 108 Nev. 358, 832 P.2d 380 (1992).

Until recently, there was no question that this Court considered survivor benefits to be at least a part of the retirement benefits. *See Carlson, Id*; *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). Even in *Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014), the Court looked at the survivor benefit option through the lens of community property, when it determined that 1) the decree could include naming the non-employee spouse the beneficiary (although it did not in that case), 2) that the district court specifically found that the benefit was not earned during the marriage, and 3) that naming any survivor beneficiary was optional and would be reduced from the employee spouse's benefit, thereby having no impact on the non-employee spouse's interest.

It is only within *Holguin v. Holguin*, Docket No 81373, 491 P.3d 735 (Table) (Order Affirming in Part July 23, 2021), that this Court has indicated that survivor benefits are not community property. *Holguin* is unpublished, and its determination creates a distinct problem for the courts.

Holguin recognizes the *Henson* holding that survivor benefits can be ordered in the Decree of Divorce, despite stating that "Nevada does not consider a survivorship interest to be a community property asset." But unless being awarded as spousal support, the court has no authority to divide separate property. *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996). Retirement interests cannot be spousal support because that would subject them to later modification. *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992). Therefore *Holguin* creates an untenable consequence, either the court must act in flagrant disregard of the legislature to divide separate property, or act in disregard of the long standing case law and statutes that make property divisions unmodifiable. The finding in *Holguin* cannot become precedent.

Further, the Court's finding in *Henson* is based on a material misunderstanding of fact, to wit: that "neither the employee nor the nonemployee spouse automatically receives a survivor beneficiary interest." *Henson,* 130 Nev. at 820. That premise is not factually accurate. The employee spouse has an automatic reversionary interest in the nonemployee spouse's portion of the retirement. **APPX VII:1305, 1329.** The Court's holding in *Henson* was based on a misapprehension of fact on this issue, and is therefore in conflict with the statute.

By failing to address and determine the award of survivor benefit options at the time of divorce, district courts are creating exactly the inequitable result with which this Court was concerned in *O'Hara*, supra, and *Kilgore*, supra.

The Court in *Wolff* appears to have been attempting to address that issue, finding that "[a]lthough a former spouse's estate is not encompassed by the definition of alternate payee in NRS 286.6703(4), we conclude that [the] estate should be entitled to [its] share of [the] retirement..." 112 Nev. at 1362.[1]

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[1] It appears that the Court believed that PERS divided their pensions at the source, rather than the payment stream, which is an error of fact.

Evidently, the Court believed that, despite it expanding the class of persons recognized as an alternate payee, PERS would comply with those Court Orders. Unfortunately, the Court appears to have been (and thereafter remained) unaware of the testimony of George Pyne, a representative from PERS speaking to the Senate Finance Committee on June 2, 1993 with respect to AB 555. According to the committee minutes from that date, Mr. Pyne stated that, "the purpose of the legislation is to reemphasize to the courts that **before** the retirement system will comply with a court order with respect to dividing a [member's] benefits with his or her divorced spouse, the court order **shall** comply with the provisions and terms of the retirement act." Marshal Willick, Esq., *A Primer on Nevada Pension Law in Divorce, PERS, and NRS 125.155*, 14, citing colloquy between Assemblyman McGaughey and Mr. Pyne (March 6, 2010) (copy on file with author) (emphasis added).

Two years after AB 555 was enacted and the comments referenced herein were made, the Nevada legislature undertook a bill (AB 292) that ultimately resulted in the enactment of NRS 125.155. NRS 125.155(3)(b) allows the Court to designate that a party's interest or entitlement be continued past the death of either party by Court Order.

The bill is subject to some controversy over its enactment, though the legislative history itself is fairly sparse.[2] The resulting statute is at various points vague and confusing. Ultimately, however, the reasons the bill was supported, passed, or even objected to, are not relevant. What is relevant is why the legislature adopted the statute it did, and what it means for survivor benefits. It is unquestionable from the legislature history that retirement accounts are community property. A.B. 292, Chapter 576, Nev. Legislature 68th Session, 11 (1995).

There is no indication in the legislative history as to why the provision related to survivor benefits was added. In fact, prior to the third reading in the Senate, at which time the bill was moved to the general file for consideration, the language had the benefits terminating at the death of either party. *Id.* at 4, 50, 54, 64, 85-87. The Journal of the Senate notes that the amendment was proposed by the Committee on the Judiciary and that Senator James made

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[2] A history of that controversy is set forth in Mr. Willick's above referenced primer, which can be provided as a supplement should the Court desire it.

remarks after proposing the adoption of the amendment, but no remarks related to the modification of the survivor benefit language were included. *Id.* at 90-91. The bill passed as amended in the Senate with no comments regarding the addition of the survivor benefit language and was returned to the Assembly for consideration and passed. *Id.*

It is unknown, therefore, why the legislature amended the bill to allow survivor benefits to be addressed in a Court Order, but what is known from the legislature history is that substantial discussion revolved around equity and effectuating an equal division of community property - and that ultimately survivor benefits were included.

A contrary argument can be made that the wording of the statute - indicating that the termination occurs upon death absent an agreement or Court Order - indicates that the legislature did not specifically consider the benefit to be community property, but that would be a misunderstanding of the intentions of chapter 125. The statute just preceding NRS 125.155 is NRS 125.150 - which specifically addresses how community property is to be divided.

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That statute states, in relevant part:

> In granting a divorce the court:
>
> > Shall, to the extent practicable, make an equal disposition of the community property of the parties, including, without limitation, any community property transferred into an irrevocable trust pursuant to NRS 123.125 over which the court acquires jurisdiction pursuant to NRS 164.010, except that the court may make an unequal division of the community property in such proportion as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

NRS 125.150(1)(b).

NRS 125.150 was revised in 1993 and the language above was clearly familiar to the legislature two years later when they adopted NRS 125.155.

Statutes are not considered in a vacuum. *Knickmeyer v. State*, 133 Nev. 675, 680, 408 P.3d 161 (Nev.App. 2017) ("We presume that the Legislature enact[s a] statue with full knowledge of existing statutes relating to the same subject."). When NRS 125.150 and NRS 125.155 are read together, it is apparent that the intention was to leave the court's existing discretion to make an unequal distribution of property when addressing retirement benefits; the inclusion of survivor benefits in NRS 125.155 can only mean that the legislature intended the Court to be able to divide the same as community property, a fact born out by this court in *Kilgore,* supra. Although addressing a different section in NRS 125.155, the Court noted that the district court's discretion to deny a non-employee spouse's request for payment of retirement benefits prior to the employee spouses actual date of retirement (instead of first eligibility) included the implicit power to reduce such benefits (and of course to grant the request), subject to the limitations set forth in NRS 125.150(1)(b).

Clearly, NRS 125.155 must be read within the context of NRS 125.150, and therefore the permissive language of NRS 125.155(3), should also be read within that context, making it apparent that survivor benefits are community property, and the discretion left to the court is pursuant to NRS 125.150(1)(b).

Further inequity, supporting the conclusion that survivor benefits are community property which must be addressed, exists in the failure to address the benefits at all. In *Wolff,* this Court specifically objected to securing retirement benefits with a life insurance policy, as the same resulted in "an 'unequal' distribution of debt" because there was no "corresponding 'equal' liability" to the other party. 112 Nev. at 1361. There is a cost to providing a survivor benefit option, as this Court recognized in *Henson*. 130 Nev. at 820. However, unlike the Court's presumption in *Henson*, the cost is not automatically attributed to the employee spouse. Unless the survivor benefit provision is addressed within the Qualified Domestic Relations Order ("QDRO") and a selection made at that time, there is no allocation of the cost. In that instance, the cost for any option selected is taken from the undivided benefit[3], often resulting in the non-employee spouse paying one half of their community property interest for someone else's survivorship benefit - similar to the situation and concern of the Court in *Carlson,* supra.

It is clear that the legislature intended survivor benefits to be community property, a power well within their control. The controlling authority set forth in *Wolff* and *Henson*, and further complicated by *Holguin*, is in conflict with the statute. This Court should make it clear that survivor benefit options are a

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[3] PERS does not allocate the benefit at the source, but rather at the payment stream.

community property asset to be addressed under the guidelines of NRS 125.150.

However, even if this Court does not determine that survivorship benefits are community property, this case is analogous to *Peterson v. Peterson,* Docket No. 77478, 463 P.3d 467 (Order of Reversal and Remand May 22, 2020), as the parties stipulated to the division of the survivor benefits.

The District Court erred in finding that the survivor benefits were not community property.

II. **The District Court Erred in Setting Aside The Survivorship Benefit Provision of The Decree.**

A. Standard of Review

"The Court reviews district court decisions concerning divorce proceedings for an abuse of discretion. District Court rulings supported by substantial evidence will not be disturbed absent an abuse of discretion. However, the district Court must apply the correct legal standard. " *Doan v. Wilkerson,* 327 P.3d 498, 501 (Nev. 2014) (superseded by statute). The division of community property is reviewed for an abuse of discretion. *Wolff,* 112 Nev. at 1359. However, the "district court's interpretation of a divorce decree presents a question of law, [which] this court reviews [] de novo." *Henson*, 130

Nev. at 818.

B. The Decree of Divorce Is the Only Valid Agreement

Even if this Court does not find that survivor benefits are community property, Sarah is still entitled to those benefits as the benefit of the bargain made. The district court's findings with respect to the Decree and the MOU must be reversed, and the Decree affirmed.

The District Court erred in its finding that the MOU was the "valid" independent agreement and that the terms of the same could not be modified by the Decree.

Contract law principles are inapplicable to the Decree. The case law makes it very clear that, as a general rule, this Court has found that the application of "contract law principles" to a Decree is improper. *Vaile v. Porsboll,* 128 Nev. 27, footnote 7, 268 P.3d 1272 (2012). *See also*, *Day,* 80 Nev. at 389-390; *Mizrachi v. Mizrachi,* 132 Nev. 666, 675, 385 P.3d 982, 988 (Nev. App. 2016).

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There have been times that contract principles have been applied to "agreement-based decrees," but only specifically to interpret the same. *Mizrachi*, 385 P.3d at 988-989. The exact boundaries of the application of contract law to Divorce Decrees, settlement or otherwise, is unclear. Certainly, as the Nevada Court of Appeals specifically stated, it is not "well understood" that contract law applies. *Id*, stating "[t]hus the extent to which contract principles may interpret an agreement-based decree is somewhat unclear under current Nevada law."

The analysis of the case law, well explained by the Court in *Mizrachi*, indicates that contract construction principles are not to be applied to merged Decrees, but application of contract principles related to intent is appropriate when interpretation of a clause is necessary to clear up ambiguity. *Id* at 989.

This case deals with a merged Decree. Nevada has long articulated the differences between addressing merged property settlements and those which survive as independent agreements. *See Lewis v. Lewis,* 53 Nev. 398, 2 P.2d 131 (1931).

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The seminal case on this issue in Nevada, which is specific and unique to Family Courts, is *Day*, which states "the survival provision of an agreement is ineffective unless the court decree specifically directs survival...Absent such a clear and direct expression *in the decree*, we shall presume that the court rejected the contract provision for survival by using words of merger in its decree." 80 Nev. at 389-390 (emphasis added). The holding in *Day* has been ratified in a number of cases since it was decided including *Rush v. Rush,* 82 Nev. 59, 60, 410 P.2d 757, 757 (1966); *Watson v. Watson*, 95 Nev. 495, 496, 596 P.2d 507, 507 (1979); *Wallaker v. Wallaker,* 98 Nev. 26, 27, 639 P.2d 550, 550 (1982); and *Vaile,* supra.

In *Day,* the court specifically identified such terms as: adopt, incorporate, approve, and ratify, etc., as terms of merger. In this case, the Decree states:

> The Court FINDS that the parties' have resolved all other issues, including but not limited to, child support, division of assets and debts, marital waste claims, alimony and attorney's fees and costs as is memorialized by the Memorandum of Understanding, a copy of which is attached hereto as **Exhibit "B."**

APPX I:0035-0036. The Decree itself then lays out all of the terms from the

MOU in greater detail, and several terms which are not in the MOU. **AA VI:0041-0070; VII:1205-1214, 1734-1739.**

The Decree also states:

> DAVID JOHN ROSE and SARAH JANEEN ROSE further expressly agree that this Decree of Divorce contains the entire agreement of the parties on these matters, <u>superseding any previous agreement</u> between them. No other agreement, statement, or promise made on or before the effective date of this Decree of Divorce by or to either party or his or her agent or representative will be binding on the parties unless (a) made in writing and signed by both parties, or (b) contained in an order of a Court of competent jurisdiction.

APPX I:0069-0070. (emphasis added). The survivor benefit provision in David's PERS is not subject to the second half of that clause (contained in an earlier writing), because despite David's testimony that the same was "discussed," it not addressed in the MOU. **APPX IX:1777-1781.** The Decree did not "modify" a previous "promise" made in writing. It is incorporating a new term - one of many.

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Further, the MOU states, "counsel for Sarah shall draft a final formal agreement incorporating the terms herein. That agreement shall be ratified by the Court, but shall not merge and shall retain its separate nature as a contract." **APPX II:0298** (emphasis added). It is clear, from that language that 1) the MOU was not intended to be the final agreement - merely that the Decree should contain its terms, and 2) that while the MOU contains language of non-merger, the same language was not set forth in the Decree. Therefore, only *Day* is applicable, and the Decree is the only surviving document.

Because this case deals with a merged Decree, it is not subject to "contract construction principles," such as a "meeting of the minds," which the district court utilized as part of its findings to set aside the Decree. Rather, by virtue of the Court signing the Decree (which does not contain non-merger language), the question is enforcement of an Order, subject only to the very specific terms of NRCP 60.

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C. The Decree Supersedes the MOU

Even if this Court were to find that the district court did not err in applying contract law, the Decree constitutes a superceding contract. *See* Restatement (second) of Contracts § 213(1) (1981), "a binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them." Pursuant to § 209(1), "an integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." Where an agreement "which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." Id. § 209(3). In other words, so long as the contract put before the court is a writing which appears to be a full and complete contract, it is presumed to be the final agreement, unless a party can show an agreement which was entered ***after***.

Although Nevada has not specifically cited to § 209 and § 213 of the Restatement (Second), the Court has cited on a number of occasions to other provisions within the Restatement (Second), including others within title 9, topic

3 of the same (the same section and topic which contains § 209 and § 213). See e.g., *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 301 P.3d 364 (2013); *James Hardie Gypsum (Nev.) Inc., v. Inquipco*, 112 Nev. 1397, 929 P.2d 903 (1996), overruled on other grounds in *Sandy Valley Assoc., v. Sky Ranch Estates Owners Ass'n.,* 117 Nev. 948, 35 P.3d 964 (2001).

Further, as the MOU predates the Decree, it cannot be the "final expression," and it is superseded as a matter of law. See *Brunzell v. Woodbury*, 85 Nev. 29, 33, 449 P.2d 158, 160 (1969), stating "When the parties have deliberately put their agreement in writing, in such language as imports a legal consideration, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is there expressed."

It is well settled case law in Nevada that a subsequent contract, entered into between the same parties, effects a novation and discharges the parties under the former agreement. *Williams v. Crusader Discount Corp.* 75 Nev. 67, 70, 334 P.2d 843, 845 (1959). In *Williams*, there were two guaranty contracts; the second was entered after the terms of the first were unmet, and reduced the total amount owed and extended the time for payment. *Id* at 68-70. The Court found that the second loan operated as a novation of the first, because it was between the same parties and it was clear from the terms that it was intended as a substitution. *Id.* Here too, it is clear from the plain language of the MOU and the Decree that the Decree was intended to be a substitution and the final expression of agreement.

For novation to occur, there must have been an existing valid contract, the parties must agree to the new contract, the new contract extinguishs the old, and the new contract must be valid. *United Fire Ins. Co., v. McClelland,* 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). For the subsequent contract to be the controlling agreement, the new agreement must do more than increase the payment to one party as a result of the other parties' failure to perform, as, in such cases, the pre-existing duty rule would invalidate the contract. *Zhang v. 8th Judicial Dist. Ct.,* 120 Nev. 1037, 103 P.3d 20 (2004). The pre-existing duty rule is inapplicable here. Where the "material terms" of the contract were simply changed, or new terms added, as a result of further "discussions" (including a writing which constitutes a counter offer) without a refusal to enforce existing terms, those terms effect a novation and the Decree supersedes the MOU. *See*

McCone v. Eccles, 42 Nev. 451, 181 P. 134, 136 (1919); Restatement (second) of Contracts § 39(1), 39b, 59a (1981).

Whether a novation occurs is a question of law "when the agreement and consent of the parties are unequivocal." *United Fire,* 105 Nev. at 508. It is "a question of fact if the evidence is such that reasonable persons can draw more than one conclusion." *Id.* There can be no reasonable ambiguity here in the terms of the agreement. The Decree contained all of the terms included in the MOU, not just by reference, but by specific written inclusion. The Decree also includes additional terms which were not previously addressed in either the parenting agreement or the MOU, but were required to fully address the issues that must be recited in a final, binding Decree. The only question is a question of law: did a novation occur. The only reasonable answer is "yes," pursuant to *United Fire* and *Williams.* Therefore the Court erred in finding that the Decree was invalid because it did not "match the MOU" with respect to survivor benefits - when the MOU was silent on that issue.

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D. <u>As the Decree Is the Controlling Agreement Parol Evidence Was Improper</u>

The district court erred in allowing David to testify as to the MOU, its terms, and the negotiations which led to the same. Ultimately, the other witnesses had to testify to the same as well, in order to rebut David's testimony. However, that testimony was improper parol evidence.

> Generally parol evidence may not be used to contradict the terms of a written contractual agreement. The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all ***<u>prior</u>*** negotiations <u>and agreements</u> are deemed to have been merged therein. Where 'a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning.'

Kaldi v. Farmers Ins. Exchange, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001). Internal citations omitted. Emphasis added.

Parol evidence may be allowed to prove "the existence of a separate oral agreement as to any matter on which a written contract *<u>is silent</u>*, and which is not inconsistent with [the written contract's] terms." *Id.* at 283. Emphasis added.

Further, although this Court declined to impose a rule based on prior dictum, in *Kaldi*, the court did recognize that "provisional receipt of parol evidence to demonstrate that a particular phrase or term in a document, that has a common meaning, was not intended by the parties to have its common meaning," but that "does not stand for a general proposition that evidence of a party's intent may be admissible to create an ambiguity in an otherwise unambiguous contract." *Id.* at 282.

There is no basis in this case for parol evidence. The Decree clearly meets the standards for a final integrated agreement. The Decree is not silent on the issue of survivor benefits (although the MOU was). There was no allegation that the language in the Decree did not have its common meaning. The Court therefore clearly erred in permitting and relying on parol evidence to set aside the Decree.

E. Sarah Did Not Have a Fiduciary Duty to David.

The district court determined that Sarah had a "fiduciary duty" to "point out the survivor benefit provision language" in the Decree. **APPX VI:1119; VIII:1520-1521, 1525-1526.** It was among the bases for finding there was no "meeting of the minds." **APPX VIII:1523-1524.**

In Nevada, a fiduciary duty exists "between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." *In re Matter of Frei Irrevocable Trust*, 133 Nev. 50, 58, 390 P.3d 646, 653 (2017), quoting *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838 (2009). Additionally, "'a confidential or fiduciary relationship' exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Perry v. Jordan*, 111 Nev. 943, 946-947, 900 P.2d 335, 337 (1995), quoting *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529-530 (1982).

Although Nevada has not directly addressed the issue of whether adversarial parties can hold a fiduciary duty to each other, the Court has implied that in instances of divorce at least, no fiduciary duty is presumed. Specifically, in *Applebaum v. Applebaum*, the Supreme Court stated:

> Nor does Steven's continued residence in the family home impose on him a fiduciary duty to his estranged wife. Once Steven announced his intention to seek a

> divorce, Geraldine was on notice that their interests were adverse. It was not necessary for Steven to treat her with animosity to bring this fact home to her.

93 Nev. 382, 384-385, 566 P.2d 85, 87 (1977).

Nevada law wherein fiduciary duties are found in divorce are generally limited to attorney-client obligations where one spouse is an attorney and convinces the other party not to hire independent counsel, making representations that the attorney-spouse will look out for the other spouse's best interests. See *Cook v. Cook*, 112 Nev. 179, 912 P.2d 264 (1996); *Williams v. Waldman,* 108 Nev. 466, 836 P.2d. 614 (1992). In *Williams*, this Court stated, "[t]he issue of whether a confidential relationship survives an announcement of an intention to seek a divorce necessarily depends on the circumstances of each case." 108 Nev. at footnote 4, While the Court in *Williams* found fiduciary relationship existed between the spouses "under the circumstances of [the] case," the seminal fact therein was that the wife did not have independent counsel to advise her and the fiduciary relationship caused by the marriage was one that "precipitat[ed] a duty to disclose pertinent assets and factors relating to those assets." 108 Nev. at 472.

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Other courts have concluded there is no fiduciary duty between adversarial parties. *See e.g., Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. 2000). ("where adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent misrepresentations")[4]; *Gold Standard, Inc., v. Getty Oil Co.*, 915 P.2d 1060, 1064 (Utah 1996); *Wells Fargo Realty Advisors Funding, Inc., v. Uioli, Inc.*, 872 P.2d 1359, 1365 (Co. 1994) ("...the parties were clearly adversarial and both sides were represented by experienced, able counsel....under the circumstances at issue, therefore, we conclude [the] lender did not have a fiduciary duty to borrowers.").

There is no evidence whatsoever that Sarah ever "supplied" false information to David. The reality is that David (and his attorney) had a duty to read, and if he had done so, the provision was completely obvious and listed in two separate places. **APPX I:0052-0055.** Sarah made no representations to David whatsoever, particularly not about the contents of the decree. **APPX VII:1193-1194.** Nor can any implication be taken that the decree had to exactly match the

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[4] In Nevada, both "negligent" and "fraudulent" misrepresentations require the defendant to supply false information. *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.,* 130 Nev. 801, 810, 335 P.3d. 190, 197 (2014).

MOU, because the MOU is two-and-a-half pages and the Decree is 39 pages. **APPX I:0032 -0070, 0086-0088.** This is always the case, because a lot of terms require specificity that is never set out in a summary MOU.

It is simply illogical to assume that parties, knowingly adversarial to each other, have a "duty to act for," or "act ... with due regard to the interests" of the opposing party. There is no question that the assets, and factors relating to those assets, were disclosed in this matter. Sarah did not have an obligation to point out every provision in which she received any benefit. Further, *Williams* and *Cook* make it clear that by virtue of having independent counsel the parties were sufficiently protected.

F. <u>The Court Erred in Finding There Was No "Meeting of the Minds"</u>

The District Court erred when it determined there was no meeting of the minds. Although contract law does not apply, pursuant to *Day*, the district court chose to set aside the Decree under contract law and specifically found there was no "meeting of the minds." That is incorrect under Nevada law.

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"A meeting of the minds exists when the parties have agreed upon the contract's essential terms." *Certified Fire Prot. Inc., v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012). "Which terms are essential 'depends on the agreement and its context and also the subsequent conduct of the parties, including the dispute which arises and the remedy sought.'" *Id.* But a valid contract does not exist when material terms remain uncertain or indefinite. *Israyelyan v. Chavez*, 466 P.3d 939 (Table) (Nev. 2020).

A party is presumed to have the information that counsel has. *See NC-DSH v. Garner*, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009), *Estate of Adams by and through Adams v. Fallini*, 132 Nev. 814, 820, 386 P.3d 621, 625 (2016), *Lange v. Hickman*, 92 Nev. 41, 43, 544 P.2d 1208, 1209 (1976), *Milner v. Dudrey,* 77 Nev. 256, 264, 362 P.2d 439, 443 (1961).

"Everyone is presumed to know the law and this presumption is not even rebuttable." *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915). See also, *In re Matter of King*, 473 P.3d 1044 (Table) (Nev. 2020). While *Smith* dealt specifically with a statute, it also dealt with a non-attorney's knowledge of the law. Presumptively, an attorney, with their greater knowledge and regular exposure to both statutes and case law, should be assumed to have an even greater scope of knowledge, to include case law, etc, which should then be imputed to the client. As addressing the survivor benefits is necessary in the Decree, there is not even a rebuttable presumption that Ms. McConnell, and by extension, David were unaware that they must be addressed.

Here, the essential terms, to wit: that the entirety of the community's interest in David's PERS would be divided, were included within the MOU; as specified in the Decree, as in *Peterson*, supra, the distribution of the "entirety" included survivor's benefits.

There is no question that, as a matter of law, all parties must be presumed to have been aware that addressing the survivor benefits was required. Therefore, the only remaining question -- if this Court were to even apply contract principles is whether the option selected was "agreed upon."

In determining whether there was a meeting of the minds, the Court needs to look at 1) the agreement; 2) its context; 3) subsequent conduct of the parties; and 4) the dispute which arises and remedy sought. *Certified Fire*, 128 Nev. at 378.

The Agreement

As detailed above, the only relevant "agreement" before this Court is the Decree, since the MOU is merged in the subsequent Decree by operation of law. If not specifically merged, then the agreement has been replaced.

The Context of the Decree

The Decree was prepared by the parties as they negotiated a settlement at arms-length, and within hours after the MOU was drafted and signed. **APPX IX:1715-1720.** Both parties were represented by the same counsel throughout the case, and throughout the day on which both the MOU and Decree were drafted. **APPX I:001, 007, 0070.** All of the testimony was in agreement that the parties had time to speak with their counsel. **APPX VII:1220-1221; IX:1782-1784.** It should be noted that Ms. McConnell's testimony on during the first day of initial trial was that she does not sign Decrees if she knows her client's have not reviewed them. **APPX V:0924.** By the first day of the second trial, Ms. McConnell was, and is, in the process of defending a malpractice suit by David. **APPX IX:1709-1710, 1730-1731.** At that point, Ms. McConnell initally demurred as to whether David read the Decree, but eventually admitted that it was her understanding that he had reviewed it. **APPX IX:1741-1743.** But only David testified that he was told *not* to read the Decree. **APPX IX:1782-1784.**

All of the relevant evidence supports that the parties relied on the advice and counsel of their attorneys. The parties knew they were adversarial, and David was aware that the Decree he was handed clearly contained far more language than was in the MOU (39 pages v. 2 pages). Under the context in which the Decree was entered, and in light of the case law, it is clear that the context of the Decree supports a "meeting of the minds."

<u>The Subsequent Conduct of the Parties</u>

The testimony provided at the time of trial by Ms. McConnell and Ms. Cooley agreed that counsel discussed the Option 2 survivor benefit language after the Decree was signed and before it was submitted. **APPX IX: 1722-1724; X:1872-1873.** While the same is arguably also parol evidence, a review of that testimony, given below, does not lead to a different result.

Both witnesses agreed that Ms. McConnell indicated that David was *no longer* (or not) in agreement with giving Sarah survivor benefits. **APPX X:1872-1873, 1891-1893.** In her first day of testimony, Ms. McConnell stated that Ms.

Cooley told her that not addressing the survivor benefits would be malpractice. **APPX IX:1724.** Both Ms. McConnell and Ms. Cooley agree that Ms. McConnell asked for time to speak with David. **APPX X:1872-1873, 1891-1893.**

Ms. Cooley and Ms. McConnell disagreed as to the context of that conversation. According to Ms. Cooley, it was represented to her that Ms. McConnell intended to discuss with David that he had made a bargain in signing the Decree. **AA X:1872-1873.** Ms. McConnell did not specify exactly what she agreed to speak with David about, but she did say that she would speak with him about Sarah's position and Ms. Cooley's statements regarding the survivor benefits. **APPX X:1892.** Ms. Cooley stated that she sent follow up correspondence to Ms. McConnell about submitting the Decree. **APPX X:1873.** Specifically, Ms. Cooley stated that she asked Ms. McConnell for an update regarding David's new objection to the survivor benefit language. **APPX X:1873.** When she didn't hear back, she informed Ms. McConnell that she would submit the Decree on a date certain, if she did not hear back on the survivor benefit provision. **APPX X:1873.** Ms. McConnell did not respond, and Ms. Cooley submitted the Decree. **APPX X:1873.**

When Ms. McConnell testified in rebuttal, she was "unable to recall" if Ms. Cooley had informed her of her intention to submit the Decree. **APPX X:1897-1899.**

However, even if this Court chooses to rely on the district court's findings on the issue, the same is ultimately not relevant. This Court has found that a judgment stands where additional negotiations were pending, provided the other party was on notice. Although differing some on facts, the case of *Heard v. Fisher's & Cobb Sales & Distributors, Inc.*, 88 Nev. 566, 502 P.2d 104 (1972), is instructive. Therein, after a trial, the trial court took counsel for both parties into chambers, gave them an indication of where he was leaning, and encouraged the parties to attempt settlement. The parties attempted settlement for ten months, but ultimately, after those ten months, the trial judgment was entered.

One party sought to have the judgment set aside for "surprise,"but this Court found there was no basis to do so, as there had been <u>no agreement to withhold the judgment</u> and the movant was aware that the other party was still pursuing judgment in case a satisfactory settlement was not reached. Although in that case the parties had proceeded to trial and "had their day in court," before attempting settlement, the fact that notice was provided was clearly of importance to this court. *Id* (emphasis added).

Here, (despite the district court's finding), only David claimed he was told of an agreement that the "decree would be reviewed after." No other witness claimed there was any kind of agreement between counsel to a "post-signing" review.

The subsequent conduct of the parties supports the fact that the Decree was properly entered.

<u>The Dispute Which Arises and the Remedy Sought</u>

Both Ms. Cooley and Ms. McConnell agree that they discussed David's objection to the signed Decree within days of the signing itself. **APPX X:1872-1873, 1899-1900.** Both of them agreed that Ms. McConnell intended to talk to David.There was no testimony that Ms. McConnell asked for any additional time to speak with David. And no further response from Ms. McConnell or David..

Only after the Decree was entered, did David seek to have the same set aside, because he made a "mistake." **APPX I:0193.** That is essentially the definition of "buyer's remorse." If every litigant who regretted his or her bargain was able to claim they made "a mistake" and therefore there was no "meeting of the minds" when a settlement was signed, no contract would ever stand.

Under the facts of this case, it is clear that the district court erred in finding there was no "meeting of the minds."

G. <u>There Is No Fraud, Nor Any Basis under NRCP 60(b) To Set Aside the Decree</u>

The district court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)." *Rodriguez v. Fiesta Palms, LLC,* 134 Nev. 654, 656, 428 P.3d 255, 257 (2018). But, a district court abuses that discretion "when it disregards established legal principles." *Willard v. Berry-Hinkley Indus.,* 136 Nev. 467, 469, 469 P.3d 176, 179 (2020).

As stated above, the district court erred in utilizing contract law to set aside the Decree. The Decree is an Order of the Court and therefore, subject solely to the Court's powers for addressing a judgment under the law and rules. *Friedman v. Friedman*, 128 Nev. 897, 381 P.3d 613 (Table) (2012); *Lin v. Lin*, 460 P.3d 485, footnote 4 (Table) (Nev. 2020). To set aside the Decree, the same must be appropriate under one of the provisions set forth in NRCP 60: clerical mistakes, oversights and omissions; mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud, misrepresentation or misconduct of an opposing party; or that the judgment is void or satisfied. David's Motion in this matter was based in either NRCP 60(b)(1) or (3). **APPX I:0188-0197; II:0289-0301.** Neither NRCP 60(b)(1) or (3) provide a basis under the law to set aside the Decree in this matter.

Mistake

There are two kinds of mistakes which may result in setting aside a Decree - unilateral or mutual. A unilateral mistake may be utilized to set aside a Decree when:

> a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
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> . . .
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

Home Savers, Inc., v. United Sec. Co., 103 Nev. 357, 358-359, 741 P.2d 1355, 1356-1357 (1987), quoting Restatement (Second) of Contracts, § 153 (1981). *See also, In re Irrevocable Trust Agreement of 1979*, 130 Nev. 597, 603, 331 P.3d 881, 885 (2014); *Oh v. Wilson*, 112 Nev. 38, 910 P.2d 276 (1996); *Graber v. Comstock Bank*, 111 Nev. 1421, 905 P.2d 1112 (1995).

A mistake does not occur when a party chooses not to inform itself:

> One who acts, knowing that he does not know certain matters of fact, makes no mistake as to those matters. If a person is in fact aware of certain uncertainties a mistake does not exist at all. One who is uncertain assumes the risk that the facts will turn out unfavorably to his interests.

Tarrant v. Monson, 96 Nev. 844, 845, 619 P.2d 1210, 1211 (1980).

Further, the Nevada Supreme Court has stated, "[u]nder the limited circumstances when we have recognized unilateral mistake, the fact pattern involves misrepresentation or fraud by a party with unequal knowledge or bargaining skill." *Pepe v. 8th Judicial Dist. Ct.*, 124 Nev. 1499, 238 P.3d 845 (Table) (2008). There are no such facts here.

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"Courts have consistently held that one is bound by any document one signs in spite of any ignorance of the document's content, provided there has been no misrepresentation." *Yee v. Weiss*, 110 Nev. 657, 877 P.2d 510, 513 (1994). *Yee* also cites to the Restatement (Second) of Contracts § 172 (1981), "[a] recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." *Id.* The Court went on to note that "the comments [] note that if the recipient should have discovered the falsity by making a cursory examination, his reliance is clearly not justified and he is not entitled to relief, he is expected to use his sense and not rely blindly on the maker's assertions." *Id.*

This position, that a party is bound to a contract he chooses not to read is supported by long standing case law from the United States Supreme Court. Nearly 150 years ago, the U.S. Supreme Court stated in *Upton, Assignee v. Tribilcock*:

> It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not

> know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.

91 U.S. 45, 50, 23 L.Ed. 203 (1875).

It cannot be said that David had justifiable reliance on any representation, or misrepresentation.

In this case, David "bore the risk," as he (allegedly) did not read the Decree. **APPX IX:1783.** He was present where the Decree was being drafted by both attorneys and he was capable of being involved in the drafting or asking questions, if he so chose. **APPX VI:0948-0952**. David was given a copy of the Decree. **APPX IX:1741.** He could have reviewed the Decree.

Therefore, even if David's testimony was credible, he created and bore the risk of mistake by choosing not to review a Decree that was more than 30 pages longer than the MOU. His choice cannot somehow create "justifiable reliance" under the law.

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Further, it is clear that there was certainly equal knowledge and bargaining skill as to the preparation of the Decree, given the circumstances in which the Decree was drafted, including the fact that both parties were represented by counsel and the fact that both parties were individually given time to review.

Pursuant to Nevada law, David's alleged "unilateral mistake" is not a basis under which the Decree may be set aside.

There was also no mutual mistake under which the Decree could be set aside. A mutual mistake "occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain." *Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P.3d 860, 863 (2016). Sarah reviewed the Decree. **APPX VII:1220-1221.** She was aware of the inclusion of the survivor benefits. **APPX VII:1199.** Sarah was under no misconception of any vital fact. Therefore, there was no mutual mistake.

Inadvertence or Neglect

To set aside a Decree for inadvertence or neglect, the same must be excusable. *Bryant v. Gibbs*, 69 Nev. 167, 243 P.2d 1050, 1051 (1952). Further, the purpose of NRCP 60(b) "is to redress any injustices that may have resulted because of the excusable neglect or the wrongs of an opposing party." *Nev. Indus. Development, Inc., v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). There is no injustice where a party's own choices are what resulted in the Decree. *See Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287-288 (9th Cir. 1988), stating, "We see no unfairness in expecting parties to read contracts before they sign them."

There is nothing excusable in failing to do even the ordinary diligence of reading the full Decree. There is every expectation that Husband (and his counsel) would read and review the Decree. It is their duty to do so.

> Where the defaulting party discloses, in the case presented by him for an order to set aside such judgment, a degree of negligence, carelessness, and lack of diligence not to be predicated of a prudent business man in a matter of material concern to him, this court will not, on appeal, disturb the order of the court below denying such application.

Bryant, 69 Nev. at 170.

There is no excusable inadvertence or neglect where a party chooses not to read a contract before signing the same, unless there has been a misrepresentation by the opposing party. *See Yee*, 110 Nev. at 662. Sarah made no representations to David as to what was in the Decree. It is obvious that the Decree necessarily included language which was not in the MOU given the page differences (2 versus 39) between the two documents, and the testimony identified many differences between the Decree and the MOU. **APPX VII:1205-1214; IX:1788-1791.** David's neglect is not excusable and the Decree cannot be set aside on the basis of inadvertence or neglect, nor can David claim he was surprised when even a cursory review would have notified him that there were clear differences between the two documents, and the testimony supports that he had both time to review before he signed, was able to be engaged in the drafting if he had desired, and chose to sign the Decree without reading.

Fraud

The elements of fraud are: 1) a false representation; 2) the nonmoving party's knowledge or belief that the representation is false (or insufficient basis for making the representation); 3) the nonmoving party's intention to induce the moving party to act, or refrain from acting, in reliance on the misrepresentation; 4) the moving party's justifiable reliance on the misrepresentation; and 5) damage to the moving party resulting from the reliance. *Bulbman, Inc., v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992), quoting *Lubbe v. Barba*, 91

Nev. 596, 540 P.2d 115 (1975).

The case of *Villalon v. Bowen*, 70 Nev. 456, 273 P.2d 409 (1954), is instructive. In that case, when discussing whether or not Phyllis (the appellant) had engaged in fraudulent conduct, the Court stated:

> The suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, ... however, [] an obligation to speak must exist. Thus in a suit for equitable relief from a judgment, [] mere failure to disclose facts which, if known, would have prevented recovery is not necessarily fraud of any kind.

Id. at 467.

The Court rejected the idea that a confidential or fiduciary relationship was required to create an obligation to speak, but did note that the obligation:

> can arise from the existence of material facts ***peculiarly within the knowledge of the party*** sought to be charged *and not within the fair and reasonable reach of the other party*. Under such circumstances the general rule is <u>*that a deliberate failure to correct an apparent misapprehension*</u> or delusion may

constitute fraud.

Id. at 467-468.

Here, Sarah did not have an "obligation to speak." The inclusion of the survivor benefits was not "peculiarly within" her knowledge - they were in a written document that was handed to David for his review which was approved by both attorneys and both parties. **APPX IX:1782.** They were within "the fair and reasonable reach" of David. All he had to do was read the Decree.

Sarah did not mislead David. It is clear from the testimony that she was not in a position to know whether or not he had read the Decree, therefore it cannot be said that his misapprehension was "apparent." **APPX V:0894-0895.** There was no testimony to suggest he made any statement within Sarah's hearing which would have alerted her to either the fact that he (allegedly) didn't read, or that he "believed" there was no language related to survivor benefits included. It cannot be said that Sarah created any "false impression" deliberately, or even negligently. It was abundantly apparent that the Decree contained substantially more language than the MOU.

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The District Court erred when it made findings that Sarah engaged in fraudulent conduct due to an alleged "fiduciary duty" to David.

Further, although David alleged during his testimony that Ms. McConnell "told him not to read the Decree," her testimony did not concur. **APPX IX:1741-1743.** Even if David's testimony were truthful, under Nevada law, his remedy for that issue is not a Motion to Set Aside to deny Sarah the benefit of the bargain made, but rather a malpractice suit for damages (which is pending) against Ms. McConnell. See *Lange*, 92 Nev. at 43, stating "Notice to an attorney is, in legal contemplation, notice to his client. The attorney's neglect is imputed to his client, and the client is held responsible for it. The client's recourse is an action for malpractice." Internal citations omitted. See also, *Huckabay Properties, Inc., v. NC Auto Parts, Inc.*, 130 Nev. 196, 322 P.3d 429 (2014).

The district court decided that malpractice damages were too speculative and forced Sarah to bear responsibility for David and Ms. McConnell's errors in direct contravention of Nevada law. **APPX VIII:1525.**

There is no basis under NRCP 60(b) to set aside the Decree. The district erred in doing so.

III. The District Court Erred in Denying Sarah's NRCP 52(c) Motion

A. Standard of Review

"NRCP 52(c) allows the district court in a bench trial to enter judgment on partial findings when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue." *Certified Fire Prot. Inc.,* 128 Nev. at 377. "Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." *Id.* "However, the district Court must apply the correct legal standard. " *Doan,* 130 Nev. at 453.

B. The Motion Pursuant to NRCP 52(c) Should Have Been Granted.

After the conclusion of the first day of trial, Sarah filed a Motion pursuant to NRCP 52(c) for judgment on partial findings. **APPX III:0657.** David had rested his case-in-chief during that first day. **APPX VI:1005.** However, due to Judge Moss's retirement, the Motion was heard by Judge Steel. **APPX IX:1674.** The transcript from the first day of trial was included and cited within the Motion; it formed the basis for the same. **APPX III:0657-0670; V:0768; VI:0942.** Judge Steel refused to review the transcript, or consider the merits of the Motion because she stated that doing so would have placed her "in the eviable position of finding other stuff also as an appellate court sort of" **APPX IX:1677.** Judge Steel also stated that Judge Moss should not have heard the Motion to Alter or Amend the original Order which had been entered by Judge Kathy Hardcastle, sitting as the senior judge. **APPX IX:1677**

In ordinary cases, once a judge has made a ruling, order or decision, no other judge may act in the case without written request of first judge. *Rohlfing v. 2nd Judicial Dist. Ct.,* 106 Nev. 902, 906, 803 P.2d 659,662 (1990), quoting DCR 18(1). *See also* EDCR 7.10. However, EDCR 1.30(b)(5), 1.31(b)(13), 1.60(c), and 1.63 make it clear that cases may be reassigned as needed, or when a judge is unavailable. *See also* EDCR 5.204 (effective June 11, 2022).

In addition, this Court has found that DCR 27 (which prevents a second judge from considering a motion which has previously been denied or is pending), is intended to prevent "judge shopping." *Moore v. City of Las Vegas,* 92 Nev. 402, 404, 551 P.2d 244, 245-246 (1976). The same policy underlies DCR 18 and EDCR 7.10 - which, like DCR 27 - require the written consent of the first judge.

However, in *Moore,* the court specifically noted that:

> a deceased judge or a judge no longer in office is not available to give written consent for another district judge to hear motions once granted or denied by him. The animus of the rule is not offended where, as here, the case becomes assigned to another judge by reason of some fortuitous event such as death or the elective process and not by reason of any action initiated by or within the control of the parties.

Moore, 92 Nev. at 404-405. Retirement of a judge is equally a "fortuitous event," which causes the reassignment of a case to a second judge. Therefore, the second judge is not required to "restart" a trial simply by virtue of not having heard directly and only having the transcript of the testimony from the first day.

Further, a district court is permitted to decide a trial on written statements and exhibits. *See North Arlington Medical Bldg., Inc. v. Sanchez Constr. Co.,* 86 Nev. 515, 520, 471 P.2d 240 (1970), noting that the trial court had decided the case on deposition testimony and exhibits. It is logical that a review of the transcript, which sets forth the entirety of the testimony and evidence for that day, is an adequate mechanism for deciding a NRCP 52(c) Motion. *See Schultz* *v. Provenzano*, 69 Nev. 324, 329, 251 P.2d 294, 296 (1952), indicating that providing a transcript of the trial in Motion for new trial is appropriate. *See also*, *Executive Management, Ltd., v. Ticor Title Ins. Co.,* 114 Nev. 823, 844, 936 P.3d 465, 479 (1998).

In addition, because Judge Moss had not issued a final ruling, nor had the Motion for Judgment been initially made to her, Judge Steel's determination that reviewing the transcript and ruling on the merits of the Motion would place her in the position of being a reviewing court was factually inaccurate.

David had rested his case. His evidence was all before the Court. Therefore, Judge Steel, as the sitting judge, had the authority to review the transcript to determine if he had met his burden. Instead, the district court based its denial on an erroneous procedural decision, and failed to hear the Motion on the merits. The district court erred in doing so.

Further, the district court's decision created substantial prejudice for Sarah. "To be reversible, an error must be prejudicial and not harmless. To demonstrate an error is not harmless a party must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016). Internal citations omitted. Sarah's Motion for Judgment Pursuant to NRCP 52(c) set forth all of the holes in David's case in chief. By failing to consider the same on the merits, the district court allowed David to use Sarah's Motion as a road map to revamp his trial strategy. In doing so, however, the district court provided no equivalent guidance to Sarah. If the Court had denied the Motion on its merits, that Order would have indicated why the Court felt David had met his burden, and provided Sarah the ability to focus her case, and provided direction for cross examination and rebuttal. However, because the Court reset the trial *de novo*, David was able to utilize the road map Sarah's Motion provided to change his trial strategy in order to increase the probability of success at the second trial, while providing Sarah no indication as to how to focus her case. The Court's decision not to address the merits of Sarah's Motion created an unfair advantage for David in litigating this case.

The district court's error in failing to decide Sarah's Motion for Judgment on its merits was substantially prejudicial to Sarah and therefore reversible error.

CONCLUSION

Based on the foregoing, Sarah respectfully requests that judgment of the Court be reversed on each of the matters appealed.

By: ____________________________

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this appellate 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 appellate brief has been prepared in a proportionally spaced typeface using Word Perfect X5 in 14-point Times New Roman style;

2. I further certify that this appellate brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,324 words;

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

in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13 day of July, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2022, I caused to be served the ***Appellant's Opening Brief*** to all interested parties as follows:

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