IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH JANEEN ROSE,

Appellant,

vs.

DAVID JOHN ROSE,

Respondent.

CASE NO. 84295

District Court Case No: D547250

JOINT APPENDIX

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AFFIRMATION

(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding documents filed in the above-referenced matter does not contain the social security number of any person.

DATED this 13 day of July, 2022.

Law Office of Shelley Lubritz, PLLC

By: _____
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Nevada Bar No. 5410
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Kainen Law Group, PLLC

By: _____
RACHEAL H. MASTEL, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2022, I caused to be served the ***Joint Appendix*** to all interested parties as follows:

___ BY MAIL: Pursuant to NRCP 5(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

____ BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

____ BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

_X_ BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

shelley@lubritzlawoffice.com

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An Employee of
KAINEN LAW GROUP, PLLC

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12/13/2021 9:14 PM
Steven D. Grierson
CLERK OF THE COURT

RESP

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EIGHTH JUDICIAL DISTRICT COURT – FAMILY DIVISION

COUNTY OF CLARK, STATE OF NEVADA

DAVID ROSE, Plaintiff, vs. SARAH ROSE, Defendant.	CASE NO. D-17-547250-D DEPT. I Date of Hearing: 9/23/21 11/15/21 Time of Hearing: 9:00 a.m.

DEFENDANT'S CLOSING ARGUMENT

COMES NOW, Defendant, SARAH ROSE, by and through her attorney of record, RACHEAL H. MASTEL, ESQ., of the KAINEN LAW GROUP, PLLC, hereby submits her closing argument from the trial conducted on September 23, 2021, and November 15, 2021.

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Case Number: D-17-547250-D

A. DAVID'S SIGNATURE ON THE DECREE IS CONCLUSIVE EVIDENCE THAT THERE IS NO ISSUE IN CONTROVERSY

The penultimate fact in this case is uncontroverted: David signed the Decree. At the trial, David acknowledged he signed the same voluntarily, of his own free will. At the end of the day, the analysis ends at that point. David had a duty to read the Decree before he signed it and his failure to do so does not obviate him of that responsibility. "Courts have consistently held that one is bound by any document one signs in spite of any ignorance of the documents 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), which further states that "[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 then goes 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.

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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).

David cannot lay his failure to read at Sarah's feet. As the Court in Yee noted, David would have discovered the Option 2 benefits with a cursory examination; an examination which made logical sense considering the dramatic clear difference between a two-and-a-half page Memorandum of Understanding ("MOU") and a 39 page Decree.[1]

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[1] To the extent this Court believes David's assertion, that Ms. McConnell "told him not to worry about reading the Decree because changes could be made after it was signed," David's 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 (which is pending) against Ms. McConnell. See Lange v. Hickman, 92 Nev. 41, 43, 544 P.2d 1208, 1209, 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).

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B. SARAH DOES NOT HAVE A FIDUCIARY DUTY TO DAVID

Further, Sarah did not have a fiduciary duty to David, as they were adversarial parties by that time. 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, 843 (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 <u>*to the interests*</u> 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), emphasis added. It is simply illogical to assume that parties, knowingly adversarial to each other, have a "duty to act for, or give advice for the benefit of," let alone "act in good faith and with due regard to the interests" of the opposing party.

Although Nevada has not directly addressed the issue of whether adversarial parties can hold a fiduciary duty to each other, other courts have and those courts have concluded there is no fiduciary duty between adversarial parties. In Minnesota, "where adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent misrepresentations." *Smith v.*

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Woodwind Homes, Inc., 605 N.W.2d 418, 424 (Minn. 2000). Minnesota recognizes negligent misrepresentation where a party is "supplying information for the guidance of others in the course of a transaction in which one has a pecuniary interest, or in the course of one's business, profession, or employment." *Id.*

In Nevada, negligent misrepresentation is limited to business transactions, specifically those claims resulting in pecuniary loss. *Reynolds v. Tufenkjian*, 136 Nev. 145, 152, 461 P.3d 147, 153 (2020). Both negligent and fraudulent misrepresentation "require that the defendant ***supply*** 'false information.'" *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.*, 130 Nev. 801, 810, 335 P.3d 190, 197 (2014). Specifically in Nevada, negligent misrepresentation requires

> One who, in the course of his business, profession, or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon that information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barmettler v. Reno Air, Inc., 114 Nev. 441 449, 956 P.2d 1382 (1998), quoting Restatment (Second) of Torts § 552.

Sarah clearly did not supply false information to David. She made no representations to him whatsoever, particularly not about the contents of the decree. It cannot even be logically stated that Sarah *implied* that the decree <u>exactly</u> matched

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the MOU, because the MOU is two-and-a-half pages and the Decree is 39. Further, a divorce is not a "business transaction." As the Nevada law on negligent misrepresentation is clearly narrower than the Minnesota rule set forth above, it reasonable to apply the same standards on adversarial relationships.

Utah also has found that when parties are in an adversarial relationship, there is not a fiduciary relationship. *Gold Standard, Inc., v. Getty Oil Co.*, 915 P.2d 1060, 1064 (Utah 1996). As has Colorado. In fact, Colorado has noted that engaging independent legal counsel is a sign that a party is not relying on the other party acting in their best interests. *Wells Fargo Realty Advisors Funding, Inc., v. Uioli, Inc.*, 872 P.2d 1359, 1365 (Co. 1994).

It is unreasonable to presume that Sarah had a fiduciary duty to a party against whom she was litigating, even if that party was her husband. Nevada law, though having no affirmative statement on the matter, has implied that no continuing fiduciary duty exists once a divorce is initiated. 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).

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Nevada case law on fiduciary duties 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).[2]

As Sarah clearly did not owe David any fiduciary duty to point out to him the terms of the Decree itself, and David acknowledged during his testimony that he did, in fact, voluntarily sign the Decree, the analysis ends there. The Decree cannot be set aside.

C. CONTRACT LAW DOES NOT APPLY

That said, this Court has asked Sarah to further brief whether contract law is a proper consideration for this case, and specifically how the necessity of a "meeting of the minds" for contracts may impact David's signature on the Decree. Whether contract law is appropriate is a complex issue. First, it should be noted by

[2] While the Court in *Williams* also noted a fiduciary relationship between spouses, the issue therein was that the wife did not have independent counsel to advise her. The fiduciary relationship caused by the marriage was one that "precipitat[ed] a duty to disclose *pertinent assets and factors relating to those assets*." 836 P.2d at 618. There is no question that the assets and factors relating to those assets were disclosed. The question was, did Sarah have an obligation to point out the division. She did not. *Williams* and *Cook* make it clear that by virtue of having independent counsel the parties were sufficiently protected.

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this Court that, although David's closing argument contains the conclusion that "it is well understood that marriages and divorces stem from contract law, and where family law cases are silent, contract cases control," he provides no citation for the same. *Plaintiff's Closing Argument*, filed November 30, 2021, Page 3, lines 3-4. The reason David provides no citation is because Nevada law makes no such statement. In fact, the case law makes it very clear that, as a general rule, the Nevada Supreme Court has found that the application of contract law principles to a Decree is improper. *Vaile v. Porsboll*, 268 P.3d 1272 (Nev. 2012). *See also*, *Dav v. Day*, 80 Nev. 386, 389-390, 395 P.2d 321, 322-323 (1964), *Mizrachi v. Mizrachi*, 385 P.3d 982, 988 (Nev. App. 2016).

Admittedly there are exceptions but those exceptions are just that, and not the rule itself. There have been times that contract principles have been applied to "agreement-based decrees," 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

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contract principles related to intent is appropriate when interpretation of a clause is necessary *to clear up ambiguity*.[3] *Id* at 989.

As such, because this case deals with a merged Decree, it is not subject to contract construction principles, such as a "meeting of the minds." However inequitable that may seem, that is the present state of the law by which this Court is bound. By virtue of the Court signing the Decree, the same is no longer a settlement agreement, but rather an Order, subject only to the very specific terms of NRCP 60.[4] As Sarah will address further below, David's counsel *knew* that the Decree would be submitted, if she didn't respond on the issue of survivor benefits.[5] For the purposes of discussing contract law principles, however, under current Nevada case law, a Decree is not subject to contract construction principles, such as a "meeting of the minds."

D. THERE WAS A "MEETING OF THE MINDS."

That said, to the extent that this Court is inclined to consider whether there was a meeting of the minds, Sarah contends that there was. "A meeting of the

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[3] There can be no question, under *Day* that the Decree in this case is a merged Decree. This is well settled case law.

[4] Sarah acknowledges and agrees that David filed timely under NRCP 60(b), however contends he failed to meet his burden to succeed under the merits of that rule.

[5] Sarah will address in greater detail below the weight and sufficiency of the evidence on that issue.

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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 (Nev. 2020).

Not every term within a contract is essential. Further, a party is bound to the actions of his or her counsel, and 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*, supra, *Milner v. Dudrey*, 77 Nev. 256, 264, 362 P.2d 439, 443 (1961).

Further, "[e]veryone 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.

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Therefore, it can be presumed that any attorney who practices regularly in the area of family is familiar with the fact that survivor benefits are part and parcel to retirement accounts and need to be addressed. Further, both Ms. McConnell and Ms. Cooley testified that they discussed the fact that the survivor benefits needed to be addressed, and even Mr. Willick agreed that to fail to address them would be malpractice.[6]

Sarah agrees that the division of retirement benefits is an essential term. However, agreeing to a division of retirement benefits does not require the parties to set out the exact division of each and every piece of the retirement benefit. "A contract can be formed, however, when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). While a recent *unpublished* Nevada case, *Holguin v. Holguin*, 491 P.3d 735 (Table) (Nev. 2021), does state that Nevada does not consider survivor benefits to be a community property asset, the case also recognized that if the survivor benefits can be allocated in the decree of divorce. *C.f., Peterson v. Peterson*, 463 P.3d 467 (Table) (Nev. 2020), recognizing that the parties agreed in briefing and at the time of the oral

[6] Mr. Willick testified that he has appeared on multiple occasions as a witness in malpractice suits addressing the failure to direct the division of survivor benefits.

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argument that the survivor benefits *were* community property, and therefore declining to address whether or not they were divisible under Nevada law.

As previously stated, 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

The only agreement before this Court is the Decree, as the MOU is merged. Alternatively, if not specifically merged, then the agreement has been replaced. The Decree is at the very least, a superseding contract. Pursuant to the *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 by virtue of its completeness and specificity to be a full and complete contract, it is presumed to be the final agreement, unless a party can show an agreement which

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was entered *after*. 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) ("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), emphasis added.

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 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 (Nevada) Inc., v. Inquipco*, 112 Nev. 1397, 929 P.2d 903 (1996).

As the MOU is superseded, David's attempt to rely upon the same is barred by the parol evidence rule.

> 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 ***prior*** negotiations and agreements 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.

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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 *is silent*, 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 "provision 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 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. David is not entitled to use of either exception to the parol evidence rule. The Decree is not silent on the issue of survivor benefits (although ironically the MOU was). David is not alleging, nor can he, that any language in the Decree does not have its common meaning. David cannot utilize parol evidence to attack the Decree.

The Decree stands as the final agreement.

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The Context of the Decree

The Decree was prepared as the parties negotiated a settlement at arms-length. Both parties were represented by counsel throughout the case, and throughout the day on which the MOU and Decree were drafted. All of the testimony was in agreement that the parties had time to speak with their counsel. All of the evidence supports that the parties relied on the advice and counsel of their attorneys.[7] The parties knew they were adversarial, and David was aware that the Decree he was handed clearly contained far more language than the MOU had. Under the context in which the Decree was entered, and in light of the case law already provided herein, it is clear that the context of the Decree supports a "meeting of the minds."

The Subsequent Conduct of the Parties

The testimony provided at the time of trial by Ms. McConnell and Ms. Cooley agrees that counsel discussed the Option 2 survivor benefit language after the Decree was signed and before it was submitted. Both witnesses agreed that Ms. McConnell indicated that David was no longer (or not) in agreement with giving Sarah survivor benefits. In her first day of testimony, Ms. McConnell stated that Ms.

[7] Again, even if this Court genuinely believes David received bad advice from his counsel, his remedy is against Ms. McConnell in a malpractice case, *not* in setting aside the Decree itself.

Cooley told her that not addressing the survivor benefits would be malpractice. Both Ms. McConnell and Ms. Cooley agree that Ms. McConnell asked for time to speak with David.

Ms. Cooley and Ms. McConnell did disagree as to what the context of that conversation was to be. 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, and possibly making an offer of a different survivor benefit provision as a means of modifying the agreement made. Ms. McConnell did not specify exactly what she agreed to speak with David about, but she did not that she would speak with him about Sarah's position and Ms. Cooley's statements regarding the survivor benefits.

It is at this point that the witness testimony diverges. Ms. Cooley stated that she sent follow up correspondence to Ms. McConnell about submitting the Decree. Specifically, Ms. Cooley stated that she asked Ms. McConnell for an update regarding David's new objection to the survivor benefit language. When she didn't hear back, she informed Ms. McConnell that she would submit the Decree on a date certain, April 9, 2021, if she did not hear back on the survivor option. Ms. McConnell did not respond, and Ms. Cooley submitted the Decree.

When Ms. McConnell testified in rebuttal, she was unable to recall if Ms. Cooley had informed her of her intention to submit the Decree. It is important

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for this Court to recall, as was addressed on the first day of trial, when Ms. McConnell was first called to testify, that David has pending litigation against her for malpractice related to these events. Therefore, while Sarah has no doubt that Ms. McConnell would not violate her duty of candor to the Court, it is understandable and realistic to assume that she would be circumspect with her testimony. Ms. Cooley is the witness more likely to be open and disclosing.

Therefore as Ms. McConnell did not directly controvert Ms. Cooley's testimony, the evidence clearly supports that Ms. McConnell, and by extension David, were well aware that the Decree, with the survivor benefit language, was being submitted and they chose not to address the same prior to its submission, despite being given the time to do so.

This Court should note that the Nevada Supreme Court has found that a judgment may stand where additional negotiations were pending, provided the other party was on notice. Although differing some on facts, in the case of *Heard v. Fisher's & Cobb Sales & Distributors, Inc.*, 88 Nev. 566, 502 P.2d 104 (1972), 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 did so for ten months, but ultimately after those ten months, the judgment was entered. One party sought to have the same set aside for "surprise," and the Nevada Supreme Court found no basis to set aside the judgment, as there had been

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no agreement to withhold the judgment 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 notice was provided was clearly of importance to the Court.

The Dispute Which Arises and the Remedy Sought

Despite having notice that the Decree would be submitted and despite the two weeks between when the Decree was signed and when it was submitted, David waited until after it was entered to address his concerns to the same. Both Ms. Cooley and Ms. McConnell agree that they discussed David's objection to the signed Decree within days of the signing itself. Both of them agreed that Ms. McConnell intended on talking to David. Of course, the details of those conversations are privileged, but certainly it cannot be said that there was not sufficient time for David or Ms. McConnell to address his concerns. Nor was there any testimony that Ms. McConnell asked for any additional time to speak with David. Instead, David and Ms. McConnell took no action.

Only *after* the Decree was entered, David then sought to have the same set aside, because he made a "mistake." Notably, David's request was not to have the Court reconsider the proper disposition of the survivor benefits, but simply to take them away from Sarah entirely. Conceivably, this was nothing more than an

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attempt to utilize the Court to get out of the agreement David made. Though Sarah has earlier analyzed why contract law does not apply here, if such an analysis were in play, the Decree was signed, prior to being entered as an Order, it was a settlement agreement subject to contract law.[8] As the above analysis shows, under contract law, David has no remedy. Therefore, David's only hope of getting out of the agreement ***he made*** was to attempt to have the same set aside for "mistake" or "fraud."

It is clear that David was well aware he was bound by his agreement. He was simply attempting to get out of the same. The objective evidence makes it clear that there was a meeting of the minds, and this is nothing more than a case of buyer's remorse. Under Nevada law, the objective evidence shows that there was in fact a meeting of the minds. As a contract, the Decree is unassailable.

E. DAVID HAS NOT MET HIS BURDEN UNDER NRCP 60(b)

The Decree cannot be set aside as a contract. But more importantly, as the Decree was filed, it is not a contract any longer. It 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, FN 4 (Table) (Nev. 2020). As such, in order to set it aside,

[8] As the case law makes clear, upon *entry* a stipulated Decree *loses* its character as an independent agreement - implying that prior to entry it was a contract. *Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964); *Vaile v. Porsboll*, 128 Nev. 27, 268 P.3d 1272, FN 7 (2012).

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David must meet one of the provisions set forth in NRCP 60, to wit: clerical mistakes, oversights and omissions; mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud, misrepresentation or misconduct of an opposing party; the judgement is void or satisfied. There is a catch-all for "any other reason that justifies relief," (NRCP 60(b)(6)) but the same is meant to have "limited and unique application," and is meant to be "available only in extraordinary circumstances." *Byrd v. Byrd*, 137 Nev. Ad. Op. 60 (Nev.App. 2021). In fact, NRCP 60(b)(6) is meant to provide relief only for circumstances that are not already covered by NRCP 60(b)(1)-(5). Id. To be clear, it is not when a party cannot succeed in having their relief granted under the other provisions, but merely when no other provision would provide an umbrella for consideration of the Motion. *Id*. As David has acknowledged, obliquely or otherwise, that his Motion is based in either NRCP 60(b)(1) or (3), NRCP 60(b)(6) does not apply.

David however, has not met his burden to prove either mistake, surprise, excusable neglect, or fraud.

Mistake

With regard to "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:

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> Where 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
>
> (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), stating, "a unilateral mistake occurs when one party makes a mistake as to a basic assumption of the contract, that party does not bear the risk of mistake, **and** the other party has reason to know of the mistake or caused it." emphasis added; *Oh v. Wilson*, 112 Nev. 38, 910 P.2d 276 (1996); *Graber v. Comstock Bank*, 111 Nev. 1421, 905 P.2d 1112 (1995).

It is clear that any mistake by David was clearly his risk. The testimony bears out that he was present where the Decree was being drafted and he was capable of being involved in the drafting or asking questions, if he so chose. Both his testimony and that of Ms. McConnell supported that he was standing in the doorway of the office in which Ms. Cooley was drafting the Decree. Ms. McConnell, Sarah, and Ms. Cooley testified that Ms. McConnell was in the office, mostly standing behind Ms.

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Cooley as she drafted the Decree, with a clear view of the same. Testimony further established that Ms. McConnell was reviewing and discussing the Decree with Ms. Cooley while she was drafting. These discussions occurred in front of David. Admittedly, there was competing testimony as to whether survivor benefit options were directly discussed, but certainly Ms. McConnell was in a position to see the language as it was being drafted, and the survivor benefit language (which composed a fairly large paragraph), was in two different places in the Decree. It was hardly unnoticeable.

> 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).

The testimony shows that David was given a copy of the Decree. He could have reviewed the Decree. In fact, although she equivocated on whether or not David reviewed the Decree - or what the conversation between them was - Ms. McConnell did testify that David could have reviewed the Decree, and that she would not have signed if she did not believe he was in agreement with the terms in the Decree.

Therefore, even if it is true that David chose not to read the Decree (which is a convenient and suspicious claim at best), he created and bore the risk of

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mistake by choosing not to review a Decree that was more than 30 pages longer than the MOU.

Sarah, who was reviewing the Decree in a separate room, had no reason to know that David would choose not to read the Decree, and she bears no fault in his choice. She knew he and his counsel were given a copy of the Decree. She knew they all signed it. It wasn't until days after the Decree had been signed that David raised any objection to the Decree. Sarah had no knowledge of the alleged mistake.

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. Eighth Judicial Dist. Ct. Of ex rel. County of Clark*, 124 Nev. 1499, 238 P.3d 845 (Table) (2008). Sarah will further address any allegations of misrepresentation or fraud below and will show the Court that she has committed neither, but it is clear that given the circumstances in which the Decree was drafted, the fact that both parties were represented by counsel, and the fact that both parties were individually given time to review, that there was certainly equal knowledge and bargaining skill as to the preparation of the Decree.

In addition, although the Decree is not a contract, setting aside a provision (rather than the entire agreement), is arguably a form of "reformation." The Nevada Supreme Court has noted that reformation is appropriate when "one

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party makes a unilateral mistake *and* the other party knew about it ***but failed to bring it to the mistaken party's attention***." *Tropicana Pizza Inc., b. Advo, Inc.,* 124 Nev. 1514, 238 P.3d 861 (Table)(2008), internal citations omitted, emphasis added. As all of the testimony showed, Sarah had no reason to know that David did not read the Decree, and therefore had no reason to know of the alleged mistake until after he made his objection. Therefore, Sarah did not "fail to bring" a mistake to David's attention.

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. She was aware of the inclusion of the survivor benefits, and as her testimony and that of Ms. Cooley supports, she was aware that Ms. McConnell had reviewed the Decree and that both counsel were aware of the inclusion of the benefits - thereby constituting continued negotiations regarding the same. Sarah was under no misconception of any vital fact. Therefore, there can be no mutual mistake.

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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.

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 same necessarily included language which was not in the MOU given the page differences between the two documents, and the testimony identified many differences between the Decree and the MOU.[9] 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 notified him that there were clear differences between the two documents, and the testimony supports that he had both time to

[9] It is worth noting that despite the numerous, and often material differences, between the documents, David is not challenging any of the other provisions he did not read.

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review if he wanted it, was able to be engaged in the drafting if he had desired, and chose to sign the Decree without reading.

Fraud and Misrepresentation

The elements of fraud, which David must prove are: 1) a false representation made by Sarah; 2) Sarah's knowledge or belief that the representation is false (or insufficient basis for making the representation); 3) Sarah's intention to induce David to act, or refrain from acting, in reliance on the misrepresentation; 4) David's justifiable reliance on the misrepresentation; and 5) damage to David resulting from the reliance. *Bulbman, Inc., v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992), quoting *Lubbe v. Barba*, 91 Nev. 596, 540 P.2d 115 (1975). Sarah's failure to directly point out the one provision that David subsequently disagreed with (out of many), does not constitute fraud.

In this area, the case of *Villalon v. Bowen*, 70 Nev. 456, 273 P.2d 409 (1954), is instructive. In that case, the appellant ("Phyllis") presented herself as the widow and sole heir of Mr. Knox. She successfully garnered a renunciation of the executor from a will that predated her marriage, and took administration of the estate. Thereafter, it came to light that Phyllis had been previously married to a Domingo Villalon, and that she had remained married to him when she entered into her marriage with Mr. Knox. The Estate through a special administrator filed an action to recover the assets and have Phyllis adjudicated guilty of fraud. The trial court

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found Phyllis guilty of fraud. The Court first found that Phyllis had fraudulent intent, recognizing that "subjective and intangible matters as frame of mind or intent are difficult to prove objectively," but continued to note, "proof of a course of conduct on the part of appellant, frequently involving deliberate falsehood, extending from the time of the Villalon marriage to the commencement of this suit, which course can hardly be deemed consistent with any proposition other than a deliberate intent to conceal the fact and avoid the effect of the Villalon marriage at all times and at all costs." *Id.* at 465-466.

The Court thereafter discussed whether or not Phyllis had engaged in fraudulent conduct. In doing so, 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, since it constitutes an indirect representation that such a fact does not exist. It is clear, however, that an obligation to speak must exist. Thus in a suit for equitable relief from a judgment, such as this, 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 that a

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> deliberate failure to correct an apparent misapprehension or delusion may constitute fraud. This would appear to be particularly so where the false impression deliberately has been created by the party sought to be charged.

Id. at 467-468.

It is clear that Sarah could not have committed fraud. 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. They were within "the fair and reasonable reach" of David. All he had to do was read the Decree. Sarah did not deliberately 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." There was no testimony to suggest he made any statement in Sarah's hearing which would have alerted her to either the fact that he didn't read, or that he believed there was no language related to survivor benefits included. It cannot be said that Sarah created the false impression, deliberately or even negligently. It was abundantly apparent that the Decree contained substantially more language than the MOU. Therefore, Sarah could not have made a false representation, which also prevents her from having knowledge or belief that the alleged representation was false.

It cannot be said that David had justifiable reliance on any representation, or misrepresentation. David admits he chose not to read. As this brief

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already highlights in many places, David cannot have justifiable reliance which is based on his own assumption of risk. David cannot have the Decree set aside on the basis of fraud or misrepresentation.

The Decree of Divorce cannot be set aside on the basis of fraud or misrepresentation.

Egregiously, David cites to testimony from the trial, for which he provides ***zero*** appropriate citations. No transcript has been filed or provided to either Sarah or the Court for the October 8, 2021, trial proceedings Despite that fact, David's citations not only fail to identify the witness speaking (despite noting that David's is pulling from both Sarah's testimony and Ms. Cooley's testimony), but also fails to include citations to the video transcript, *the only transcript to which Sarah and the Court currently have access*. There is no way to identify the context of the testimony David is pulling from piecemeal, nor to determine if he is accurately reflecting the record. In fact, after citing piecemeal from a non-existent transcript, David seems to indicate it was *not* Ms. Cooley's testimony at all that he was citing, but rather Ms. McConnell's. David's evidentiary support is of no value because it cannot be verified.

Regardless, from a legal standpoint, as this brief analyzes in great detail, Sarah has not committed fraud, and David has no basis in law or fact to seek to set aside any portion of the Decree. As Sarah has set forth at various points

throughout this case, negotiations do not have to be verbal - modification to a written agreement is engaging in continuing negotiations. Further, as the cumulative testimony, and most notably the testimony of Ms. Cooley and Ms. McConnell prove, *David* signed the Decree without interlineation. He thereafter *changed his mind*, and tried to force Sarah into signing a second Decree, which she was unwilling to do. That, and the fact that David had prevented her from receiving funds to which she was entitled under the Decree (and the MOU, ironically), were the context of the "video recording" in which Sarah stated "a new signature is going to cost you." She was reacting to David's attempt to coerce her into signing a Decree, removing the benefit of the bargain they made.

There is absolutely no evidence provided to this Court which proves any of the factors necessary for David to have the Decree set aside, under either contract law or NRCP 60(b). Therefore, this Court should deny David's request in toto.

F. OMITTED ASSETS

Although the law does not permit the Decree to be set aside, should this Court choose to do so, the survivor benefit designation becomes an omitted asset. Sarah acknowledges that very recently, in an unpublished disposition, the Nevada Supreme Court stated that survivorship interest is not a community property asset. *Holguin v. Holguin*, 491 P.3d 735 (Table) (Nev. 2021). The Court cites to *Henson*

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v. Henson, 130 Nev. 814, 334 P.3d 933 (2014), for that premise. However, as Mr. Willick's report and testimony state, 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." *Id*. at 820. As Mr. Willick's testimony and report make clear, that is not factually accurate. The employee spouse has an automatic reversionary interest in the nonemployee spouse's portion of the retirement. Therefore, the Court's understanding is fundamentally flawed, and creates an inequitable result.[10]

That said, Sarah also believes the Supreme Court's finding in *Holguin* is in conflict with the statutes. Sarah believes that the survivor beneficiary interest in PERS *is* community property. 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. By giving the Court authority to make such orders, the legislature clearly saw such benefits as being community property, otherwise they would not be subject to disposition. None of the case law which addresses survivor benefit

[10] Sarah recognizes that this Court is unable to disregard precedential decisions from the Nevada appellate courts, but unpublished decisions are not precedential. NRAP 36(2)-(3). Further, even if this Court is inclined to follow the persuasive authority of the Court in *Holguin*, Sarah cannot raise any issue on appeal which is not raised in the District Court - and as such requests this Court consider whether the Supreme Court's decision on this issue is based on a flawed understanding of the facts. *Old Aztec Mine, Inc., v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981).

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options in Nevada conclusively address the impact of NRS 125.155(3) on the characterization or disposition of those benefits.

NRS 125.155 was revised to add subsection 3 in 1995 in A.B. 292. The summary of the bill specifically states:

> This measure further provides that, if a party receives an interest in a plan because of the disposition ordered by the court and would not be entitled to such an interest without court disposition, the interest and any related obligation to pay that interest terminates upon the death of either party, ***unless*** an agreement of the parties ***or a court order requires the benefit recipient to provide for a retirement plan with survivor benefits.***

A.B. 292, Chapter 576, Nev. Legislature 68th Session (1995), emphasis added.

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 proposed had the benefits terminating at the death or either party. The journal of the senate notes that the amendment was proposed by the Committee on the Judiciary and that Senator James made remarks after proposing the adoption of the amendment, but those remarks are not included. *Id*. 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. *Id*. The bill then passed in the assembly without further recorded commentary.

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It is unknown, therefore *why* the legislature amended the bill to allow survivor benefits to be addressed in a Court Order, but ultimately the legislature clearly intended the Court to be allowed to do so. 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. *Id*. It is therefore clear that the Supreme Court's position is in conflict with the statute - the legislature considers survivor benefits to be community property which can be addressed by Court Order.

An argument can be made that the wording of the statute - indicating that the termination occurs upon death absent an agreement or Court Order would indicate 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. In fact, that statute just before NRS 125.155 is NRS 125.150 - which specifically addresses how community property is to be divided. 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***

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> ***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), emphasis added.

NRS 125.150 was revised to include that language in 1993. It was clearly familiar to the legislature when they revised NRS 125.155 in 1995. 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."). It is apparent and logical, when read together, that the intention was to leave the courts discretion to make an unequal distribution of property, but the inclusion of survivor benefits in the statute can only mean that the legislature intended the Court to be able to divide the same as community property.

Although addressing a separate section in NRS 125.155, the Nevada Supreme Court addressed the consideration of NRS 125.155 in the context of NRS 125.150 in *Kilgore v. Kilgore*, 135 Nev. 357, 449 P.3d 843 (2019). Therein the Court noted that the district courts 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). The Court noted that the district court's authority was still subject to the limitations set forth in NRS 125.150(1)(b). Clearly,

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the Nevada Supreme Court believes that 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). See also, *Hallenback v. Hallenback*, 130 Nev. 1184 (2014).

Thus far, the only appellate case to specifically address NRS 125.155(3) is the case of *Nicolson v. Eighth Judicial Dist. Ct.*, 134 Nev. 989 (2018) - which denied the petitioner's request for a *Writ* to prevent the district court from entering an order directing designation of the petitioner as survivor beneficiary. The Court of Appeals declined the writ specifically on the basis that neither party addressed the statute in their arguments. Therefore, NRS 125.155(3)(b) has not been fully considered at the appellate level, and the argument that implicit in the language is the fact that survivor benefits are community property has not been addressed.

It should be noted that the "seminal case," on PERS benefits, *Henson*, only addresses NRS 125.155 to indicate that the district court improperly applied the statute to the case, as it was not in effect at the time of the parties' divorce.[11] *Id.* at 819. Footnote 3 in *Henson* does note that Decrees entered after July 5, 1995, may

[11] Although decided in 2014, the parties underlying divorce Decree was entered in June 1995, prior to the enactment of A.B. 292.

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allow for a survivorship interest to be awarded, but does not further address the nature of the benefit.

As such, it is clear that the legislature intended survivor benefits to be community property, a power well within their control, and one which supersedes the Supreme Court's decisions on this matter. Therefore, should the Court set aside the Survivor Benefit Option language in the Decree, the same becomes an omitted asset which the Court *must* consider.

David's contention, that the survivor benefits were "intentionally omitted," cannot stand as a matter of law. As set forth above, everyone is presumed to know the law. Therefore, the fact that survivor benefits are part and parcel of a retirement, is presumed to be understood by attorneys and litigants alike. The presumption is ***not*** rebuttable. The parties cannot simply intentionally "omit" a known asset. Nor does Sarah's testimony support that the survivor benefits were intentionally omitted. It was Sarah's testimony, confirmed by Ms. Cooley and Ms. McConnell, that aside from initially bringing up the survivor benefits, no further discussion regarding them occurred. *David* even agreed that he had no knowledge that Sarah was waiving her interest in the same. Therefore, while it may have been David's intent (likely formed *after* he developed "buyer's remorse") that the survivor benefits be intentionally omitted, it was not Sarah's, which is why the

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provision was addressed in the Decree that *David* signed. Further, as detailed below, the omission still must be corrected under Nevada law.

The Supreme Court has long held that an omitted asset in a divorce decree existed when the asset had been "omitted from consideration by the parties." *Doan v. Wilkerson*, 130 Nev. 449, 327 P.3d 498, 502 (2014), quoting *Amie v. Amie*, 106 Nev. 541, 542-543, 796 P.2d 233, 234-235 (1990). In *Doan*, however, the Court narrowed the definition of an omitted asset to those assets which were "[not] litigated and adjudicated," instead of considering "merely whether it was written down in the decree." *Id*. at 503.

After the Supreme Court's decision in *Doan*, the legislature specifically abrogated the decision. *Kilgore*, 449 P.3d 849. The legislature's clear intent was to allow the court to adjudicate an asset "omitted from the decree or judgment as the result of fraud or mistake." *Id*. Clearly, if the Court intends to strike the provision related to survivor benefits from the Decree, the asset will have become omitted by mistake. Despite David's continued *willful* misunderstanding of the law, the Decree is the controlling document ***not*** the MOU. While David may believe that the survivor benefits were "intentionally" omitted from the MOU, the MOU is destroyed as an agreement due to the Decree. If the survivor benefits are not included by "agreement" then they are *ipso facto* omitted by mistake. Certainly, as Sarah has analyzed above, a unilateral mistake exists when one party makes a mistake as to a

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basic assumption of the contract, that the party does not bear the risk of mistake, ***and*** the other party has reason to know of the mistake or caused it." *Irrevocable Trust Agreement of 1979*, supra, emphasis added. Sarah was aware that the survivor benefit language was in the Decree; she made a basic and natural assumption that David agreed with the language ***because he signed it***; she does not bear the risk of that mistake, as it was solely David's actions; and David certainly had reason to know the mistake given that he could have read the Decree; David caused the mistake by signing the Decree. Therefore, if the Court finds that the survivor benefit language must be removed from the Decree, it is an asset omitted by mistake and this Court will need to determine what to do about the survivor benefits, pursuant to NRS 125.155.

G. THE SURVIVOR BENEFIT SHOULD BE DIVIDED PURSUANT TO OPTION 2

Sarah believes that this Court should Order that David be required to name her as the Option 2 beneficiary of his retirement. A present, Sarah has been David's wife the longest. While David is presently married, there is no guarantee that he will remain so longer than he was married to Sarah. To presume otherwise would require the Court to engage in speculation. "A verdict may not be based on speculation, whether the testimony comes from the mouth of a lay witness or an expert." *Gramanz v. T-Shirts and Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342,

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347 (1995), quoting *Advent Systems Ltd., v. Unisys Corp.*, 925 P.2d 670, 682 (3rd Cir. 1991).

> When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." A party cannot use one inference to support another inference; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. Thus a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed.

Franchise Tax Bd., of CA v. Hyatt, 401 P.3d 1110, 1141 (Nev. 2017), internal citations omitted.

This Court cannot base its decision on what *might happen* in the future. It can only base it on the facts which exist at the present moment. At the present moment, David has been married to no one longer than Sarah. Therefore, no one has a greater right to David's survivor benefit than Sarah.

As Marshal Willick testified to this Court, David has an automatic reversionary interest in Sarah's portion of his pension. If Sarah dies, the pension benefit she received during life does not go to her estate and she cannot direct the benefit to pay out to any other person, David simply gets it back. Sarah's community property interest in the pension is wholly conditional.

In contrast, if David dies, Sarah's benefit simply *ends*. She no longer even receives the portion she is entitled to under the law. It simply ceases. Therefore,

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if the Court does not award Sarah a survivorship interest in David's pension, it is inherently dividing the parties' community property unequally. There is no basis in this case for an unequal division. As such, it is only appropriate to provide Sarah with the Option 2 survivor benefit.

H. THE PARTIES SHOULD SPLIT THE COST OF THE SURVIVOR BENEFIT

As stated above, David has an automatic reversionary interest in Sarah's portion of his pension. That reversionary interest has no cost. In contrast, in order for Sarah to receive an equal benefit, there is an associated cost. In order to preserve an equal division of the community property, that cost must be divided equally. There is no compelling reason for Sarah to bear the majority, or all, of the cost associated with ensuring that she and David receive equal benefit.

I. THE SURVIVOR BENEFIT CANNOT BE SEEN AS ALIMONY

The Nevada Supreme Court has been clear, retirement benefits are community property. *Kilgore*, 449 P.3d at 846. As Mr. Willick's testimony has been clear, survivor benefits are part and parcel of the retirement. As addressed above, it is clear that the legislature intended survivor benefits to be community property. And community property cannot be conflated with alimony. See *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998). Specifically, in *Shydler*, the Nevada Supreme Court stated:

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> A community property award made to a spouse serves to divide community property acquired during the marriage to which the recipient spouse is entitled as a matter of law, including community property in the form of compensation for labor and skills of a working spouse performed during marriage.
>
> Alimony is an equitable award serving to meet the post-divorce needs and rights of the former spouse…
>
> As property and alimony awards differ in purpose and effect, the post-divorce property equalization payments payable to Margaret in this case do not serve as a substitute for any necessary spousal support. Although the amount of the community property to be divided between the parties may be considered in determining alimony…By determining that the community property equalization payments acted as a substitute for alimony, Margaret received a lesser share of the community property…

Id at 40-41, internal citations omitted.

The Nevada Supreme Court did clarify how property may be utilized to obviate an alimony award in *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 439 P.3d 397 (2019). Therein, the Court found that the property the wife received in the divorce would produce sufficient passive income to meet the parties' marital standard of living and therefore removed any need for alimony. The factual difference between *Kogod* and *Shydler* is clear. In *Shydler*, the wife would be required to expend her property award to meet her post-divorce needs. In *Kogod*, the property itself was producing income, and that income was stated to be sufficient to meet the standard of living.

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It is only the income produced by the property which can be used to obviate alimony. Here, Sarah has no guarantee that she will outlive David and therefore actually receive benefits under the survivor benefit clause, but the same exists "just in case," because Sarah is entitled to receive the entirety of the benefit of her community property. The facts are far more similar to *Shydler* than *Kogod*. Without the protection of the survivor benefit clause, Sarah would be forced to use her community property interests to support herself – despite the unequal income of the parties and the agreement to alimony. Therefore, as the survivor benefit clause does not produce income, but rather is an assurance of the continuation of Sarah's community property interest in David's pension, the same cannot be alimony.

J. MARSHAL WILLICK'S TESTIMONY

David devotes the majority of his closing argument to rehashing his arguments for Mr. Willick's testimony to be inadmissible. This is highly improper. This Court has ruled on no less than *three* separate occasions, that Mr. Willick would be permitted to testify. The first time was after David filed his *Motion in Limine to Preclude The Testimony of Marshal S. Willick, Esq.*, filed on September 5, 2019. Judge Moss heard the Motion on October 23, 2019, and specifically ruled "that Marshal Willick shall be permitted to testify but will limit his testimony to avoid giving his opinion regarding the merits of the law. It will be the Court's responsibility to distinguish legal fact from interpretation." *Order from Hearing on*

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October 23, 2019, filed January 13, 2020, page 2, lines 8-10. David orally renewed his Motion in front of Judge Moss at the first day of the trial on January 27, 2020, at which time the Motion was again denied, and Mr. Willick, Esq., was admitted as an expert in both Family Law and PERS. See *Minutes*, January 27, 2020. Thereafter, on September 23, 2021, David again made his oral Motion to exclude Mr. Willick's testimony, or at least limit the same. Again, the Motion was denied and Mr. Willick was permitted to testify as an expert.

It is inappropriate for David to continue to make the same, repetitive Motion to exclude Mr. Willick's testimony. In fact, at this point, David has *no legal* basis to rehash his Motion. "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." *Paradise Palms Community Ass'n v. Paradise Homes*, 89 Nev. 27, 30, 5050 P.2d 596, 598 (1973), internal citations omitted.

"The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. He is bound by that litigation only if he has been a

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party thereto or in privity with a party thereto." *Id*. at 31, internal citations omitted. "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the pleas is asserted a party or in privity with a party to the prior adjudication?" *Id.*

Here is it is clear that David is bound by res judicata, and this issue cannot be relitigated. He is clearly a party to the case. He is the party that raised the issue. The issue is identical – in fact, it is nearly word for word the same legal argument this court has already rejected. There was a final adjudication on this issue.

The fact that there was a final decision has been applied to motions as well as cases themselves. The Supreme Court has applied the doctrine to custody motions. See *Mosley v. Figluizzi*, 113 Nev. 51. 930 P.2d 1110 (1997). Further, the Nevada Rules of Civil Procedure and the Eighth Judicial District Court Rules support a finding of res judicata with respect to Motions. *See* NRCP 52, NRCP 60, and EDCR 2.24. David's repetitive request to strike, or have the Court disregard Mr. Willick's testimony must be denied under the doctrine of res judicata. To the extent that this Court intends to reconsider its ruling (and for the sake of brevity), Sarah directs this Court to her Opposition to David's Motion in Limine, filed September

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19, 2019. As David's Motion is merely rehashing his prior legal arguments, Sarah's opposition has fully addressed the same.

David has alternatively proposed that Mr. Willick's testimony be struck as to specific statements, but even that is unnecessary and improper. This Court has repeatedly found that it is able to separate and weigh Mr. Willick's testimony. There is no need to strike the same. Further, David's analysis comparing Mr. Willick's summary of *Peterson v. Peterson*, Docket No. 77478 (Order of Reversal and Remand May 22, 2020), is an attempt to parse distinction where none exists. Mr. Willick's testimony correctly summarized the case: the Court did not rule on whether survivor benefits were community property, because they found that the parties agreed that they were and agreed that they were an omitted asset.

As to David's contention that the survivor benefit was *not* omitted by fraud or mistake, the same is clearly addressed herein above, as is the fact that the survivor benefit *is* community property.

Additionally, contrary to David's next assertion in his unending question to prevent this Court from considering Mr. Willick's testimony, his testimony as to the law governing survivorship benefits in PERS was clearly cited. The relevant language is in Chapter 286. Further, David's arguments regarding this testimony are chock full of unbelievable hubris. Out of one side of his mouth, David states that Mr. Willick's testimony must be disregarded because only the Court is

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allowed to review and interpret the law. Then out of the other side of his mouth, David wants this Court to disregard Mr. Willick's testimony because he did not direct the Court to the specific provision within Chapter 286, *which the Court is perfectly capable of looking up*, on its own recognizance. Mr. Willick provided the guidance by which the Court could review the relevant law and make its own legal determination – exactly what he should be doing. Further, Mr. Willick acknowledged, very clearly, the factual basis under which the Nevada Supreme Court was operating, as David's closing brief acknowledges. The fact that the Nevada Supreme Court was *wrong* is a matter of fact pursuant to NRS 286.592(1). It is not Mr. Willick's opinion, nor is it an inaccurate statement. Such testimony is not only helpful to the Court, it is critical to this Court's analysis.

K. ATTORNEY'S FEES

This case has been pending for three years. Over that time, substantial time and numerous fees have been incurred. Much of the same has been incurred by virtue of what Sarah believes are actions by David which violate NRCP 11, EDCR 7.60, and NRS 7.085. An in-depth brief is necessary to delineate the fees incurred and the basis for awarding Sarah the same. In the interest of judicial economy, and given the length of this brief already, Sarah requests the opportunity to address the same in a Motion pursuant to NRCP 54(2), and to include her *Brunzell* brief therein.

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For the purposes of this argument Sarah will only note that the Nevada Supreme Court has stated in *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005) articulated at pages 729 - 730:

> Initially, we conclude that a party is not precluded from recovering attorney fees solely because his or her counsel served in a pro bono capacity. While Nevada law has been silent on this issue, many courts have concluded that an award of attorney fees is proper, even when a party is represented without fee by a nonprofit legal services organization. In addition to the various state courts, the United States Supreme Court has concluded that an award of attorney fees to a nonprofit legal services organization is to be calculated according to the prevailing market rate, stating that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." We agree with these courts and conclude that significant public policy rationales support awarding fees to counsel, regardless of counsel's service in a pro bono capacity. First, the fact that a government institution or private charity has provided legal assistance should not absolve other responsible parties of their financial obligations. For example, when pro bono counsel assist a parent in a custody or child support dispute, the wealthier parent should not be relieved of an obligation to pay attorney fees. Further, in domestic matters, one partner has often created or contributed to the other partner's limited financial means by leaving the household, failing to remit child support, drawing funds from a shared account, or other similar conduct. In those cases, if fees are not awarded to pro bono counsel, a wealthier litigant would benefit from creating conditions that force the other party to seek legal aid. In addition, pro bono counsel serve an important role in the legal system's attempt to address the unmet needs of indigent and low-income litigants within our state. To impose the burden of the cost of

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> litigation on those who volunteer their services, when the other party has the means to pay attorney fees, would be unjust.

It is clear from the language in *Miller*, that it is appropriate to award a party fees even when the party has been represented *pro bono*. Although the Court is also to consider the *Brunzell* factors in pro bono cases, there are further equitable considerations, as delineated above, to wit: that pro bono services do not absolve responsible parties of their financial obligations (such as those due under *Sargeant v. Sargeant*, 88 nev. 23, 495 P.2d 618 (1972); *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971); *Halbrook v. Halbrook*, 114 Nev. 1455, 971 P.2d 1262 (1998)), that "when pro bono counsel assist a parent in a custody or child support dispute, the wealthier parent should not be relieved of an obligation to pay attorney's fees," and finally, "**to impose the burden of the cost of litigation on those who volunteer their services, when the other party has the means to pay attorney's fees, would be unjust."**

Therefore, pursuant to *Miller*, Sarah requests the opportunity to address attorney's fees after this Court issues its judgment, pursuant to NRCP 54.

. . .

. . .

. . .

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CONCLUSION

Nothing in Nevada law supports David's positions in this matter. There is no basis in law or fact for the Decree to be set aside. Therefore, David's request, to have the Decree set aside as to the survivor benefit language, should be denied in toto.

DATED this 13th day of December, 2021.

KAINEN LAW GROUP, PLLC

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December, 2021, I caused to be served the ***Defendant's Closing Argument*** to all interested parties as follows:

BY MAIL: Pursuant to NRCP 5(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

X BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Attorney for Plaintiff

Shelley@lubritzlawoffice.com
Daverose08@gmail.com

An Employee of
KAINEN LAW GROUP, PLLC

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Shelley Lubritz, Esq.
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Attorney for Plaintiff
David John Rose

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

DAVID JOHN ROSE, Plaintiff, vs. SARAH JANEEN ROSE, Defendant	Case No.: D-17-547250-D Dept. No.: I Hearing Date: Hearing Time: **Hearing Not Requested**

EMERGENCY EX PARTE REQUEST TO EXTEND TIME TO FILE RESPONSIVE CLOSING ARGUMENT

COMES NOW, Plaintiff, David John Rose, by and through his counsel, Shelley Lubritz, Esq., of Law Office of Shelley Lubritz, Esq., and requests that this Honorable Court Extend the Time to File Responsive Closing Argument.

The trial in this matter concluded on November 15, 2021. The Court ordered that Plaintiff file his Closing Argument by November 30, 2021 and his responsive brief by December 20, 2021. Defendant filed her Closing Argument on December 13, 2021 and was given until December 27, 2021, to file her responsive brief.

The undersigned was in trial on December 15, 2021 and is also set to appear before the Hon. Shell Mercer for trial on December 20, 2021 and December 21, 2021.The briefing schedule unduly prejudices Plaintiff as well as the undersigned's client for the December 20, 2021 custody and divorce evidentiary hearing.

In the 28 days Defendant was given to prepare her Closing Argument (vs. the 15 days given to Plaintiff), she filed a 50-page document containing approximately 70 citations to case law and other legal authority. Plaintiff simply requires additional time.

The undersigned respects the Court's desire to bring the parties a resolution prior to the close of 2021; however, whether the extension is granted, the same will not be accomplished. The Court was hesitant to allow the undersigned until the 20th of December, 2021, because it is the week of Christmas. The undersigned requests the opportunity to work through the week of December 20, 2021 and file his final Closing Argument no later than Sunday, December 26, 2021. This extension would necessarily require a one-week extension for Defendant to respond.

A stipulation to extend has been requested of Defendant's counsel. She has not had an adequate time to respond so this request is filed in an abundance of caution.

Dated this 16th day of December, 2021.

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

By: _____

Shelley Lubritz, Esq.
Nevada Bar No. 5410
375 E. Warm Springs Road Suite 104
Las Vegas, Nevada 89119
Attorney for Plaintiff

DECLARATION OF SHELLEY LUBRITZ, ESQ.

SHELLEY LUBRITZ, ESQ., states under penalty of perjury pursuant to NRS 53.045:

1. I am an attorney duly licensed to practice law in the State of Nevada. I am employed by the Law Office of Shelley Lubritz, PLLC, and am counsel of record for Plaintiff, David John Rose, in Case No. D-17-547250-D. I have personal knowledge of the facts contained herein and I am competent to testify thereto, except for those matters stated upon information and belief, and as to those matters, I believe them to be true.

2. Defendant filed her Closing Argument on December 13, 2021 while I was in trial preparation. I was in trial on December 15, 2021 and I will be in trial before the Honorable Shell Mercer on December 20, 2021. That matter is also scheduled for December 21, 2021.

3. The Court ordered that my responsive Closing Argument be filed by December 20, 2021. Defendant's Closing Argument is 50 pages in which she cited nearly 70 cases and other legal authority. I simply cannot file an appropriate response and prepare for trial. My clients in both matters will be impacted if the extension is not granted.

4. This matter has been pending since 2018. A 6-day extension will not unduly prejudice either party. Mr. Rose deserves the opportunity to respond fully.

5. This request is not made for purposes of delay.

Further your Declarant sayeth naught.

Dated this 16th day of December, 2021.

Shelley Lubritz

SHELLEY LUBRITZ, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December, 2021, I caused to be served the *Emergency Ex Parte Request to Extend the Time to File Responsive Closing Argument* to all interested parties as follows:

_____BY MAIL: Pursuant to NRCP S(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

_____BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

_____BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

__X__BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Attorney for Defendant: *service@kainenlawgroup.com* *racheal@kainenlawgroup.com* *kolin@kainenlawgroup.com*

Plaintiff: *daverose08@gmail.com*

Dated this 16th day of December, 2021.

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

By: _____
Shelley Lubritz, Esq.
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Attorney for Plaintiff

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Attorney for Plaintiff
David John Rose

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION
CLARK COUNTY, NEVADA

DAVID JOHN ROSE, Plaintiff, vs. SARAH JANEEN ROSE, Defendant	Case No.: D-17-547250-D Dept. No.: I Date of Hearing: Time of Hearing:

STIPULATION AND ORDER TO EXTEND TIME FOR PLATINFF TO FILE CLOSING ARGUMENT

IT IS HEREBY STIPULATED by and between, Plaintiff, David John Rose, through his attorney, Shelley Lubritz, Esq., of the Law Office of Shelley Lubritz, PLLC, and Defendant, Sarah Janeen Rose, through her counsel, Racheal H. Mastel, Esq., of the KAINEN LAW GROUP, PLLC as follows:

WHEREAS the deadline for Plaintiff to file his responsive Closing Argument is December 20, 2021.

WHEREAS Plaintiff's counsel is scheduled to appear before the Hon. Shell Mercer on December 20, 2021 and December 21, 2021 for an evidentiary hearing in Case No. D-21-622151-D.

WHEREAS the parties in Case No. D-21-622151-D have been unable to reach a resolution and will proceed to evidentiary hearing.

WHEREAS Defendant's Closing Argument was filed on December 13, 2021.

WHEREAS Plaintiff's counsel was in trial on December 15, 2021 in Case No.D-20-616949-D.

WHEREAS Plaintiff will be prejudiced if the submission date is not extended.

WHEREAS counsel have agreed, subject to the Court's approval, that the current submission date of December 20, 2021 should be extended through and including December 27, 2021.

WHEREAS currently, Defendant's submission date for the filing of her responsive Closing Argument is December 27, 2021.

WHEREAS counsel have agreed, subject to the Court's approval, that the current submission date of December 27, 2021 be extended through and including January 10, 2022.

Based upon the foregoing, the parties agree as follows:

IT IS HEREBY STIPULATED upon the Court's approval that Plaintiff shall file his responsive Closing Argument on December 27, 2021.

IT IS HEREBY STIPULATED upon the Court's approval that Defendant shall file her responsive Closing Argument on January 10, 2022.

ORDER

Based upon the Stipulation of the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that Plaintiff shall file his responsive Closing Argument no later than December 27, 2021.

IT IS HEREBY ORDERED that Defendant shall file her responsive Closing Argument no later than January 10, 2022.

Dated this 17th day of December, 2021

for Judge Steel

4C8 66C 5D62 787E
Sunny Bailey
District Court Judge

Respectfully submitted by:

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

Shelley Lubritz, Esq.
Nevada Bar No. 005410
375 E. Warm Springs Rd., Suite 104
Las Vegas, Nevada 89119
(702) 833-1300
Attorney for Plaintiff

Approved as to form and content:

KAINEN LAW GROUP, PLLC

RACHEAL H. MASTEL, ESQ.
Nevada Bar No. 11646
3303 Novat Street, Suite 200
Las Vegas, Nevada 89129
(702) 823-4900
Attorney for Defendant

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

David Rose, Plaintiff	CASE NO: D-17-547250-D
vs.	DEPT. NO. Department I
Sarah Rose, Defendant.	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 12/17/2021

Racheal Mastel	racheal@kainenlawgroup.com
Service KLG	service@kainenlawgroup.com
Kolin Niday	kolin@kainenlawgroup.com
David Rose	daverose08@gmail.com
Shelley Lubritz	shelley@lubritzlawoffice.com

Electronically Filed
12/27/2021 11:42 PM
Steven D. Grierson
CLERK OF THE COURT

MISC

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Attorney for Plaintiff
David John Rose

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

DAVID JOHN ROSE, Plaintiff, vs. SARAH JANEEN ROSE, Defendant	Case No.: D-17-547250-D Dept. No.: I Hearing Date: 9/23/21 and 11/15/21 Hearing Time: 9:00 a.m.

PLAINTIFF'S REBUTTAL CLOSING ARGUMENT

Mr. Rose, again, thanks this Court for its indulgence and for undertaking the unenviable task of deciding the issues presently before it.

An irrevocable right of survivor benefits (hereinafter "SBP" or "survivor benefits") to a PERS pension, has been defined neither legislatively nor in a published opinion, as a community property asset subject to division[1]. While this Court, and others, may believe

[1] In its unpublished opinion, *Holguin v. Holguin*, 491 P.3d 735 (Table) (Nev. 2021), the Nevada Supreme Court specifically held that However, ***Nevada does not consider a survivorship interest to be a community property asset and, as such, does not require a divorce decree to provide***

the time is ripe for the Nevada Supreme Court to decide this issue, Mr. Rose respectfully asserts the record for a case to go up on appeal should be pristine. The instant matter is not that case.

The basic premise upon which Ms. Rose defends the inclusion of survivor benefits to her in the Stipulated Decree of Divorce (hereinafter the "Decree") is,

> The penultimate fact in this case is uncontroverted: David signed the Decree.
>
> [Defendant's Closing Argument, page 2, lines 3 – 4]

By this statement, Ms. Rose evidences her overarching theme that Mr. Rose's signature, regardless of how it was obtained, is the only factor for the Court to consider in its determination as to granting or denying the pending NRCP 60(b) motion[2]. In furtherance of her position, in the paragraphs that followed, Ms. Rose wrote,

> ***At the trial, David acknowledged he signed the same voluntarily, of his own free will. At the end of the day, the analysis ends at that point.*** David had a duty to read the Decree before he signed it and his failure to do so does not obviate him of that responsibility. "Courts have consistently held that one is bound by any document one signs in spite of any ignorance of the documents 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), which further states that "[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***

---

a former spouse with a survivor beneficiary interest. This case is addressed more fully in the discussion of Mr. Willick's testimony.

[2] *Plaintiff's Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based upon Mistake* filed April 25, 2018.

> **reasonable standards of fair dealing**." Id. The Court then goes on to note that "the comments []3 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.
>
> [Emphasis added]
>
> [Defendant's Closing Argument, page 2, lines 4 – 23]

As will be set forth, more fully, below Ms. Rose's failure to act in good faith, as well as the failure of her former counsel, is but one basis upon which Mr. Rose's motion should be granted. Mr. Rose submits that his former wife and her counsel did not act in good faith and in accordance with reasonable standards of fair dealing. Their failure will be addressed later in this Rebuttal. Prior to addressing the issues of the MOU and Decree, Mr. Rose is compelled to address the testimony of Marshal Willick, Esq.[4]

Mr. Willick's Testimony as an Expert Witness

Prior to his discussion of the legal authority relative to survivor beneficiaries, Mr. Rose will address the Court's decision to allow Marshal Willick, Esq. to testify as an expert on the issue of PERS and survivor beneficiaries. At the evidentiary hearing, Mr. Rose objected to the Court's ruling that Mr. Willick would be allowed to testify as an expert in this matter. The objection was overruled and noted. Mr. Rose respectfully submits that

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[3] Defendant omitted the citation to "§172" which is in the original quote.

[4] Commencing on page 4, line 1 and concluding on page 7, line 13, Ms. Rose sets forth the argument that, relative to the Decree, she did not have a fiduciary duty to David. In support of the same, Sarah cited to Minnesota and Utah caselaw. The issues of fiduciary duty and negligent misrepresentation was not raised in Mr. Rose's Closing Argument. He intentionally omits from this Rebuttal any response.

the Court's consideration and/or reliance upon his testimony would be misguided and reversible error.

NRS 50.275 provides,

> If scientific, technical or other specialized knowledge will ***assist the trier of fact to understand the evidence or to determine a fact in issue***, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge. [Emphasis added].

By definition, an expert witness's testimony, must be offered, only, to assist the Court's understanding of the evidence, or, to assist the Court in determining a fact at issue. Mr. Willick's testimony did neither. His testimony was elicited, solely, to testify about Nevada law relative to PERS. In so doing, his testimony included personal opinions as to prevailing Nevada Supreme Court cases which do not support his beliefs and, therefore, exceeded the scope of NRS 50.275.

NRS 125.070 provides,

> The judge of the court shall determine ***all questions of law and fact*** arising in any divorce proceeding under the provisions of this chapter.
>
> [Emphasis added].

It is well-settled that adjudicating issues of law is within the exclusive province of the court. "The rule prohibiting experts from providing their legal opinions or conclusions is so well established that it is often deemed a basic premise or assumption of evidence law - a kind of axiomatic principle. [Internal citation omitted]. In fact, every [federal] circuit **has *explicitly held that experts may not invade the court's province by testifying on issues of law."*** *In re Initial Public Offering Securities Lit.*, 174 F.Supp.2d 61, 64

(S.D.N.Y. 2001). "[T]he calling of lawyers as 'expert witnesses' ***to give opinions as to the application of the law to particular facts*** usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and ***results in no more than a modern day 'trial by oath' in which the side procuring the greater number of lawyers able to opine in their favor wins.*****"** *Downer v. Bramet*, 199 Cal.Rptr. 830, 833, 152 Cal.App.3d 837, 842 (Cal. App. 4th Dist. 1984).

> As McCormick on Evidence teaches: Undoubtedly some highly opinionated statements by the witness amount to nothing more than an expression of his general belief as to how the case should be decided or the amount of damages which would be just. ***All courts*** exclude such extreme conclusory expressions. There is no necessity for this kind of evidence; its receipt would suggest that the ***judge and jury may shift responsibility for the decision to the witness***. In any event, the opinion is worthless to the trier of fact.[5]
>
> [Emphasis added]

It is respectfully submitted that the Court erred by allowing Mr. Willick, to testify as an expert witness ***"to give opinions as to the application of the law to particular facts."*** In direct contravention thereto, much of Mr. Willick's testimony consisted of ***his opinions and his interpretation*** of Nevada law and ***the application of his interpretation to facts*** in this matter. Mr. Willick's opinions were offered to advise the Court on Nevada law and the application of Nevada law to the facts in this matter. As such, his testimony should be stricken and disregarded.

. . .

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[5] McCormick on Evidence § 12, at 60 (6 ed. 1999).

Notwithstanding the same, because his testimony is a part of the record, Mr. Rose must, again, address portions thereof in this Rebuttal. First, on the broad issue of "omitted community property assets," Mr. Rose concurs that they must be divided pursuant to *NRS 125.150(3)*. Second, the portion of Mr. Willick's testimony that classified survivor benefits as community property assets was, quite simply, wrong. The Nevada Supreme has not recognized them as such. It is this portion of Mr. Willick's testimony that muddied what may be referred to an already murky record.

In reference to survivor benefits, Mr. Willick testified,

> Peterson was going to lead to a holding explicitly stating that. During oral argument, Counsel for the party who had retained the property, stipulated that that was all true, agreed with appellant's counsel that that was an omitted asset that should be divided.
>
> The Supreme Court said that because everybody at oral argument agreed that that was the law, there was no justiciable controversy for them to rule upon and ***therefore, elected to simply remand for the court to do what everybody agreed they should do, to divide the omitted asset without issuing a written opinion, saying that the law required people to equally divide the community property*.**
>
> [Emphasis added].
>
> [9/23/21 Partial Transcript[6] page 55, lines 12 – 23]

Mr. Willick misstated and inappropriately applied the Nevada Supreme Court's unpublished decision in *Peterson v. Peterson*, 463 P.3d 467 (2020) to the facts of this

---

[6] The transcript of Mr. Willick's September 23, 2021 testimony was filed on November 12, 2021.

case. ***He*** labeled survivor benefits "omitted assets, the Nevada Supreme Court did not.

The Court opined that,

> To warrant adjudication under NRS 125.150(3), the SBP must be (1) community property and (2) omitted by mistake or fraud. [footnote omitted]
>
> Because James admitted both in the district court briefing and at oral argument that the SBP was a community property asset that was ***"inadvertently omitted" from the divorce decree***, we conclude that ***under these particular facts, his admission is sufficient to establish that the SBP was omitted by mistake*** under NRS 125.150(3). [footnote omitted]
>
> * * * *
>
> We therefore reverse the district court's order as it pertains to the SBP and remand for the district court to adjudicate the SBP under NRS 125.150(3). On remand, the district court must comply with NRS 125.150(3)'s mandate to ***"equally divide the omitted community property," unless it finds "a compelling reason" not to, which it must set forth in writing. However, the district court is not required to order James to select an SBP and designate Louisa as the sole beneficiary. It might instead exercise its broad discretion, to deny the requested relief or provide an alternative form of equitable relief.***
>
> [Emphasis added]

In its footnote 3, the Nevada Supreme Court held,

> ***Because of James's concession, we need not make a legal determination on appeal of whether the SBP here is a community property asset or a mere "right" to be exercised under the military pension.***
>
> [Emphasis added]

. . .

. . .

The Court's ruling as cited, above, must be broken down into parts. Specifically,

> To warrant adjudication under NRS 125.150(3), the SBP must be (1) community property and (2) omitted by mistake or fraud. [footnote omitted]

Assuming, *arguendo*, that this honorable Court finds survivor benefits are community property, they were not omitted by mistake or fraud. Rather, the provision awarding Ms. Rose the irrevocable survivor benefit rights to Mr. Rose's PERS was inserted into the Decree of Divorce improperly. Ratifying that award unjustly enriches Ms. Rose.

Turning to the next paragraph,

> Because James admitted both in the district court briefing and at oral argument that the SBP was a community property asset that was ***"inadvertently omitted" from the divorce decree***, we conclude that ***under these particular facts, his admission is sufficient to establish that the SBP was omitted by mistake*** under NRS 125.150(3). [footnote omitted]

The facts in *Peterson* are fundamentally different than those of the instant matter. Both parties in *Peterson* agreed an asset was inadvertently omitted from the Decree of Divorce. Such is not the case in the matter presently before this Court.

The Nevada Supreme Court does not recognize survivor benefits as community property. They are not an asset to be divided absent an agreement of the parties.

Mr. Willick testified that the PERS survivor benefit is non-divisible but was unable to provide a citation for that statement even when pressed by the Court.

> THE COURT: But you couldn't get it divided by timeline on the –
>
> THE WITNESS: On the PERS survivorship interest, no.

THE COURT: Why not?

THE WITNESS: It is it's not my fault. It's a non-divisible benefit. Under certain –

THE COURT: Where does it say that?

THE WITNESS: -- retirement systems.

THE COURT: ***Does it say non-divisible?***

THE WITNESS: ***Yes.***

THE COURT: ***Where?***

THE WITNESS: ***Of, the word?***

THE COURT: ***You're the expert; yeah.***

THE WITNESS: ***It just says there can only be one survivorship – I can't give you the subsection, but it's in 286.*** There can – you can only have one named survivor beneficiary.

[emphasis added]

[9/23/21 Partial Transcript page 59, lines 9 – 24 and page 60, line 1]

Mr. Willick is correct. There can only be one (1) irrevocable survivor beneficiary. Accordingly, the insertion of the provision granting Sarah Rose Option 2 irrevocable survivor benefits by Ms. Cooley with the full knowledge of Ms. Rose wrongfully forced Mr. Rose to provide for his former wife in direct contravention of his expressed wishes. If the NRCP 60(b) motion is denied, then Ms. Rose and her former counsel have, in reality, stolen Mr. Rose's right to choose his irrevocable survivor beneficiary at the time of retirement by granting to his former wife something to which she would not otherwise be entitled.

If this Court determines Mr. Willick's testimony to be admissible, the following is submitted for the Court's review. While Mr. Willick skillfully testified about PERS and the operation of survivor beneficiaries to a Police Fire PERS, interwoven into that testimony is personal opinion on published decisions of the Nevada Supreme Court, and incomplete facts. The latter of which was driven by the direct examination of Ms. Rose's counsel.

On the issue of whether the Nevada Supreme Court issued a holding that characterizes irrevocable survivor benefits as community property, he testified as follows,

> A The existing case law going back to 1978 in Ellett just say all benefits. They – they did not make a list. They just said retirement benefits, whether vested or not, whether matured or not, if they are accrued during the period of marriage, they are divisible benefits to be addressed upon divorce.
>
> [Emphasis added]
>
> [9/23/21 Partial Transcript page 23, lines 4 – 9]

From *Wolff* to *Henson*, Mr. Willick testified that the Nevada Supreme Court is wrong and that it continues to operate on a "false fact." In addressing *Wolff*, he testified "Nobody has an automatic survivorship interest. Unfortunately, they were simply wrong as a matter of fact, because that's not how PERS works, as we've already discussed." [9/23/21 Partial Transcript page 48, lines 18 – 20] and "Henson made it worse." [9/23/21 Partial Transcript page 49, line 12]

Notably, Mr. Willick did not advise the Court that the Nevada Supreme Court, in an unpublished decision, held that[7],

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[7] On page 11, lines 16 – 21 of her Closing Argument, Ms. Rose cited to *Holguin v. Holguin*, 491 P.3d 735 (Table) (Nev. 2021). She emphasized that this was an unpublished decision notwithstanding

> First, appellant contends that the district court erred when it failed to award her a survivorship interest in respondent's PERS retirement benefit, and that it abused its discretion when it did not make specific findings in support of that decision. ***However, Nevada does not consider a survivorship interest to be a community property asset and, as such, does not require a divorce decree to provide a former spouse with a survivor beneficiary interest. As this court has previously held, "unless specifically set forth in the divorce decree, an allocation of a community property interest in the employee spouse's pension plan does not also entitle the nonemployee spouse to survivor benefits.***" *Henson v. Henson*, 130 Nev. 814, 815-16, 334 P.3d 933, 934 (2014); *see also id.* at 820, 334 P.3d at 937 (noting that "...***the only pension benefit the nonemployee spouse is guaranteed to receive is his or her community property interest in the unmodified service retirement allowance calculated pursuant to NRS 286.551*** and payable through the life of the employee spouse."). Thus, we affirm the district court's decision denying appellant's request for a survivor benefit as substantial evidence supports the division of respondent's PERS benefit. *See Kilgore v. Kilgore*, 135 Nev. 357, 359-60, 449 P.3d 843, 846 (2019) (reciting the well-established rule that this court reviews factual findings deferentially, but conclusions of law de novo). The district court was not required to make specific findings where its final division effectuated an equal distribution, pursuant to NRS 125.150(1)(b).
>
> [emphasis added]

Notwithstanding that the *Holquin* decision was filed on July 23, 2021, two (2) months before his September 23, 2021, appearance, Mr. Willick did not provide balanced testimony on the seminal issue in this case - - ***Nevada does not recognize survivor***

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the fact that she cited to and relied on several unpublished decisions. In particular, *Peterson v. Peterson*, 463 P.3d 467 (2020) was addressed in the Closing Argument and testified to by Mr. Willick. Unpublished decisions are not precedential. NRAP 36(2)-(3) but the Court may follow their persuasive authority.

benefits to a PERS pension as community property unless specifically set forth in the divorce decree or other order.

Because Nevada does not recognize survivor benefits to PERS as community property, Mr. Willick testified, by analogy, as to California laws on this issue.

> California has made it extremely clear that survivor benefit component of a retirement benefit is an item of value to be divided like all other items of value in an equal division of community assets in every case.
>
> [9/23/21 Partial Transcript page 46, lines 5 - 8]

The Court interjected and correctly stated "But that's not the case here in Nevada yet" a fact to which Mr. Willick conceded.

On the issue of survivor benefits, Mr. Rose respectfully directs the Court's attention to Mr. Willick's testimony as follows,

> THE WITNESS: Right. In a normal -- for everybody except Police Fire, if you choose option one, nobody gets anything if you die. ***For Police Fire, if you happen to be married on the date that you retire, that person gets the equivalent of an option three survivorship benefit without any deduction in the total amount paid under option one.*** In other words, you get a free survivorship interest. That makes Police Fire different from all other PERS employees and it is irrevocable.
>
> ***If someone is married on the date that they retire under an option one selection for PERS Police Fire, and they divorce the next day, that spouse, irrespective of the wishes of the parties, the order of the court or anything else, will receive that survivorship benefit*** in the event that the employee predeceases the former spouse, no matter what anybody wanted and no matter what any court ordered. That's simply how PERS will do it. And it's an irrevocable election –
>
> [9/23/21 Partial Transcript page 15, lines 4 – 18]

THE WITNESS: Okay. If you are Police Fire - -

THE COURT: Uh-huh.

THE WITNESS: - - and you retire under option one, you get the maximum possible benefit.

THE COURT: Uh-huh.

THE COURT: [sic] ***But if the employee dies first, the person he was married to on the day that he retired*** will get a survivorship benefit as if he had selected option three.

THE COURT: Okay. Okay. I got it. Got it. Got it.

THE WITNESS: But it's free. There's no deduction in the lifetime payments to the employee or to the spouse or former spouse, for the survivorship benefit that that spouse will receive.

THE COURT: Okay.

THE WITNESS: But they have to be married to that person on the day of retirement.

[9/23/21 Transcript page 17, lines 7 – 23]

BY MS. MASTEL:

Q Okay. So, what controls how a survivorship works, who's entitled and - - and what the options are?

A Well, if - - if nobody - - if no court anywhere has done anything up to the date of retirement, married or not, then the mili - - the - - military; excuse me - - the PERS - - sorry - -

THE COURT: Gotta be married - - go ahead.

THE WITNESS: ***The PERS participant has the option of selecting whatever option he wants.***

THE COURT: On the day of retirement.

THE WITNESS: ***On the day of retirement.*** If some court somewhere, meaning a district court of proper jurisdiction or

> the Supreme Court according to those regs, if either one of those courts has issued an order and it has to be a Nevada court, has issued an order requiring an option selection, PERS will honor the court order if they are properly served with an appropriately phrased order and they will enforce the option selection at the time of retirement, no matter what the retiree wishes to select.
>
> [9/23/21 Partial Transcript page 19, lines 14 – 24 and page 20, lines 1 – 8]

Responding directly to the inquiry, Mr. Willick testified that the PERS employee has the option of selecting an option up to the day of retirement. ***Interwoven into his testimony is the caveat that if a court order exists in which a selection is made prior to retirement, then PERS will follow that order which, in this scenario, is the Decree.***

Commencing on page 27, lines 24 – 24 and concluding on page 28, line 12 of the September 23, 2021, partial transcript, Mr. Willick's testimony was based upon the false fact that survivor benefits to PERS are a community property asset subjection to division. See, *Henson v. Henson*, 130 Nev. 814, 815-16, 334 P.3d 933, 934 (2014). Mr. Rose respectfully requests that the Court disregard this portion of the testimony as it is simply the opinion of the witness and unsubstantiated by Nevada law. In fact, the testimony contravened Nevada law on this issue.

The foregoing led to a discussion between the witness and the Court about informed decisions when negotiating the terms of a Decree of Divorce. Again, operating upon a false fact that survivor benefits to a PERS are community property.

> THE WITNESS: The larger the - - except for option one for Police Fire, which is again is a freebie, except for that one, the bigger the survivorship benefit, the smaller the lifetime payout.
>
> THE COURT: Okay. If you didn't know that when you were bargaining back and forth, both parties, if you didn't

know the formulation of it, could you make a -- a informed decision?

THE WITNESS: In my personal opinion - - well, opinion is apparently a bad word.

THE COURT: Your expert.

THE WITNESS: You asked me a question, may I answer it?

THE COURT: Again, yes.

THE WITNESS: In my opinion, nobody can make an informed decision without knowing what they're doing and he [sic] ramifications of the choices that they're making.

[9/23/21 Partial Transcript page 35, lines 5 – 21]

In this instance, Mr. Willick offered his personal opinion not an opinion supported by Nevada law. Again, operating on the false fact that survivor benefits are recognized as community property in Nevada.

As Mr. Willick's testimony did not include specific citations to NRS 286, the below is set forth for the Court's review.

NRS 286.6767 provides, in pertinent part, as follows:

1. A member ***may designate***, in writing, a survivor beneficiary and one or more additional payees to receive the payments provided pursuant to NRS 286.67675, 286.6768, or 286.67685 ***if the member is unmarried on the date of the member's death.***

2. A designation pursuant to subsection 1 must be made on a form approved by the Executive Officer. If a member has designated one or more payees in addition to the survivor beneficiary, the member must designate the percentage of the payments that the survivor beneficiary and each additional payee is entitled to receive.

NRS 286.67675 provides, in pertinent part, as follows:

> 1. Except as otherwise provided in this subsection, the survivor beneficiary of a deceased member is entitled to receive a cumulative benefit of at least $450 per month. If a member has designated one or more payees in addition to the survivor beneficiary pursuant to NRS 286.6767, the cumulative benefit paid pursuant to this subsection must be divided between the survivor beneficiary and any additional payee in the proportion designated by the member pursuant to NRS 286.6767. The payments must begin on the first day of the month immediately following the death of the member and must cease on the last day of the month in which the survivor beneficiary dies.
>
> 2. Except as otherwise provided in this subsection, if payments made pursuant to subsection 1 cease before the total amount of contributions made by the deceased member have been received by the survivor beneficiary, the surplus of contributions over payments received must be paid to the survivor beneficiary. If the member had designated one or more payees in addition to the survivor beneficiary pursuant to NRS 286.6767, the surplus of contributions over payments received must be divided between the survivor beneficiary and any additional payee in the proportion designated by the member pursuant to NRS 286.6767.
>
> 3. The benefits paid pursuant to this section are in addition to any benefits paid pursuant to NRS 286.673.
>
> 4. As used in this section, "survivor beneficiary" means a person designated pursuant to NRS 286.6767.

NRS 286.551 provides, in pertinent part, as follows:

> Except as otherwise required as a result of NRS 286.535 or 286.537:
>
> 1. Except as otherwise provided in subsection 2:
>
> **(a)** ***For a member who has an effective date of membership before January 1, 2010, a monthly service retirement allowance must be determined by multiplying the member's average compensation by 2.5 percent for each year of service earned before July 1, 2001, and 2.67***

percent for each year of service earned on or after July 1, 2001.

As set forth, above, on direct examination, Mr. Willick's testimony was incomplete. He was not asked and, thus, he did not testify about what occurs if the spouse at the time of retirement does not consent to the survivor benefit option chosen by the PERS employee. NRS 286.541 provides, in pertinent part, as follows:

> **1.** ***Applications for service retirement allowances or disability retirement allowances must be submitted to the offices of the System on forms approved by the Executive Officer. The form shall not be deemed filed unless it contains:***
>
> (a) The member's selection of the retirement plan contained in NRS 286.551 or one of the optional plans provided in NRS 286.590;
>
> (b) A notarized statement of the marital status of the member; and
>
> (c) ***If the member is married, a statement of the spouse's consent or objection to the chosen retirement plan, signed by the spouse and notarized.***
>
> 2. Except as otherwise required by NRS 286.533, retirement becomes effective on whichever of the following days is the later:
>
> (a) The day immediately following the applicant's last day of employment;
>
> (b) The day the completed application form is filed with the System;
>
> (c) The day immediately following the applicant's last day of creditable service; or
>
> (d) The effective date of retirement specified on the application form.

3. The selection of a retirement plan by a member and consent or objection to that plan by the spouse pursuant to this section does not affect the responsibility of the member concerning the rights of any present or former spouse.

4. The System is not liable for any damages resulting from the false designation of marital status by a member or retired member.

NRS 286.545 provides, in pertinent part, as follows:

1. If the spouse of the member does not consent to the retirement plan chosen by the member before the date on which the retirement becomes effective pursuant to NRS 286.541 the System shall:

(a) Notify the spouse that the spouse has 90 days to consent or have the member change the member's selection; and

(b) Pay the retirement at the amount calculated for Option 2 provided in NRS 286.590 until the spouse consents or for 90 days, whichever is less.

2. Upon consent of the spouse or at the end of the 90 days, the retirement benefit must be recalculated and paid under the terms of the option originally selected by the member retroactively to the date on which the retirement became effective.

Addressing alternative selections to Option 1, NRS 286.590 provides, in pertinent part, as follows:

The alternatives to an unmodified service retirement allowance are as follows:

1. **Option 2** consists of a reduced service retirement allowance payable monthly during the retired employee's life, with the provision that it continue after the retired employee's death for the ***life of the beneficiary whom the retired employee nominates by written designation acknowledged and filed with the Board at the time of retirement should the beneficiary survive the retired employee.***

NRS 286.676 provides, in pertinent part, as follows:

> 1. Except as limited by subsections 3 and 4, ***the spouse of a deceased member*** who had 10 or more years of accredited contributing service is entitled to receive a monthly allowance equivalent to that provided by:
>
> (a) Option 3 in NRS 286.590, if the deceased member had less than 15 years of service on the date of the member's death; or
>
> (b) Option 2 in NRS 286.590, if the deceased member had more than 15 years of service on the date of the member's death.
>
> To apply the provisions of Options 2 and 3, ***the deceased member shall be deemed to have retired on the date of the member's death immediately after having named the spouse as beneficiary under the applicable option.*** This benefit must be computed without any reduction for age for the deceased member. ***The benefits provided by this subsection must be paid to the spouse for the remainder of the spouse's life.***
>
> 2. The ***spouse*** may elect to receive the benefits provided by any one of the following only:
>
> (a) This section;
>
> (b) NRS 286.674; or
>
> (c) NRS 286.6766.
>
> 4. The benefits provided by paragraph (a) of subsection 1 may only be paid to the ***spouses of members who died on or after May 19, 1975.***

NRS 286.6765 provides, in pertinent part, as follows:

> 1. Except as limited by subsection 2, the ***spouse of a deceased member*** who was fully eligible to retire, both as to service and age, is entitled to receive a monthly allowance equivalent to that provided by option 2 in NRS 286.590. This section does not apply to the spouse of a member who was eligible to retire only under subsection 6 of NRS 286.510. ***For***

the purposes of applying the provisions of option 2, the deceased member shall be deemed to have retired on the date of the member's death immediately after having named the spouse as beneficiary under option 2. The benefits provided by this section must be ***paid to the spouse*** for the remainder of the ***spouse's life***. The spouse may elect to receive the benefits provided by any one of the following only:

(a) This section;

(b) NRS 286.674;

(c) NRS 286.676; or

(d) NRS 286.6766.

2. ***The benefits provided by this section may only be paid to the spouses of members who died on or after May 19, 1975.***

NRS 286.6766 provides, in pertinent part, as follows:

Any ***spouse*** eligible for payments under the provisions of NRS 286.674 or 286.676 may elect to waive payment of a monthly allowance and to receive instead in a lump sum a refund of all contributions to the Public Employees' Retirement Fund or the Police and Firefighters' Retirement Fund made by a deceased member plus any contributions made by a public employer in lieu of the employee's contributions, but if more than one person is eligible for benefits on account of the contributions of any one deceased member, no such lump-sum payment may be made.

NRS 286.67665 provides, in pertinent part, as follows:

1. ***The spouse of a member who is a police officer or firefighter killed in the line of duty on or after July 1, 2013,*** or the spouse of any other member killed in the course of employment on or after July 1, 2013, ***is entitled to receive a monthly allowance equivalent to the greater of:***

(a) Fifty percent of the salary of the member on the date of the member's death; or

(b) One hundred percent of the retirement allowance that the member was eligible to receive based on the member's years of service obtained before the member's death without any reduction for age for the deceased member.

2. The benefits provided by this section ***must be paid to the spouse*** for the remainder of the ***spouse's life***.

3. The ***spouse*** may elect to receive the benefits provided by any one of the following only:

(a) This section;

(b) NRS 286.674;

(c) NRS 286.676;

(d) NRS 286.6765; or

(e) NRS 286.6766.

4. For the purposes of this section, the Board shall define by regulation "killed in the line of duty" and "killed in the course of employment."

NV PERS provided a PERS Pre-Retirement Guide for Police and Fire Members[8] which provides, in pertinent part, as follows,

Retirement Options

The Unmodified Retirement Allowance ***(Option 1) is the maximum allowance you can receive and pays you the full monthly benefit you have earned for your lifetime. You may designate your spouse or registered domestic partner at the time of retirement*** under this option to receive a benefit upon your death equal to 50% of the benefit you earned through the Police and Firefighters' Retirement Fund. In order for your spouse or registered domestic partner to receive a benefit under this option, you must be contributing to PERS under the Employer Pay Contribution Plan prior to

[8] https://www.nvpers.org/public/publications/pfPreRtrmt.pdf

the termination of your employment. ***After your death, your spouse*** or registered domestic partner benefit will be effective upon his or her 50th birthday.

There are six additional options from which to choose. Each offers a benefit somewhat lower than the Unmodified Allowance but does afford a monthly benefit for your beneficiary after your death.

You may name anyone you wish as your beneficiary under Options 2 through 7. However, your spouse or registered domestic partner must consent to the plan selection and beneficiary designation. There are many factors to consider in selecting an option. Some are:

- The amount and source of income from other retirement programs

- Employment which is or maybe available to your beneficiary

- The amount and types of debts your beneficiary may be responsible for discharging after your death

- The type and amount of insurance, such as mortgage insurance and/or life insurance available to your beneficiary

The other retirement options are:

Option 2: An actuarially reduced allowance for the lifetime of the retired employee. After the retired employee's death, the same allowance continues for the lifetime of the beneficiary.

Option 3: An actuarially reduced allowance for the lifetime of the retired employee. After the retired employee's death, 50 percent of the allowance continues for the lifetime of the beneficiary.

Option 4: An actuarially reduced allowance for the lifetime of the retired employee. After the retired employee's death, and beginning when the beneficiary reaches age 60, the same allowance continues for the lifetime of the beneficiary.

Option 5: An actuarially reduced allowance for the lifetime of the retired employee. After the retired employee's death, and

> beginning when the beneficiary reaches age 60, 50 percent of the allowance continues for the lifetime of the beneficiary.
>
> Option 6: An actuarially reduced allowance for the lifetime of the retired employee. After the retired employee's death, a specific sum per month, as selected by the retired employee, will continue for the lifetime of the beneficiary. This amount may not exceed the monthly allowance paid to the retired employee.
>
> Option 7: An actuarially reduced allowance for the lifetime of the retired employee. After the retired employee's death, and beginning when the beneficiary reaches age 60, a specific sum per month, as selected by the retired employee, will continue for the lifetime of the beneficiary. This amount may not exceed the monthly allowance paid to the retired employee.
>
> Since Options 6 and 7 are based on an amount which you specify we do not normally provide an estimate for these options. If you wish to provide for a set amount to go to your beneficiary, contact PERS and indicate the amount. We will be happy to provide an estimate for these two options.
>
> The reduction in Retirement Options 2 through 7 from the Unmodified Allowance is based on the age and life expectancy of the retired employee and beneficiary. On the following page is an example of benefits which would be available under the optional plans.
> [Emphasis added]

Mr. Rose cannot be compelled to name a survivor beneficiary upon retirement. Sarah Rose is not entitled to survivor benefits to Mr. Rose's PERS save and except for its wrongful inclusion in the Decree which is why those paragraphs awarding Option 2 irrevocable survivor benefits to Ms. Rose must be set aside.

Contract Law Does Apply:

It is well understood that marriages and divorces stem from contract law, and where family law cases are silent, contract cases control. The Nevada Supreme Court

recognized that settlement agreements are contracts and that their enforcement is governed by the principles of contract. *May v. Anderson*, 26 121 Nev. 668, 672, 119 P.3d 1254, 1257 (Nev. 2005). When the parties have agreed on the essential terms of a settlement, an enforceable settlement agreement exists. *May*, 121 Nev. at 674.

In the case presently before this Court, the Memorandum of Understanding is a contract between the parties. Within the four (4) corners of the document, the MOU resolved "all" issues[9] and shall not be merged into the Decree.[10] The MOU is an integrated agreement; thus, no term can be added or subtracted without destroying the contract itself. Nevada law is clear that the Court cannot step into the shoes of the parties and negotiate from the bench. Mr. Rose respectfully submits that if this Court denies his NRCP 60(b) motion and upholds the disputed provision in the Decree of Divorce or if the Court substitutes its own, then the Memorandum of Understanding is destroyed and the parties will be compelled to negotiate the terms of their asset and debt distribution as well as alimony. As Mr. Rose testified, he would not have agreed to an award of alimony to Ms. Rose if he knew she would also receive the survivor benefit.

In *May*[11], the Nevada Supreme Court confirmed that once a "settlement contract is formed when the parties have agreed to its material terms, even though the exact language is finalized later, a party's refusal to later execute" the document after agreeing upon the essential terms does not render the settlement agreement invalid.[12] Specifically,

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[9] Paragraph 1.
[10] Paragraph 1.
[11] *May v. Anderson*, 119 P. 3d 1254 (2005).
[12] *Id*. At 1256.

in *May*, the defendant's insurance offered to pay $300,000 to the injured parties in exchange for a release of all claims and a covenant not to sue. The plaintiff signed a letter memorializing the terms of the parties' agreement and acknowledged that he agreed to the terms. Upon receiving the document to be executed which contained the settlement terms, the plaintiff refused to sign.

On appeal, the Court held, "because a settlement agreement is a contract, its construction and enforcement are governed by principles of contract law. Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration. With respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms. A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite. A contract can be formed, however, when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later. In the case of a settlement agreement, a court cannot compel compliance when material terms remain uncertain. The Court must be able to ascertain what is required of the respective parties."[13]

In Section C of Defendant's Closing Argument, Ms. Rose asserts that contract law does not apply in this case. In support of that assertion, she wrote,

> In fact, the case law makes it very clear that, as a general rule, the Nevada Supreme Court has found that the application of contract law principles to a Decree is improper. Vaile v. Porsboll, 268 P.3d 1272 (Nev. 2012). See also, Day v. Day,

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[13] *Id*. at 1256.

> 80 Nev. 386, 389-390, 395 P.2d 321, 322-323 (1964), Mizrachi v. Mizrachi, 385 P.3d 982, 988 (Nev. App. 2016). [Id. at page 8, lines 8 – 13]

Her reliance on the foregoing is misplaced. It is not the Decree to which contract law applies, it is the MOU which was declared a contract that "shall not merge and shall retain its separate nature as a contract." MOU, page 1.

Ms. Rose's position that contract law does not apply appears to cherry pick those holdings that inure to her benefit but are inherently contradictory. Specifically, on page 10, lines 9 – 16, she argues,

> Not every term within a contract is essential. Further, a party is bound to the actions of his or her counsel, and 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*, supra, *Milner v. Dudrey*, 77 Nev. 256, 264, 362 P.2d 439, 443 (1961).

And, again, on page 11, lines 9 – 16 citing to *May v. Anderson*,

> Sarah agrees that the division of retirement benefits is an essential term. However, agreeing to a division of retirement benefits does not require the parties to set out the exact division of each and every piece of the retirement benefit. "A contract can be formed, however, when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

In a previously referenced paragraph, Ms. Rose even cited to the Restatement (Second) of Contracts § 172 in support of claim that the Court should deny Mr. Rose's motion fled pursuant to NRCP 60(b).

> Yee also cites to the Restatement (Second) of Contracts § 172 (1981), which further states that "[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.
>
> [Defendant's Closing Argument, page 2, lines 13 – 19]

Her contradictory arguments and citations evidence a lack of clarity on the issue of contract law and whether it applies to the facts in this case. To that point, on page 12, line 13, Ms. Rose stated, "The Decree is at the very least, a superseding contract."

Notwithstanding her position[14] that parol evidence does not apply to this case, at the September 23, 2021, evidentiary hearing, Ms. Mastel argued ***"And, Your Honor, parol evidence is appropriate.*** [9/23/21 Transcript page 42, lines 4 – 5]

Of course, contract law applies in this matter. The contract at issue is the March 23, 2018, Memorandum of Understanding not the Decree and "parol evidence is appropriate."

"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). A meeting of the minds exists when the parties have agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d 1262, 1265 (1996). Which terms are essential "depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought." Restatement (Second) of Contracts § 131 cmt. g (1981). *Certified Fire Prot. Inc. v. Precision Constr*., 128 Nev. 371, 378, 283 P.3d 250, 255 (2012).

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[14] Defendant's Closing Argument, page 13, lines 17 – 24 and page 14, lines 1 – 22.

Respectfully, the Court need not look farther than Ms. Rose's own words to ascertain whether there was a meeting of the minds. On page 8, lines 23 – 25 of *Defendant's Opposition to Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based on Mistake and Counter-motion for Attorneys' Fees and Costs* filed on May 10, 2018 Ms. Rose swore under penalty of perjury,

> As stated in David's Motion, ***the parties specifically discussed and agreed during the settlement conference*** that David wanted the children to receive the benefit of his survivor benefits.
>
> [emphasis added]

Mr. Rose is Entitled to Relief Under NRCP 60(b)

On April 25, 2018, fourteen (14) days after the Decree of Divorce was filed, Regina McConnell, Esq., Mr. Rose's former attorney, filed a *Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based upon Mistake* and acknowledged she "missed" the inclusion of the above-stated term. Mr. Rose submits that the disputed term awarding his former wife irrevocable survivor beneficiary rights be found invalid and an Amended Decree of Divorce be ordered in its place. This Court has already found that the Motion was timely filed.

Parties enter into settlement negotiations with the understanding that, once reduced to writing, the agreement will be enforced and unaltered. Denying enforcement of this agreement will have a chilling effect on many parties who may enter settlement negotiations. The knowing and willful insertion of the provision granting Ms. Rose survivorship benefits has the effect of reducing the amount of Mr. Rose's monthly pension

upon retirement and grant to her something to which she would not be entitled absent the insertion of the offending paragraphs.

Turning to the "how" the disputed provision was inserted into the Decree of Divorce, Mr. Rose submits the following. The testimony as to whether the survivor benefit was considered at the March 27, 2019 mediation is clear. Ms. Rose acknowledged that the issue was addressed and that Mr. Rose did not consent to designating her as the irrevocable survivor beneficiary to his PERS. As such, survivor benefits were not included in the *Memorandum of Understanding*.

The parties and Ms. McConnell testified that on March 23, 2018, Mr. Rose and Sarah Rose, participated in a mediation presided over by, then, attorney Rhonda M. Forsberg. Ms. Forsberg drafted a *Memorandum of Understanding* (hereinafter the "MOU") memorializing the terms of the parties' agreement. Both parties and their respective counsel signed the MOU while at Attorney Forsberg's office.

All three testified that the Decree of Divorce at issue was drafted directly after the mediation on March 23, 2018. The parties and their respective counsel signed the Decree that day with the understanding that Ms. McConnell, Mr. Rose's former counsel, would maintain the original document for further review prior to its submission to the Court. Ms. McConnell's testimony on this issue will be addressed later in this Rebuttal.

The wrongdoing of Ms. Rose's former counsel, Shelly Booth Cooley, Esq. is at the forefront of this dispute. Ms. Rose acted in concert with Ms. Cooley to obtain Mr. Rose's signature on the Decree. Because Nevada does not recognize survivor benefits to a retirement as community property, the only way she could receive these benefits was through the Decree of Divorce or other Order of the Court.

Before addressing Ms. Cooley's testimony at the November 15, 2021, evidentiary hearing, Mr. Rose submits the following for review.

Ms. Rose, Mr. Rose, and Ms. McConnell all testified that the Decree was drafted after the MOU was signed. In her *Opposition to Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based on Mistake and Counter-motion for Attorneys' Fees and Costs* filed on May 10, 2018, Ms. Cooley wrote,

> On or about March 23, 2018, after approximately six (6) hours of settlement negotiations, a Global Settlement was reached resolving the entire matter. ***During the settlement negotiations, Ms. Cooley began working on a draft Stipulated Decree of Divorce, in the event of resolution of all issues.*** Fortunately, the matter resolved. Unfortunately, Ms. Cooley neglected to bring her charger to the settlement conference and was unable to incorporate the final terms into the Decree as her computer battery died. ***So as to memorialize the basic terms of the settlement, Ms. Forsberg prepared a Memorandum of Understanding, a copy of which is attached to the Decree of Divorce as Exhibit "B."***
>
> [Emphasis added]

Ms. Cooley revealed that she began drafting the Decree during the settlement negotiations and not after the MOU was finalized and signed which runs counter to the testimony of Mr. Rose, Ms. Rose, and Ms. McConnell. Specifically, she testified that while they were "working on issues" she began drafting the Decree and made revisions as Ms. Forsberg "came in and out" of the rooms. [11/15/21 video citation 9:50:42 – 9:51:01] The timing of is of specific import. Upon being notified that Mr. Rose refused to grant Sarah Rose survivor benefits, Ms. Cooley intentionally included the offending paragraphs in the Decree.

Mr. Rose respectfully submits it was at this point that Ms. Cooley began to perjure herself. Ms. Cooley testified that Ms. Forsberg advised the parties and counsel that she "had to catch a flight so she would have to stop the mediation at a certain time" at which point a hearsay objection was interposed but the testimony was not stricken. [11/15/21 video citation 9:51:13 – 9:51:23]

Upon the Court's admonition, Ms. Cooley testified,

> It was my understanding that we had to - - um - - stop working with the settlement judge at a certain time because she was no longer available but we had most of the issues resolved so it was offered that we could stay there and continue negotiating - - um - - because there was staff present. So, when Ms. Forberg - - Forsberg - - left, we continued negotiating issues and I continued working on the Decree and at some point, probably it was in the - - in the late afternoon my computer died - - um - -and I forgot to bring my charger with me so we went to another office so that I could finish drafting the Decree because we had - - um - - all issues resolved. [11/15/21 video citation 9:51:37 – 9:52:32]

Ms. Cooley's direct testimony shockingly contravened that of the parties and Ms. McConnell in the initial evidentiary hearing presided over by the Hon. Cheryl Moss. It also contravened the testimony of all three at the September 23, 2021 evidentiary hearing over which this Court presided. Mr. Rose submits it was at this point that Ms. Mastel should have stopped her examination of Ms. Cooley because it was so clearly false and was radically different than her own client's testimony. Rather than do so, Ms. Mastel continued her examination and Ms. Cooley continued to testify.

It has long been the position of Mr. Rose and Ms. McConnell that after approximately six (6) hours of mediation, further review of the proposed Stipulated Decree of Divorce was needed. In support thereof, Ms. McConnell retained the original Decree.[15]

On this issue, Ms. Cooley testified that,

> We finalized the Decree - - um - - while we were finalizing the Decree - - well after we finalized the Decree - - um - - Regina McConnell and I went through the Decree a few times - - um - - from start to finish to make sure it was what we agreed to in the settlement conference, Um, once she and I both agreed that it was final we printed it out. I reviewed it with my client and signed it. I gave the original to Regina and she provided the original back to me with her - - her and her client's signature. [11/15/21 video citation 9:52:42 – 9:53:28]

Ms. Cooley testified further that she signed the MOU before Ms. Forsberg left but continued to negotiate at Ms. Forsberg's office after it was signed. [11/15/21 video citation 9:53:34 – 9:53:59]

At the September 23, 2021, evidentiary hearing, the following testimony was given by Ms. McConnell,

> Q And between the signing of the MOU and the signing of the Decree of Divorce did you and Ms. Cooley discuss modifying the terms of the MOU.
>
> A No.
>
> Q And between the signing of the Decree of Divorce did you and Ms. Cooley stipulate to naming Ms. Rose as the irrevocable survivor beneficiary to Mr. Rose's PERS retirement account.

---

[15] It is noted that one (1) of Ms. McConnell's many errors in her representation of Mr. Rose was that she provided Ms. Cooley with a signed ***copy*** of the proposed Decree before reviewing it in detail. This allowed Ms. Cooley to submit the copy as an original to the Court and it was ultimately filed.

A No.

[9/23/21 video citation 11:01:09 – 11:01:31]

Upon a review of page 23, paragraph B of the Decree, Ms. McConnell testified that the provision awarding Sarah Rose irrevocable survivor benefits was inconsistent with the parties' agreement and was not negotiated. [9/23/21 video citation 11:01:34 – 11:02:17]

Ms. McConnell testified further that she became aware of the inclusion of paragraph B on Page 23 of the Decree "a couple of days" after signing it. Prior to submission to the Court, she flipped through the original Decree and saw the paragraph awarding irrevocable survivor benefits to Ms. Rose at which point she contacted Ms. Cooley. The call took place prior to April 11, 2018. Notwithstanding their conversation, Ms. Cooley submitted a copy of the Decree for filing. [9/23/21 video citation 11:06:48 – 11:08:14]

Mr. Rose submits that the testimony of Ms. Rose and Ms. Cooley evidenced their fraudulent insertion of the disputed provision.

> Q And would you please follow along with me while I read from the MOU starting on the fifth line down?
>
> A Okay.
>
> Q It says the memorandum addresses the material terms of the agreement and is intended to bind the parties to those terms. Did I read that accurately?
>
> A Yes, ma'am.
>
> Q Would you consider irrevocable survivor benefits to Mr. Rose's PERS to be a material term? Yes or no?
>
> A Yes.

Q Now when I use the acronym PERS, do you understand that it's the -- I'm referring to the Public Employee Retirement System pension?

A Yes.

[9/23/21 Transcript[16], page 13, lines 1 – 10.]

Q When you signed the MOU, you relied on the fact that the terms set forth in it would not be changed, correct?

A Correct.

Q And if there were modifications to the terms agreed to at the mediation, you would have expected those modifications to be pointed out to you before signing it, correct?

A Correct.

[9/23/21 Transcript, Page 13, lines 15 – 22]

Q Specifically, please directs the Court's attention to the provision in the MOU naming you the irrevocable survivor beneficiary to Mr. Rose's PERS retirement account.

A It does not say.

* * * *

Q At no point did you or your lawyer say to Ms. For – Forsberg, wait a minute. You left out a provision granting me the irrevocable survivor beneficiary rights, correct?

A Correct.

[9/23/21 Transcript, page 15, lines 1 – 5 and lines 9 - 12]

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[16] The transcript of Sarah Rose's September 23, 2021 testimony was filed on October 8, 2021.

Q It's accurate to state that you and Mr. Rose did not discuss the terms of the MOU from the time it was signed until the time the decree was signed, correct?

A Correct.

Q And it's also an accurate statement that between the signing of the MOU and the signing of the decree of divorce, you and Mr. Rose did not discuss modifying the terms of the MOU, correct?

A Correct.

Now between the signing of the MOU and signing the decree of divorce, you and Mr. Rose made no agreement to name you as the irrevocable survivor beneficiary to his PERS retirement account, correct.

[9/23/21 Transcript, page 17, lines 22 – 25 and page 18, lines 1 – 10]

Q At the time you signed the decree of divorce, you knew that the provision awarding you irrevocable survivor benefits to Mr. Rose's PERS was included in the decree, correct?

A I did.

[9/23/21 Transcript, page 23, lines 16 – 19.]

Q Okay. Do you have an opinion as to why Mr. Rose signed the Decree of Divorce?

* * * *

THE WITNESS: My opinion is he wanted to be divorced.

* * * *

Q …Is it your opinion that Mr. Rose wanted the divorce decree to be signed that day?

A Yes.

Q And he was willing to give you the irrevocable survivor beneficiary rights in order to have the decree signed that day?

A No.

[9/23/21 Transcript, page 61, lines 23 – 24; page 62, line 3 and lines 18 – 25]

Ms. Rose, Mr. Rose, and Ms. McConnell all testified consistently. Specifically, that no modifications were made to the MOU between the time it was signed and the time the Decree of Divorce was signed. Ms. Cooley testified under penalty of perjury that after the MOU was signed, the parties and counsel remained at Ms. Forsberg office and negotiated the disputed term.

In Carlson v. Carlson, 108 Nev. 358, 361, 832 P.2d 380, 382 (1992), the Nevada Supreme Court held that,

> Motions under NRCP 60(b) are within the sound discretion of the district court, and this court will not disturb the district court's decision absent an abuse of discretion. *Heard v. Fisher's & Cobb Sales & Distrib., Inc.,* 88 Nev. 566, 568, 502 P.2d 104, 105 (1972).
>
> * * * *
>
> Austin never expressly addresses whether he or his counsel made the misrepresentations. Instead, ***Austin argues that because Trudy was represented by counsel and because Trudy did not opt to continue discovery, her arguments are without merit. Arguably, Trudy's counsel should have more diligently*** pursued information about the pension or, at least, moved for a continuance until she determined the actual value of the pension. ***Nonetheless, "[t]he salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party. Rule 60 should therefore be liberally construed to effectuate that purpose."*** *Nevada Indus. Devel., Inc. v. Benedetti,* 103 Nev. 360, 364, 741 P.2d 802, 805 (1987) (citations omitted).
>
> ***Moreover, the record clearly demonstrates that the representations were the result of either mistake or fraud.*** If both Austin and Trudy were mistaken about the pension's

> value, the parties entered the property settlement based upon a mutual mistake, namely, that they had essentially split their property equally. A mutual mistake entitles a party to relief from a judgment. NRCP 60(b)(1). If, however, Austin or his counsel knew the value of the pension, they fraudulently misrepresented the value of Austin's pension. Such fraud is grounds for relief from the judgment pursuant to NRCP 60(b)(2).[6] Therefore, we conclude that Trudy was entitled to relief from the judgment.

Factually, *Carlson* is distinguished from the instant matter on one significant issue. The employee spouse retired during the marriage and selected the survivor benefit option.

Mr. Rose respectfully asks that this Court not interpret his silence as to the remainder of Defendant's Closing Brief as tacit agreement. He believes that the issues set forth therein merely detract from the issues to be resolved by the Court.

Specifically, are survivor benefits to Mr. Rose's PERS pension community property subject to division? The Nevada Supreme Court has not recognized them as such.

Did Mr. Rose agree to grant Sarah Rose the irrevocable survivor benefits to his PERS pension. The testimony and evidence are clear - - he did not.

Was the issue of survivor benefits discussed and addressed in the March 23, 2018, mediation? The testimony and evidence are clear - - it was.

Was inclusion on page 21, lines 17 – 22 and page 24, lines 4 – 10 of the Decree of Divorce, to-wit: "based upon a selection of Option 2 being made at the time of retirement so as to name SARAH JANEEN ROSE as the irrevocable survivor beneficiary of DAVID JOHN ROSE' pension benefits upon death, to divide said retirement account" proper? The testimony and evidence are clear - - it was not.

Did it reflect the parties' agreement of all material terms of the MOU? The testimony and evidence is clear – it did not.

Finally, why was the language included? Mr. Rose asserts it was improperly inserted into the Decree because absent the same, Sarah Rose was not entitled to survivor benefits.

Attorney's Fees and Costs

Fees should be awarded to Mr. Rose for having to litigate this matter. In an Order of Affirmance in *Arcuri v. Ceraso* (Nev. App., June 9, 2016), the Court of Appeals noted that in *Miller v. Wilfong*, 121 Nev. 619, 624,119 P.3d 727, 731 (2005), a court must consider the *Brunzell* factors and a disparity in income under *Wright v. Osburn*, 114 Nev. 1367 1370, 970 P.2d 1071,1073 (1998), when deciding whether to award attorney fees in family law cases).

The Nevada Supreme Court has adopted four factors which, in addition to hourly time schedules kept by an attorney, are to be considered in determining the reasonable value of an attorney's services. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The factors the Court must consider are "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time, and attention given to the work; and (4) the result: whether the work performed by the lawyer was successful and what benefits were derived."

The qualities of the advocate:

The undersigned is well-experienced in domestic relations law having spent the majority of her 27 years, as a licensed Nevada attorney, in this field and is in good

standing with the State Bar of Nevada. The undersigned also served as a Nevada Deputy Attorney General and a Special Assistant United States Attorney for the District of Columbia.

The character of the work to be done:

The work in this matter work requires something more than a passing knowledge of domestic relations law.

The work actually performed by the lawyer:

All work conducted in this case has been performed by the undersigned.

The result:

Mr. Rose believes he will prevail at the time of trial.

While there is a disparity in income between the parties, the same cannot be ascertained with any specificity as Ms. Rose fails to record income from her photography business and other sources.

Dated this 27th day of December, 2021.

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

By _____

Shelley Lubritz, Esq.
Nevada Bar No. 5410
375 E. Warm Springs Road Suite 104
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Attorney for Plaintiff
David John Rose

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of December, 2021, I caused to be served *Plaintiff's Rebuttal Closing Argument* to all interested parties as follows:

_____BY MAIL: Pursuant to NRCP S(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

_____BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

_____BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

__X__BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Attorney for Defendant: *Service@KainenLawGroup.com*
racheal@kainenlawgroup.com kolin@kainenlawgroup.com
daverose08@gmail.com

Dated this 27th day of December, 2021.

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

By: _____
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EIGHTH JUDICIAL DISTRICT COURT – FAMILY DIVISION

COUNTY OF CLARK, STATE OF NEVADA

DAVID ROSE, Plaintiff, vs. SARAH ROSE, Defendant.	CASE NO. D-17-547250-D DEPT. I Date of Hearing: 9/23/21 11/15/21 Time of Hearing: 9:00 a.m.

DEFENDANT'S REBUTTAL TO PLAINTIFF'S REBUTTAL CLOSING ARGUMENT

COMES NOW, Defendant, SARAH ROSE, by and through her attorney of record, RACHEAL H. MASTEL, ESQ., of the KAINEN LAW GROUP, PLLC, hereby submits her rebuttal to Plaintiff's rebuttal argument from the trial conducted on September 23, 2021, and November 15, 2021.

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. . .

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A. PROPRIETY OF APPEAL AND STATEMENT OF THE LAW

David starts his rebuttal by claiming that Survivor Benefits have not been conclusively established as community property by either the legislature or the courts. Yet, later in his brief, David suggests and attempts to convince the Court that *Holguin v. Holguin,*491 P.3d 735 (Table) (Nev. 2021), an unpublished opinion, creates that conclusive proof. Despite that fact, David simply wholesale *ignores* Sarah's analysis of the statute itself. This has been a theme of David's strategy throughout this litigation: where the law states that he is wrong, David willfully and intentionally ***disregards*** the applicable law. He does not attempt to distinguish it; he does not address it; he simply pretends it does not exist.

With regard to *Holguin*, which Sarah addressed in her initial Closing Argument, in addition to comparing it to *Peterson v. Peterson,* Docket No. 77478 (Order of Reversal and Remand May 22, 2020), both cases are unpublished and at best, persuasive authority. *Holguin* relies on the same factual error in the law that the preceding cases do, as Sarah's brief makes clear. However, as Sarah's brief also addresses, to the extent that the Court relies on *Holguin*, Sarah has asked for findings on the issue so that the same can be properly brought before the Supreme Court.

As far as David's "opinion" as to whether this case is the appropriate case for appeal, the same is unmitigated hubris, improper, and an inappropriate statement clearly designed to influence the Court's decision by veiled threat of creating "bad law." The record on this case is not at all murky. The decisions to date and facts to be considered by the Court have been clear and pointed. While it is likely that there have been decisions by this Court that either party may have disagreed with, that does not make the decisions or the record "murky." Further, both parties have repeatedly indicated their intention to appeal a loss, so neither David's opinions, nor the "threat" of appeal should impact this Court's decision.

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Sarah has fully briefed the issues of "good faith dealing" and fraud *ad nauseum* in her Closing Argument. Sarah very clearly analyzed Nevada case law on those issues. Further, those issues are the basis for David's claims under NRCP 60(b), and therefore, analysis of the same was properly before the Court.[1] Sarah will not waste this court's time repeating her analysis and will only note, once again, that David's rebuttal makes conclusory, often inflammatory, statements as to the "state of the law," without at any time addressing, analyzing or attempting to distinguish the case law and statutory authority Sarah has comprehensively briefed. Again, David's strategy is to simply ignore and pretend that any case law which does not support his position does not exist.

B. CHAPTER 286 AND MR. WILLICK'S TESTIMONY

Once again, David devotes more than half of his rebuttal brief to Mr. Willick's testimony. While attempting to avoid repeating herself extensively, Sarah will address the continued claims by David to sway this Court to strike Mr. Willick's testimony.

As Sarah has already addressed, David is attempting to parse hairs with regard to Mr. Willick's summary of *Peterson* with his summary. In doing so, in his rebuttal, David tries to imply that Mr. Willick claimed *Peterson* stood for the preposition that survivor benefits were community property. That was not Mr. Willick's testimony. *After* addressing *Peterson*, the question was put to Mr. Willick as follows:

> Q: Based on your understanding of that case law, if the Court were to set aside the provision in the decree addressing

---

[1] As this Court is aware, Sarah is not limited in her initial Closing Argument to only rebut what David has set forth in his Closing Argument. She is both permitted and expected to set forth her theory of the case and address any claims which the Court may consider.

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survivorship options, does Nevada law require the Court to consider how to – to consider some division and make findings and conclusions?

A: You would presumably come right back to where we are now. Because assuming that it got left out of the decree and the final decree order, and I'm saying the decree, the post decree litigation, the appeal, whatever is part of the process of finalizing the decree, if it gets left out, then it's omitted…

Partial Transcript of September 23, 2021 Hearing, filed November 12, 2021, Page 56, lines 2-12.

Mr. Willick was asked a very narrow question, if based on his understanding of the previously discussed case law (*Peterson*; *Henson v. Henson,* 130 Nev. 814, 334 P.3d 933 (2014); *Doan v. Wilkerson,* 130 Nev. 449, 327 P.3d 498 (2014), and *Wolff v. Wolff,* 112 Nev. 1355, 929 P.2d 916 (1997)), the Court would need to address survivor benefits as an omitted asset. He testified to his understanding (which Judge Moss's Order from the October 23, 2019 hearing, filed January 13, 2020, permitted), as to how that case law should be applied. He did not state that the Nevada Supreme Court had specifically called survivor benefits "community property."[2]

As far as the Option 2 provision in the Decree "wrongfully forc[ing] Mr. Rose to provide for his former wife in direct contravention of his express wishes…" that argument is without merit or relevance. *Plaintiff's Rebuttal Closing*

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[2] Sarah has already addressed the differing testimony in whether the survivor benefits were omitted from the MOU intentionally, whether they were inserted into the Decree improperly, and why those questions are not relevant in her initial Closing Argument, and directs the Court to that filing for substantial analysis and discussion of the same.

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Argument, filed December 27, 2021, Page 9, lines 21-22. As this Court is well aware, *every* divorce decree, stipulated or issued after a trial, requires spouses to provide for their former spouses in "direct contravention" of their wishes. Compromise decrees often contain provisions that were negotiated for, that one party did not wish to grant, but ultimately did, because they had some other provision which they received in exchange.[3] No one has "stolen" anything from David. It is abundantly clear this is a case of "buyer's remorse" – once he had what he wanted (the divorce), he then regretted what he had given to get it (retirement benefits, including survivor benefits) and decided he wants a "do-over."

The "false fact" that Mr. Willick testified to, the "automatic survivor interest," presupposed in *Wolff*, has already been addressed in Sarah's Closing Argument.

As far as Mr. Willick's failure to mention *Holguin*, Mr. Willick was not questioned about that case, nor about its potential impact on his analysis. As stated above, Mr. Willick was asked about a handful of very specific cases, and asked to analyze the court's obligation based on *those* cases. If David wanted to challenge Mr. Willick's analysis of the case law, and have him address *Holguin*, then his counsel had every opportunity to do so during cross examination. Mr. Willick does not somehow become less of an expert because Ms. Lubritz failed to ask questions of him during her cross examination.

As for why Mr. Willick was not asked to address *Holguin* by Sarah's counsel, as an unpublished case it did not get substantial attention, and Sarah's counsel had not learned about the case by the time of the trial proceeding. As proper,

[3] Although there was not substantial testimony on this issue, Sarah did testify that she believed David wanted to be divorced and that was his motivation in settling. As this Court is well aware, that is often the exchange bargained for against specific provisions in a Decree.

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pursuant to the rules of professional conduct, Sarah disclosed the existence of the *Holguin* case as soon as she learned of it. It should be noted, however, that *Holguin* is hardly the "seminal case," as it is an unpublished disposition. In fact, if the case had been decided only a few years ago, it would not even be citable – either under the prior NRAP, or under the current NRAP if it had been heard and decided prior to 2016. To date, the Supreme Court has made a conscious decision *not* to set precedent with regard to the characterization of survivor benefits.

Certainly, as Sarah already stated in her own closing argument, the *Holguin* case is persuasive, but so is the fact that the Supreme Court has *refused* to set precedent. *Holguin* is <u>not</u> seminal. Despite David's contentions, Mr. Willick did not base his testimony on a "false fact." Rather he highlighted that the law he had been asked to address left open the implication of whether survivor benefits are community property, and opined that the Court's prior decisions to parse retirement benefits from survivor benefits was based on a misunderstanding of NRS 286, *which Sarah has already shown to be true.*

David also misstates and creates a false implication with regard to Mr. Willick's testimony related to California law on the issue of survivor benefits. Mr. Willick *did not* address California law "because Nevada does not recognize survivor benefits to PERS as community property." *Plaintiff's Rebuttal Closing Argument,* page 12, lines 3-4. David is again arguing without context.

The missing, highly pertinent context for the citation by David is as follows:

> Q: …Does *Gemma* also discuss the relation in Nevada law to conditions that are solely in an employee's control?

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A: This is the – that – that language you just stated is out of a California case called Luciano. And the Luciano Gillmore line of authority was adopted by the Nevada court in Gemma, Fondi, Sertic, and Wolff, so that yes, the – the holding is that a employee spouse is not allowed by election of any attribute within his sole control to alter the amount of the spouse's entitlement to retirement benefits.

Q: And because Gemma, Sertic, et cetera, have relied on California authority and California's position on retirement accounts, can you briefly for the Court explain how California addresses survivorship options.

. . .

Q: Has California gone further or codified survivorship benefits specifically?

A: Oh, yeah.

Ms. Lubritz: Objection, Your Honor. We're talking about Nevada, not California.

Ms. Mastel: And the foundation –

Ms. Lubritz: I'd ask that –

Ms. Mastel: – question –

Ms. Lubritz: Excuse me, I'm not finished. And I'd ask that the response be stricken.

Court: Counsel?

Ms. Mastel: The foundation question was do – does – since Nevada has relied on California authority, California authority is persuasive to how Nevada addresses these issues.

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Partial Transcript of September 23, 2021 Hearing, filed November 12, 2021, page 44, line 11 – page 45, line 22.

When the context is provided, it is clear that Mr. Willick was testifying as to persuasive authority that falls in line with the persuasive authority Nevada has applied to its retirement account decisions, because the Nevada Courts have not issued a *precedential* decision on the characterization of survivor benefits.

Sarah is uncertain as to the basis for the extensive recitation of portions of Mr. Willick's testimony related to what happens with survivor options *if* a party is married on the date of retirement *and* there is no prior Court Order, as that is obviously not the issue here. Sarah can only assume the same is meant to relate to David's extensive citations to NRS 286.

Unsurprisingly, David's citations to NRS 286 create a fundamental false impression of the law. First, David copies chunks of NRS 286.676, 6765, 6766, 67665, 6767, and 67675 from the statute. What he fails to acknowledge to the Court is that these statutes *do not* address post-retirement survivor benefits, but rather *pre-*retirement death benefits. First, it is abundantly clear by looking at NRS 286.672, which sets forth the eligibility requirements for "payments as provided in NRS 286.671 to 286.679, inclusive," that those sections apply to non-retired employees. NRS 286.672(1). To make that even clearer, NRS 286.050, specifically defines "member" as:

> …a person:
>
> (1) who is employed by a participating public employer and who is contributing to the System; or
>
> (2) who has previously been in the employ of a participating public employer and who has contributed to the System but who

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subsequently terminates such employment without withdrawing the person's contributions.

Conversely, elsewhere in the chapter, when addressing post-retirement persons, the statutes refer to "a retired employee." *See* NRS 286.520, 523, 525, 590, 592. As such, it is apparent with only minimal reading that NRS 286.671 to 286.679, inclusive, *do not apply* to the analysis being conducted by *this* court in *this* case and should therefore be disregarded.

Moving to the *applicable* statutes, David would like this Court to focus on NRS 286.541 (1)(c), which requires a spouse's consent for the retirement option selected. Yet, David wants to *ignore* NRS 286.541(3):

> The selection of a retirement plan by a member and the consent or objection to that plan by the spouse pursuant to this section does not affect the responsibility of the member concerning the rights of any present or former spouse.

This section, which was noticeably not emphasized by David, gives important context to the next section he cites, NRS 286.545, where once again, David choses to focus on the wrong aspect of the statute. It is true that if the spouse objects, that individual has 90 days to consent *or* convince the member to change their option. *However*, the objection is really just illusory. The important provision of NRS 286.545 (in light of NRS 286.541(3)), is section 2:

> Upon consent of the spouse or the end of the 90 days, the retirement benefit must be recalculated and paid under the terms of the option originally selected by the member retroactively to the date on which the retirement became effective.

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In other words, while a spouse can object to the selection of a retiring employee (or the application of a court Order), the spouse's objection does not, and cannot, impact the requirement of the member to provide for a former spouse as directed in a Court Order, and the plan will not modify the benefit selected by the member (or Ordered by the Court) due to a spouse's objection.

David next references the PERS Pre-Retirement Guide for Police and Fire Members. Reference to the same is grossly inappropriate. That document was neither testified to, nor was it produced or admitted into evidence at the time of trial. *See Wickliffe v. Sunrise Hosp., Inc.,* 104 Nev. 777, 766 P.2d 1322, 1325 (1988), stating "Courts will ban closing arguments which go beyond the inferences **the evidence in the case** will bear" (internal citations omitted) (emphasis added); *Jain v. McFarland*, 109 Nev. 465, 475-476, 851 P.2d 450, 457 (1993), "arguments of counsel are not evidence and do not establish the facts of the case. Counsel is allowed to argue any reasonable inferences **from the evidence the parties have presented at trial**" (internal citations omitted) (emphasis added); *Glover v, Eighth Judicial Dist. Ct.,* 125 Nev. 691, 220 P.3d 684, 694 (2009), "also fundamental, however, is the legal and ethical rule that 'counsel may not premise arguments on evidence which has not been admitted.'"

Further, such reference cannot be considered by judicial notice, despite David's inclusion of a website address for the same. The rules governing judicial notice are in title 4, chapter 47, of the NRS – dealing specifically with witnesses and *evidence*. This chapter very clearly governs the admissibility of facts and law ***at trial***. A party is entitled to a meaningful opportunity to be heard in both time and manner. *See Mesi v. Mesi*, 478 P.3d 366, 369 (Nev. 2020). Providing a meaningful opportunity to be heard involves making a decision based on the record before it. *Id.* That record can include affidavits and documentary evidence without a trial *when*

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the evidence is undisputed. *Id.* Where there has been a trial, evidence should be admitted and a party should have the right of confrontation in order to be properly weighed and considered. Inclusion of new information *after* the trial, which prevents confrontation of the same is improper and has the potential to diminish the integrity of the trial itself.

Therefore, the references to the PERS Pre-Retirement Guide, specifically set forth on page 21, line 16 – page 23, line 18, and any inference from the same must be struck.

C. CONTRACT LAW DOES NOT APPLY

Sarah has conducted substantial analysis as to why contract law does not apply to this case. The analysis is as clear and cogent as Nevada Law is as it relates to the intersection of contract law and divorces. The fact that David was apparently unable to follow the same does not make it unclear.

In contrast, David's arguments again rely on a fundamental misunderstanding of the law. First, David begins his rebuttal with the *same* conclusory statement he used in his initial brief, "[i]t is well understood that marriages and divorces stem from contract law and where family law cases are silent, contract cases control." *Plaintiff's Rebuttal Closing Argument,* page 23, lines 26-27. Once again, David has not provided ***a single*** citation to the law that supports his claim. Further, his analysis is flawed.

As he has done throughout this case, David cites to *May v. Anderson*, 121 Nev. 668, 119 P.3d 1254 (2005), for the premise that a settlement agreement is a contract. David's reliance on *May* for that general premise is correct – although *May* addressed a civil settlement agreement, which is a necessary distinction. David's reliance on *May* flatly ignores *Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964), which completely destroys David's argument. Unlike in the Civil/Criminal

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cases, in Family Court, where a settlement agreement contains non-merger language, but the Decree does not, the settlement agreement loses its independent character and it is subsumed in the Decree. Despite the fact that David continues to simply pretend *Day* doesn't exist, it does, and it resolves this issue.

The MOU is ***NOT*** the contract. It cannot be, it is subsumed and destroyed by the Decree no matter what David would like. David cannot simply recreate its legal existence by will or wish alone. Because of *Day*, *May* loses its influence over this case.

Further, as Sarah has extensively briefed, even if the MOU were to survive integration into the Decree under *Day*, it is still then destroyed by the Decree. *May* does not indicate any difference between a MOU, or independent settlement agreement, and one provided to the Court for signature (i.e., a Judgement or Decree). In fact, in *May*, after determining the settlement agreement was enforceable, the Court entered a Judgment. 119 P.3d. at 1257. The challenge in *May* was to the entry of the Court's Order, based upon a supposed lack of settlement. *Id.* Here David isn't claiming a lack of settlement, rather he is claiming that the settlement doesn't match the Order. Therefore, *May* is focused on a different aspect of settlement agreements. *Nothing* in *May* sets forth the preposition that a *stipulated* Decree, as a settlement agreement, cannot modify the terms of an earlier settlement contract.

As Sarah previously briefed the Decree is the only potential contract in consideration – the MOU simply cannot be, the law does not support that argument. For the Court to uphold the Decree does not involve the Court "negotiating from the bench." Rather it is simply the Court applying the ***very clear*** law of the state of Nevada to the facts and issues before it.

There is nothing contradictory about Sarah's arguments regarding contract law. Even the out of context provisions David states provide a clear line of

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thought – (1) a contract must set out the essential terms, but not every term is essential; (2) while retirement benefits are essential, the exact division of each and every piece of a retirement account is not required or "essential" in and of itself.

As to David's allegations regarding "parol evidence," his citation without context egregiously creates a blatantly false impression – bordering on sanctionable behavior. There was *never* a blanket statement that parol evidence was appropriate for all analysis. Specifically, the context of the statement was:

> Ms. Mastel: Can you explain the – the events surrounding the survivor benefits during the mediation?
>
> Ms. Lubritz: The – the specifics of the mediation are confidential in nature. And so I would ask that the answer be limited to anything other than the specifics.
>
> Ms. Mastel: Your Honor, the point at which they brought the is in a contract and the terms and whether or not the survivor benefits were part of that, they waived any confidentiality to that mediation because my client has to be able to testify to what happened to be able to discuss whether or not the survivor benefits were approp—appropriately included in the decree. That is the theme of their case.
>
> Ms. Lubritz: And I would note the last time we were before the Court, before Judge Moss, counsel made the very objection that I just made. And…
>
> Ms. Mastel: I made the objection…
>
> Ms. Lubritz: Excuse me.
>
> Ms. Mastel: … to hearsay.
>
> Ms. Lubritz: I'm sorry. Can I finish, please?

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The Court: Mm-hm.

Ms. Lubritz: Thank you. But counsel made the very same objection and the Court – that I – that I was required to rephrase my question so that it did not include the specifics of what was discussed.

Ms. Mastel: That's inaccurate, Your Honor. My objection was to hearsay, because my client said, the mediator said to us. And I objected to her making the specific statement. I made no objection based on the confidentiality.

Ms. Lubritz: That is correct. And I would renew my – I so I withdraw that portion of my statement. But I do request that the specific terms of the confidential mediation be excluded from testimony. The best evidence is the memorandum of understanding.

Ms. Mastel: And, Your Honor, parol evidence is appropriate. **They've waived confidentiality because the question is whether or not the term existed and was part of the question.** If – I – I agree that hearsay is inappropriate. And I will – I would happily have the Court caution my client about hearsay again because it did come up last time. However, they have brought this issue before the Court; and therefore, this issue needs to be openly addressed.

Partial Transcript of September 23, 2021 Hearing, filed October 8, 2021, page 40, line 20 – page 42, line 12 (emphasis added).

It is very clear, when the entire exchange is provided, that Sarah was *not* arguing that the parol nature of the MOU was appropriate to challenge the Decree. Although the claim that the MOU is the superseding contract must fail under Nevada law, it is the central theme of David's case. Where parol evidence *may be*

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appropriate is ***with respect to the specific terms of the MOU***, to show how the terms in that document came to be. Because David has argued that the MOU is the appropriate contract, Sarah is entitled to present evidence to rebut his claims as to the terms themselves. That does not mean that Sarah is abandoning her claims that the MOU is *not* the appropriate contact, nor does it mean that there is a *carte blanche* on parol evidence. To the extent that the Court believes the MOU is the appropriate contract, parol evidence is appropriate as to excluded or contradictory terms. *However,* to the extent that the Court agrees with Sarah that the Decree is the appropriate contract – the MOU is in and of itself inadmissible parol evidence, as Sarah has previously briefed.

Once again, David's citation to the Sarah's original Opposition is once again taken out of context. The quote David uses on page 28, lines 7-10 of his *Rebuttal Closing Argument*, is a preamble to a list of several facts which are offered to *prove* that there was an agreement for Sarah to receive the benefits. *See Defendant's Opposition to Motion to Set Aside the Paragraph Regarding Survivor Benefits in The Decree of Divorce Based on Mistake and Counter-Motion for Attorney's Fees and Costs*, filed May 10, 2018, page 8, line 23 – page 9, line 17. All that preamble states is that the parties agreed that David *wanted* the benefits to go to the children. If that is so, frankly, it makes more sense that the benefit goes to Sarah, than for it to go to his current, or any potential future, wife.

D. NRCP 60(b)

Sarah extensively addressed NRCP 60(b), and its application to this case in her initial closing argument, and will not repeat herself here. She will however, address the factual allegations David has made. First, the idea that failing to enforce the MOU will have a "chilling effect on settlement," is nothing more than

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a red herring. The Decree is the final negotiated agreement. *That* is the only remaining settlement.

Sarah did not agree that the issue of survivor benefits was addressed and that David did not consent. That was not the testimony. On Page 42, line 21 – Page 44, line 14 of the *Partial Transcript of September 23, 2021 Hearing,* filed October 8, 2021, Sarah testified:

> Q (by Ms. Mastel): So, Sarah, would you describe the events surrounding the survivor benefits during mediation?
>
> A: During the first portion of the mediation where both Mr. Rose, his counsel, myself, my counsel and the mediator were at the conference table at the beginning, we were discussing the portion of retirement and what I was entitled to. And what I heard by the mediator was that…
>
> [Hearsay Objection, Discussion and Ruling on the Same]
>
> The Witness: It was my understanding that I was entitled to PERS because I was a first responder spouse. And that was part of retirement.
>
> Q By Ms. Mastel: What was part of retirement.
>
> A: PERS.
>
> Q: Okay. PERS – well, when you say PERS, are you including survivor benefits?
>
> [Leading Objection, Discussion and Ruling on the Same]
>
> Q By Ms. Mastel: Okay. So what happened after Judge Forsberg brought up that concept.

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A: There was no discussion on it. It was just a statement that was made.

Q: Okay.

A: And – and then we moved on.

Further, on page 13, line 23 – Page 14, line 23, Sarah testified:

Q: At the time of the March 23rd, 2018, mediation, the issue of survivor benefits to Mr. Rose's PERS was discussed; correct? Yes or No.

A: I do not recall.

Q: I'm sorry?

A: I do not recall.

Q: Do you remember your prior testimony that in fact the is – that you testified that the issue was discussed?

A: Yes

Q: Okay. Would you like to revise your – your answer?

A: Yes.

Q: Okay. And how would you like to revise that, please?

A: I would like to revise the, we discussed it, to a no.

Q: I apologize. Say it again.

A: I would like to revise it to a no.

Q: So you are now testifying, as I understand it, that the issue of survivor benefits was not discussed during the March 23rd, 2018, mediation.

A: Discussed, no.

Q: I'm sorry?

A: No.

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Q: Okay. It was addressed, correct?

A: Yes.

David testified that he told Judge Forsberg "no," when asked about the survivor benefits, but acknowledged that Sarah was not in the room when that occurred, and that she never specifically agreed to waive that interest, merely that he took the fact that Judge Forsberg did not bring it up again as tantamount to an agreement from Sarah. David's assumption does not make a truth, especially in light of the clear facts that Ms. Cooley and Ms. McConnell were both involved with drafting and reviewing the Decree, which included the survivor benefits language.

Further, the uncontroverted testimony at trial *did not* establish that the reason Ms. McConnell had the original was to allow for post-signing review. Not only would that be highly unusual, but Sarah testified that she had no reason to believe that David had not read the Decree, as did Ms. Cooley. Further, Ms. McConnell testified that she would not have signed the Decree, if she didn't believe David had reviewed it and assented to it. Thus, there is no appropriate inference that the Decree was taken by Ms. McConnell "to review."

As for Ms. Cooley's testimony, the only person, other than Ms. Cooley herself, who may have known what she was working on during the mediation was Sarah- and that presumes that Sarah was looking over Ms. Cooley's shoulder. David, Sarah and Ms. McConnell can only testify to what they saw – that is the time they were all standing together at Mr. Shapiro's office, while Ms. Cooley was typing. To the extent the testimony is contradictory, Ms. Cooley is clearly the most accurate witness for *her* actions. That said, there is no reasonable inference that Ms. Cooley added the survivor benefit provision later, "upon being notified that Mr. Rose refused to grant Sarah Rose survivor benefits." *Plaintiff's Rebuttal Argument*, Page 30, line 24-25. Ms. Cooley was filling in the details, and making modifications, of a

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39 page Decree. Further, *all* parties agreed that she was drafting, with Ms. McConnell standing over her, *after* the mediation. There is absolutely no basis for David's now *speculation* as to when Ms. Cooley added that term.

This claim is nothing more than a red herring, designed as a character assassination. Ultimately, it does not matter *when* during the drafting Ms. Cooley added the term, because until the Decree was signed, negotiations were ongoing regardless of whether they were verbal or written. The term was in the Decree when David signed David *agreed* to the term when he signed the Decree.

Additionally, there was nothing false, nor does Sarah believe there was anything contradictory about Ms. Cooley's testimony with regard to the negotiations. The testimony of David, Sarah and Ms. McConnell was that after the MOU was signed, Ms. Cooley's computer died and they went, at staggered times, to Mr. Shapiro's office so that Ms. Cooley could continue drafting the Decree. No one testified that there was not a time between the two events where discussions continued. The testimony was merely that the MOU was signed, and after, when Ms. Cooley's computer died, the parties moved offices to continue the process of drafting the Decree. Just because one party testifies to additional events that they recall during a day that no one else testified regarding, does not mean that that witness contradicted other witnesses or perjured themselves. Rather, it simply means that testimony is uncontroverted.

As far as the submission of the Decree after Ms. McConnell supposedly "noticed" the provision regarding survivor benefits, Ms. McConnell's testimony did not support David's implication that Ms. Cooley and Sarah fraudulently submitted the Decree. Ms. Cooley's testimony was very clear: she and Ms. McConnell spoke a few days after the Decree was signed about the inclusion of the survivor benefits, and how David no longer agreed with them.

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Incidentally, Ms. McConnell's September 23rd testimony is in congruence with the same. On September 23rd, Ms. McConnell clearly testified that she and Ms. Cooley spoke about the inclusion of the survivor benefits and that Ms. Cooley had informed her that failing to address them would have been malpractice. Both Ms. Cooley and Ms. McConnell (on both dates of her testimony) agreed that Ms. McConnell requested time to speak with David regarding the same. The implication by both witnesses was that Ms. McConnell was going to discuss this term of the Decree and some form of survivor benefit being given to Sarah – even if David wanted to negotiate something other than Option 2. Both witnesses' testimony supports the fact that Ms. McConnell did not reach back out to Ms. Cooley. Although Ms. McConnell's initial November testimony was that she was unaware that Ms. Cooley intended to submit the Decree, when pressed she admitted it was possible that she had received a letter or email but could not remember receiving the same.[4] Therefore, the most credible testimony of the submission event is Ms. Cooley, which supports that she made Ms. McConnell aware that she intended to submit the Decree.

Nor does Sarah's testimony indicate that there was a fraud. First, as Sarah has extensively briefed to which David has completely failed to respond, Sarah's testimony does not meet the *legal* requirements. That said, Ms. Lubritz's inartful question did not elicit the facts she would like to claim that it had. Sarah's testimony on page 13 of the *Partial Transcript*, filed October 8, 2021, was in response to Ms. Lubritz's questions: (1) "When you signed the MOU, you relied upon the fact that *the terms set forth* ***in it*** would not be changed; and (2) And if there were modifications *to the terms agreed to* ***at mediation***, you would have expected

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[4] Sarah would remind this Court that Ms. McConnell is presently facing a malpractice law suit from David, and therefore some witness intimidation must be expected, making Ms. McConnell more likely to be circumspect in her testimony.

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those modifications to be pointed out to your before signing it. Page 13, lines 15 – 16, 18 – 19 (emphasis added). As Sarah has pointed out repeatedly: survivor benefits were **not** addressed in the MOU ***at all***. Everyone's testimony supports the finding that there was no agreement to either grant or waive the benefits at mediation.[5] Therefore, *nothing* in the MOU was changed – rather *necessary* terms were added to the Decree.

As Sarah and David both testified at the trial, there were many necessary terms *not in the MOU* which were added in the Decree. As the MOU states (Defendant's Trial Exhibit A), "The memorandum addresses the material terms of the agreement, and is intended to bind the partis to ***those*** terms." The MOU does not contemplate that the there are no other terms – merely that the parties are bound to the terms in the MOU itself. The MOU does state that it is intended to resolve "all issues," but again, it is apparent that the MOU is not a complete document. As noted, and affirmed at trial, the terms within the MOU were not changed, but other necessary terms added. Which made it wholly apparent to David, just by virtue of page length that there was more to review.

Further, Sarah's continued testimony, as set forth in David's rebuttal wholly supports that she had no basis to know that he had not read the Decree. As Sarah sets forth in response to Ms. Lubritz's questions, Sarah and David did not speak regarding the MOU or the Decree. *Sarah and David* did not discuss anything. But as all of the testimony supports, Ms. McConnell was in a position to review the Decree and *everyone* presumed that David read the Decree as he had an obligation to do. There is no reason for Sarah to know that David did not agree to the Option

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[5] David's testimony was that he *assumed* that because he said "no" and it was not brought up again, Sarah had waived the benefit – but this is court is aware of the complete lack of value to an assumption.

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selected, when selection of an option is necessary for retirement benefits to be addressed, both David and Ms. McConnell are presumed to know the law (and such presumption is not rebuttable), *and* David and Ms. McConnell had an opportunity to review.[6]

As far as Sarah's "opinion" as to David's desire to finalize the divorce – first, as noted in the objection, Sarah's opinion is speculative at best. Further, although David's brief misstates part of the transcript, it does not change the sentiment. Sarah does not have to believe that David gave her the survivor benefits to get the Decree signed. *No one* asked Sarah why he gave her the survivor benefits, and frankly, she would not have any way to know. At best, Sarah's testimony supports that she believed David wanted to finalize the divorce and, completely uncoupled from that, Sarah doesn't know what David's motivation was for providing the benefits.

David also attempts to conflate the MOU with the Decree to contend that Ms. Cooley's testimony about negotiations is not credible. But the same is simply unrelated. Once again, the MOU was *not changed*. Survivor benefits were not mentioned in the MOU at all. As such, there is nothing contradictory that additional negotiations on *additional* terms were conducted while Ms. Cooley continued to prepare the Decree before her battery died.

Further, despite David's claims that *Carlson v. Carlson,* 108 Nev. 358, 832 P.2d 380 (1992), is only "distinguished…on one significant issue" that is wholly inaccurate. David contends that the only issue was that the employee spouse (Austin) had already named his wife (Trudy) as the surviving beneficiary. But that issue is

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[6] Sarah would remind the Court that the Decree was finalized in 2018 – well before either *Peterson* or *Holguin* was considered by the Supreme Court and therefore, the persuasive discussions of the nature of survivor benefits (however still unclear) had not been addressed.

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not actually even the crux of the case. The issue of the survivor interest was merely a holding by the Court that because Trudy had been so named prior to the divorce, the QDRO was required to name her as such as well. *Id* at 362. The primary issue of the case was a clear *stated* misrepresentation or mutual mistake by Austin and his counsel.

In *Carlson*, Trudy had not received documentation providing the specific value of the pension when the parties settled. *Id* at 360. Trudy represented to the Court that Austin informed her that the division of assets and debts, including the pension, was "essentially equal." *Id.* Ultimately, after the Decree was entered, Trudy learned she had received only twenty-nine percent of the assets, due to the division of the pension. *Id.* The Supreme Court found that either Austin had blatantly misrepresented the equality of the settlement, or both he and Trudy had been mistaken as to the value of the pension. *Id* at 362. As a result, NRCP 60(b) was appropriate. This case is wholly distinguishable. Sarah has already addressed, in extensive detail, both misrepresentation and mutual mistake. It is clear that *factually,* this is a very different case. *Carlson* is wholly inapplicable because Sarah has made no misrepresentations under Nevada law, and there was clearly no mutual mistake.

CONCLUSION

While David has made a blanket statement that the Court should not take his silence on Sarah's brief as tacit agreement, this Court can and should take his silence as an inability to provide any law which contradicts Sarah's analysis, and therefore, while David may not agree the simple fact is that the contract law does not apply and David has not met his burden under NRCP 60(b).

There is no precedent that states survivor benefits are not community property, and to the extent this Court finds *Holguin* persuasive, Sarah suggests the same is based on an error in fact by the Supreme Court. More importantly, however,

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it is *Peterson*, not *Holguin*, which is on point, because the parties ultimately *agreed* that the survivor benefits were divisible in the Decree.

The fact is, by the plain language of the Decree, David did grant Sarah survivor benefits. He chose to sign the Decree. If he didn't read it, that was also his choice and he bears the risk of that mistake. His remedy for his "mistake" lies in a malpractice suit against Ms. McConnell, not in revision of the Decree.

The evidence is not "clear" that survivor benefits were discussed and addressed. David claims they were – but even his limited testimony was that they were brought up, he said no, and he took Sarah's silence as agreement. *There was no testimony that an agreement was reached or Sarah waived the benefit, or further discussion was had during the mediation.* It simply wasn't discussed.

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The inclusion of the survivor benefits, especially in light of the state of law when the Decree was entered, was not only proper, but necessary to avoid malpractice and ensure that the entire PERS issue was addressed. The inclusion also has no bearing on the terms within the MOU, because the MOU is silent on the issue.[7]

This Court should clearly uphold the Decree, it is the only possible solution under Nevada Law.

DATED this 10 day of January, 2022.

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[7] This also begs the question, if as David claims his "no" was agreed upon, *why* not include it in the MOU – after all, at that point it would have been a term "addressed and discussed."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January, 2022, I caused to be served the ***Defendant's Rebuttal to Plaintiff's Rebuttal Closing Argument*** to all interested parties as follows:

_____ BY MAIL: Pursuant to NRCP 5(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

_____ BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

_____ BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

_X_ BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Attorney for Plaintiff:

shelley@lubritzlawoffice.com

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Carol Nas

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DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID ROSE PLAINTIFF, v. SARAH ROSE DEFENDANT.	CASE NO. D-17-547250-D DEPT NO. I DATE OF HEARINGS: DAY 1: 09-23-2021 DAY 2: 11-15-2021

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DAVID JOHN ROSE, Plaintiff [hereinafter "DAVID"] v. SARA JANEEN ROSE, Defendant [hereinafter "SARAH"] appeared for trial before Senior Judge Cynthia Dianne Steel regarding David's Post Divorce Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Stipulated Decree of Divorce Based upon Mistake. The parties were represented by SHELLY LUBRITZ, ESQ., LAW OFFICE OF SHELLY LUBRITZ, PLLC, for the Plaintiff and RACHEL H. MASTEL, ESQ., KAINEN LAW GROUP, PLLC, for the Defendant.

FINDINGS OF FACT

THE COURT HEREBY FINDS the following findings of fact pursuant to the pleadings filed, the evidence entered into evidence and the testimony of witnesses presented at trial.

- On 03/23/21, at approximately 9:00 am, the parties enter into mediation regarding the possibility of finalizing the terms of the Divorce to avoid trial.
- The parties were in separate rooms during the mediation and relocated to the same room to sign the final MOU.
- At the close of the mediation, conducted by Rhonda Forsberg, Esq., the parties entered into a Memorandum of Understanding signed by the parties and their prior respective counsel, REGINA M. McCONNELL, ESQ., for David, and SHELLY BOOTH COOLEY, ESQ., for Sarah. The Memorandum of Understanding did not specifically address the division of the Survivor Benefits of David's employer.
- The Decree was reduced to writing partially during the mediation and the reminder following the close of mediation by Sarah's attorney.
- The Survivor Benefit was discussed during the mediation, however, David declined to award the Survivor Benefit to Sarah.
- Testimony at trial revealed that Sarah's attorney went over the divorce terms with her client prior to signing off on the Decree.
- Sarah's attorney then tendered the original to David's attorney to sign off.
- David's attorney needed more time to review the terms of the divorce and had David sign off on the proposed Decree of Divorce. She explained that it would save the time to have him come to her office later to sign the

decree should she find that the Decree reflected the terms agreed to in the Memorandum of Understanding, after which, she too signed the Proposed Decree of Divorce and tendered a copy of the original Proposed Decree to Sarah's counsel.

- The attorneys agreed that David's attorney would hold the original Proposed Decree of Divorce with the original signatures and would either forward the original to Sarah's attorney after review or file the Decree.
- There was no fall back plan should David's attorney request a correction to the proposed decree.
- Approximately 3 days after the 3/23/18 mediation, David's attorney contacted Sarah's attorney to report a mistake in the Decree. Testimony was unclear as to the number of contacts between counsel, however, Sarah's counsel indicated that further mediation would be necessary to remove Sarah as the Survivor Beneficiary.
- Sarah told David it would "cost him" if she re-signed the decree.
- Sarah's attorney did not file the original Stipulated Decree of Divorce, but tendered the copy in her possession for the Court's signature.
- Sarah's attorney relayed to David's attorney that the Survivor Beneficiary designation needed to be included in the Decree or risk the possibility of litigating an omitted asset later.

- Sarah's attorney ultimately changed the terms of the oral agreement between the attorneys to file the original Decree after an opportunity to review and instead gave David's attorney a deadline to respond to her messages or she would file the Decree in her possession.
- Ultimately, over the stated objection to one of the terms by David's attorney, Sarah's attorney filed the Decree, on 4/11/18 without further notice.
- On 4/25/18 David's Motion to Set Aside the Paragraph Regarding the Survivor Benefits in the Decree of Divorce upon Mistake was filed, without undue delay.
- After a number of motions, including an Order granting the relief by a Senior Judge and a subsequent Order Setting Aside said relief signed by the Judge of record, a trial was granted to determine the intent of the parties. The case was re-assigned to a Senior Judge for further proceedings upon the retirement of the Judge of record.
- In retrospect, the testimony of Marshal Willick, Esq., regarding the law on Survivor Benefits was not appropriate and the Court, sitting without a jury did not utilize his testimony or his report to decide the question before the court in this case.

DISCUSSION

David argues that he never agreed to or intended for his Survivor Benefit to be awarded to Sarah. It was mentioned during the mediation, however the award was intentionally omitted from the Memorandum of Understanding. It is David's position that the Survivor/Death Benefit is not community property to be divided and that were it not addressed in the Decree of Divorce it would not rise to the level of an omitted asset.

David further argues that an agreement made pursuant to a Memorandum of Understanding, standing alone, would only be enforced as to the material terms of the agreement. The time-line division of his Pension in the MOU does not automatically include the division of his death benefit. He further argues that the benefit must be determined at the time of retirement and, if married, the employee's current spouse must agree to and sign off on the Option selected by the employee.

Fraud is alleged against Sarah for the inclusion of the benefit in the Decree which was never David's intent or the agreement of the parties, arguing that there was no meeting of the minds for this term to be included in the Decree.

David argues that a fiduciary duty is warranted during a settlement conference where all cards are to be laid on the table and that the subsequent addition of the Survivor Benefit Option 2 should have been brought to the

attention of himself and his attorney as it went above and beyond the stated terms of the MOU. Since both parties were represented, it stands to reason that the duty was not owed to one spouse or the other, but to the process.

Finally, the MOU was not to merge into the Decree of Divorce pursuant to a clear statement in the MOU and yet the proposed Decree included a contrary term merging the MOU into the Stipulated Decree of Divorce.

Both David and his prior counsel alleged that neither Sarah or her attorney, the drafter, brought the inclusion of the merger of the MOU or the award of David's Survivor Benefit Option 2 to their attention upon presentation of the Decree for signature. Sarah and her prior attorney believed David and David's attorney knew of the inclusion of the Survivor Benefit because David's attorney was able to see the computer screen during the time the document was being prepared.

Credible testimony established that Sarah's attorney began drafting the decree during the negotiations, while the parties were negotiating from separate rooms, and finished the Decree terms after the MOU was signed. Testimony also established that David's attorney was observing the preparation of the Decree after the MOU was signed. Sarah expressed surprise when she read the Decree and discovered that David had relented and awarded her the Survivor Benefit after all.

Sarah argues that David should have reviewed the Decree prior to signing the document and that he was merely experiencing "buyer's remorse" when he filed his motion requesting that the Survivor Benefit be eliminated from the Decree. She also testified that the Survivor Benefit was not agreed to during the negotiations prior to signing off on the Memorandum of Understanding and that there were no further negotiations between herself and David to include the award of survivor benefits to her after the MOU was signed.

Sarah further argues that David should have insisted on time to review the Decree prior to signing and that his negligence to sign off before reading and reviewing the terms bound him to the terms once the Decree was signed by the Judge.

According to Sarah, no fiduciary duty attaches between spouses where they are on equal footing during a settlement/mediation effort.

CONCLUSIONS OF LAW

May v. Anderson, 119 P. 3d1254 (2005) was cited by both parties as a basis that a Memorandum of Understanding is an enforceable contract. The *May* Court confirmed that once a settlement contract is formed, the parties having agreed to its material terms, it is enforceable. In addition, no term may be changed or added in the final drafting of the agreement. While defining the elements for the test of a contract, the court included a test which states that a

contract requires an offer and acceptance, the meeting of the minds of those to be bound by the contract and consideration.[1]

The MOU in the present case was formed when all parties agreed to the stated terms and signed off on the written agreement.[2] The MOU stated clearly that the terms of the agreement would not merge into the Decree. The MOU was silent as to any agreement to select Option 2 on David's Survivor Beneficiary designation by agreement of the parties in favor of Sarah. Sarah's attorney included both provisions in the proposed Stipulated Decree of Divorce without further agreement from David or his attorney.

No testimony was tendered that the parties subsequently agreed in further negotiations to merger of the terms of the MOU into the Decree or to the granting of David's Survivor Beneficiary to be designated to Sarah. There was no offsetting consideration amendment given in the final decree to show an amendment to the MOU contract. Using this test, the court finds no meeting of the minds to the additional terms incorporated into the proposed Decree independently by Sarah's Attorney as no meeting of the minds can be determined and no additional consideration identified.

As to the element of meeting of the minds, neither David nor Sarah testified that the agreement contained in the Decree had an affirmative agreement in the

[1] *Certified Fire Prot. Inc., v. Precision Constr.* 128 Nev. 371, 378, 283 P.3d 250, 255 (2012).
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MOU, and there were no further negotiations after the MOU pursuant to Sarah, David and David's attorney.

When David and his attorney made immediate steps to address the oversight they were met with a demand from Sarah's attorney to re-negotiate or the copy of the Decree would be filed. As a result, this case has lingered on where a trial could have been held for the benefit of the parties closer to 2018.

No one testified that the Survivor Beneficiary had been affirmatively agreed to by an offer, an acceptance, the meeting of the minds of those parties to be bound or consideration.[3] The Survivor Beneficiary term is a material term as it has significant financial implications either at the retirement of David, or his death while employed by his current employer. Those consequences were not addressed in the Decree.

Sarah cites *Yee v. Weiss*[4] to strengthen her argument that a signature on the Decree is final and therefore, David is bound to the Decree's terms absent his reading of the terms prior to signing the Decree. She argues that his remedy is to pursue a malpractice complaint against his prior attorney. It is the contention of Sarah that a signature is final unless there was a failure to act in good faith and in accordance with fair play.

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The remedy is not financially calculable as it is unknown when David will retire, the cost to his pension for the invocation of the Survivor Benefit, Option 2; who would pay for the benefit; or if David may die prior to his retirement with his current employer. There was no indication in testimony that any of those consequences were known at the time of signing the Decree.

David has alleged fraud against Sarah and her former attorney. In testimony Sarah responded differently than her former attorney as to whether further negotiations were entertained and agreed to after the MOU was signed. Sarah indicated there were no further negotiations, while her attorney stated there was. Sarah also denied that there was consideration for the additional term's inclusion.

Sarah's former attorney was the drafter of the proposed Decree. Placing the Survivor Benefit in the Decree of Divorce without the provision appearing in the MOU was a direct violation of the written negotiations within the MOU and should have been specifically addressed when the proposed Stipulated Decree of Divorce was presented to David's attorney. Without the disclosure, she surreptitiously inserted the Survivor Beneficiary and the merger terms into the Decree, informing only her client. She failed to discuss the inclusion of the Survivor Benefit term with David's prior attorney prior to the signing of the Decree.

The pivotal point of the signing of the decree was that the attorneys agreed to hold the signed Decree until David's attorney had a chance to review it. Once she reviewed it and discovered the inclusion of the Survivor Benefit, she immediately notified Sarah's attorney, who then wanted further negotiations or she would file the copy in her possession.

David's prior attorney was more credible in her testimony than Sarah's attorney. While Sarah's attorney testified that she filed the Decree with the original signatures, when pressed, she was not certain. David's attorney presented the original Decree in her possession during trial. Her retention of the Original Decree corroborates the agreement between counsel to wait to file the original once David's attorney had the opportunity to review it more fully, a condition subsequent. David's disagreement with awarding the Survivor Benefits and merger terms was timely addressed. Emails from Sarah's attorney to David's attorney not only corroborates the oral agreement that David's attorney was given time to review the Decree prior to the validation of the signatures on the original document, it reveals that she knew there was a conflict.

Notice of the failure to agree on the Decree should have voided David's signature. Instead, Sarah's attorney filed her copy of the Decree. The fact that she waited from March 23, 2018 until April 11, 2018 to file the Decree further

corroborates David's prior attorney's testimony that even though the Decree was signed by all, that she would be given an opportunity to fully review the Decree prior to filing in order to ensure that the Decree was accurate and in line with the MOU, and that the attorneys intended that the original be filed with the court. As acknowledged by Sarah, the signed MOU went from 3 pages to 39 pages in the final hours of the meeting, warranting a review by David's attorney.

The fact that David and his attorney signed the Decree is uncontroverted, however, the circumstances brought to the attention of the court at trial shows that it was not valid unless his attorney reviewed and approved the Decree as written. The parties had negotiated the MOU and signed off between 9am and approximately 4pm. Ms. Forsberg, Esq., had to leave to catch a flight and afterward and the parties remained at her office to prepare the Decree. At some point it was necessary to travel to another location to finalize the terms and hopefully sign off on a final Decree. Due to the late hour and long day, the Attorneys agreed that the non-drafting attorney, David's attorney, would be given the opportunity to review the decree for accuracy prior to submitting the Decree for filing.

It is disingenuous to now declare that he is bound to his signature on the Decree, citing *Yee*,[5] where there was an oral agreement between the attorneys to give his attorney further time to review and submit the Decree. Both David and his attorney had the right to rely on the condition between the attorneys made subsequent to the signing of the Decree. The decision by Sarah's attorney to change the terms of the agreement smacks of unfair dealing and the failure to act in good faith.

If further negotiations were not possible, the parties should have notified the court to be assigned a trial date. Sarah's attorney could have filed a motion with the court to Approve the Stipulated Decree of Divorce as written. As it happened, Sarah's attorney filed her copy of the Stipulated Decree of Divorce without contacting David's attorney; the Court unwittingly signed off on contested provisions in the Decree; and thereby, the Court was denied the opportunity to hear the matter of the Survivor Benefit or the Merged MOU and to make a clear decision pursuant to testimony and evidence. Sarah is using the fact that the Court signed off on the Decree to claim that the Decree is final and binding, thereby superseding the agreements in the MOU.

The attorneys could have believed that the inclusion of the Survivor Benefit was necessary to the Decree, however, the nature of the Survivor Benefit has

[5] Id.

never been declared as community property in statute or by caselaw[6], and therefore, a mistake as to the law.[7] *Holquin v. Holquin.*[8]though unpublished is persuasive that Nevada has not indicated or implied whether the Survivor Benefit is community property or not.

Sarah argues that the passage of Senate Bill 292[9] was addressing all benefits of the Public Employees Benefit Plan, including the Survivor Benefit or Benefit upon death. This court does not interpret the statute to read as portrayed by Sarah. The focus of the bill was to incorporate predictability in the Community Property rights of the Pension and the terms of the division at the time of filing the Decree of Divorce. No case law was presented at trial or in briefs to show that the Supreme Court had ever rendered a published opinion clearly indicating that the Survivor Benefit is indeed community property.

A court's ability to address Survivor Benefits at trial does not translate to a requirement that the Survivor Benefit designation must be included in the Decree. As a matter of caselaw, the Survivor Benefit can be considered and result in a court order after trial over the objection of the employee spouse only

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[6] Upon noticing Sarah's attorney that the Survivor Benefit was not agreed to in the MOU, she opined to David's Attorney that the Survivor Benefit needed to be included in the Decree or risk an omitted asset, at which time negotiations broke down.

[7] *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-359, 741 P.2d 1355, 1356-1357 (1987)

[8] 491 P.3d 735 (Table)(Nev.2021).

[9] **The Court makes the following disclaimer: The Court was an Assemblywoman during the 68th session of the Nevada Legislature in 1995, serving on the Judiciary Committee. This court was assigned to the subcommittee to further amend or approve legislation proposed in SB 292, which ultimately passed. There was no discourse regarding the Survivor Benefit, and if the Legislature had wanted to include it, it would have been clearly stated, not left for speculation or inference.**

if (1) a compelling reason is found to do so, as well as (2) reducing the reason to writing in the Decree. This follows along with the court's ability to consider separate property of one spouse for the support of another spouse or child in certain circumstances utilizing the same requirements. As the Survivor Benefit has never been declared by statute or case law to be community property, its absence from the Decree would not have been an omitted asset.

A Court Order resulting from an affirmative agreement within the Decree is also enforceable, pursuant to caselaw. The parties may negotiate and agree at the time of the divorce to include the death benefit as part of negotiated terms within the Decree and once signed by the Court and filed in the Clerk's office it is enforceable. In this instance, testimony and the conduct of the parties betray Sarah's argument that an agreement was made regarding the Survivor Benefits and that the signatures were to be enforceable even if David's attorney discovered a mistake upon full review of the proposed Decree.

IT IS HEREBY ORDERED AND DECREED that the portion of the Stipulated Decree of Divorce, filed April 11, 2018, awarding the Survivor Benefit Option 2 selection by David to Sarah be set aside;

FURTHER ORDERED that the language be amended to delete the underlined portion of the following passage found on page 21 beginning at line 17 of the Stipulated Decree of Divorce filed 4/11/2018:

> '("QDRO"), based upon a selection of Option 2 being made at the time of the retirement so as to name SARAH JANEEN ROSE as the irrevocable survivor beneficiary of DAVID JOHN ROSE'([s] *sic)* pension benefits upon death, to divide said retirement account.'

FURTHER ORDERED that the following underlined language be inserted and should read as follows:

> '("QDRO") to divide said Pension between DAVID JOHN ROSE and SARAH JANEEN ROSE. The parties shall....'

FURTHER ORDERED that David is awarded his attorney fees in this matter upon filing a Memorandum of Fees and Costs for review by the Court pursuant to NRCP Rule 54.

SO ORDERED this 31st day of January, 2022.

Cynthia Dianne Steel,
District Court Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the above file stamp date, I E-Served pursuant to NEFCR 9, and/or mailed, via first-class mail, postage fully prepaid, the foregoing Decision and Order to:

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375 E Warm Springs Rd Ste 104
Las Vegas, NV 89119
Shelley@lubritzlawoffice.com

Racheal Mastel
3303 Novat St Ste 200
Las Vegas, NV 89129
service@kainenlawgroup.com

Ruthanne Denning

Ruthanne Denning
Judicial Executive Assistant
Department I

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Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA
****

David Rose, Plaintiff vs. Sarah Rose, Defendant.	CASE NO.: D-17-547250-D DEPT.: I

NOTICE OF ENTRY OF ORDER

Please take note that a Findings of Fact, Conclusions of Law and Order was filed in this matter on January 31, 2022. A copy of the Order is attached hereto. I hereby certify that on the above filed stamped date:

I E-Served pursuant to NEFCR 9, and/or, mailed, via first-class mail, postage fully prepaid, the foregoing Notice of Entry of Order to:

Racheal H. Mastel
3303 Novat St Ste 200
Las Vegas, NV 89129
service@kainenlawgroup.com

Shelley Lubritz
375 E Warm Springs Rd Ste 104
Las Vegas, NV 89119
Shelley@lubritzlawoffice.com

Ruthie Denning
Ruthie Denning
Judicial Executive Assistant
Department I

SUNNY BAILEY
DISTRICT JUDGE
FAMILY DIVISION, DEPT I
LAS VEGAS, NV 89101-2408

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Steven D. Grierson
CLERK OF THE COURT

FFCL

DISTRICT COURT
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v.

SARAH ROSE
DEFENDANT.

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DEPT NO. I

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- The Decree was reduced to writing partially during the mediation and the reminder following the close of mediation by Sarah's attorney.
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decree should she find that the Decree reflected the terms agreed to in the Memorandum of Understanding, after which, she too signed the Proposed Decree of Divorce and tendered a copy of the original Proposed Decree to Sarah's counsel.

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CONCLUSIONS OF LAW

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Sarah's former attorney was the drafter of the proposed Decree. Placing the Survivor Benefit in the Decree of Divorce without the provision appearing in the MOU was a direct violation of the written negotiations within the MOU and should have been specifically addressed when the proposed Stipulated Decree of Divorce was presented to David's attorney. Without the disclosure, she surreptitiously inserted the Survivor Beneficiary and the merger terms into the Decree, informing only her client. She failed to discuss the inclusion of the Survivor Benefit term with David's prior attorney prior to the signing of the Decree.

The pivotal point of the signing of the decree was that the attorneys agreed to hold the signed Decree until David's attorney had a chance to review it. Once she reviewed it and discovered the inclusion of the Survivor Benefit, she immediately notified Sarah's attorney, who then wanted further negotiations or she would file the copy in her possession.

David's prior attorney was more credible in her testimony than Sarah's attorney. While Sarah's attorney testified that she filed the Decree with the original signatures, when pressed, she was not certain. David's attorney presented the original Decree in her possession during trial. Her retention of the Original Decree corroborates the agreement between counsel to wait to file the original once David's attorney had the opportunity to review it more fully, a condition subsequent. David's disagreement with awarding the Survivor Benefits and merger terms was timely addressed. Emails from Sarah's attorney to David's attorney not only corroborates the oral agreement that David's attorney was given time to review the Decree prior to the validation of the signatures on the original document, it reveals that she knew there was a conflict.

Notice of the failure to agree on the Decree should have voided David's signature. Instead, Sarah's attorney filed her copy of the Decree. The fact that she waited from March 23, 2018 until April 11, 2018 to file the Decree further

corroborates David's prior attorney's testimony that even though the Decree was signed by all, that she would be given an opportunity to fully review the Decree prior to filing in order to ensure that the Decree was accurate and in line with the MOU, and that the attorneys intended that the original be filed with the court. As acknowledged by Sarah, the signed MOU went from 3 pages to 39 pages in the final hours of the meeting, warranting a review by David's attorney.

The fact that David and his attorney signed the Decree is uncontroverted, however, the circumstances brought to the attention of the court at trial shows that it was not valid unless his attorney reviewed and approved the Decree as written. The parties had negotiated the MOU and signed off between 9am and approximately 4pm. Ms. Forsberg, Esq., had to leave to catch a flight and afterward and the parties remained at her office to prepare the Decree. At some point it was necessary to travel to another location to finalize the terms and hopefully sign off on a final Decree. Due to the late hour and long day, the Attorneys agreed that the non-drafting attorney, David's attorney, would be given the opportunity to review the decree for accuracy prior to submitting the Decree for filing.

It is disingenuous to now declare that he is bound to his signature on the Decree, citing *Yee*,[5] where there was an oral agreement between the attorneys to give his attorney further time to review and submit the Decree. Both David and his attorney had the right to rely on the condition between the attorneys made subsequent to the signing of the Decree. The decision by Sarah's attorney to change the terms of the agreement smacks of unfair dealing and the failure to act in good faith.

If further negotiations were not possible, the parties should have notified the court to be assigned a trial date. Sarah's attorney could have filed a motion with the court to Approve the Stipulated Decree of Divorce as written. As it happened, Sarah's attorney filed her copy of the Stipulated Decree of Divorce without contacting David's attorney; the Court unwittingly signed off on contested provisions in the Decree; and thereby, the Court was denied the opportunity to hear the matter of the Survivor Benefit or the Merged MOU and to make a clear decision pursuant to testimony and evidence. Sarah is using the fact that the Court signed off on the Decree to claim that the Decree is final and binding, thereby superseding the agreements in the MOU.

The attorneys could have believed that the inclusion of the Survivor Benefit was necessary to the Decree, however, the nature of the Survivor Benefit has

[5] Id.

never been declared as community property in statute or by caselaw[6], and therefore, a mistake as to the law.[7] *Holquin v. Holquin,*[8]though unpublished is persuasive that Nevada has not indicated or implied whether the Survivor Benefit is community property or not.

Sarah argues that the passage of Senate Bill 292[9] was addressing all benefits of the Public Employees Benefit Plan, including the Survivor Benefit or Benefit upon death. This court does not interpret the statute to read as portrayed by Sarah. The focus of the bill was to incorporate predictability in the Community Property rights of the Pension and the terms of the division at the time of filing the Decree of Divorce. No case law was presented at trial or in briefs to show that the Supreme Court had ever rendered a published opinion clearly indicating that the Survivor Benefit is indeed community property.

A court's ability to address Survivor Benefits at trial does not translate to a requirement that the Survivor Benefit designation must be included in the Decree. As a matter of caselaw, the Survivor Benefit can be considered and result in a court order after trial over the objection of the employee spouse only

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[6] Upon noticing Sarah's attorney that the Survivor Benefit was not agreed to in the MOU, she opined to David's Attorney that the Survivor Benefit needed to be included in the Decree or risk an omitted asset, at which time negotiations broke down.

[7] *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-359, 741 P.2d 1355, 1356-1357 (1987)

[8] 491 P.3d 735 (Table)(Nev.2021).

[9] **The Court makes the following disclaimer: The Court was an Assemblywoman during the 68th session of the Nevada Legislature in 1995, serving on the Judiciary Committee. This court was assigned to the subcommittee to further amend or approve legislation proposed in SB 292, which ultimately passed. There was no discourse regarding the Survivor Benefit, and if the Legislature had wanted to include it, it would have been clearly stated, not left for speculation or inference.**

if (1) a compelling reason is found to do so, as well as (2) reducing the reason to writing in the Decree. This follows along with the court's ability to consider separate property of one spouse for the support of another spouse or child in certain circumstances utilizing the same requirements. As the Survivor Benefit has never been declared by statute or case law to be community property, its absence from the Decree would not have been an omitted asset.

A Court Order resulting from an affirmative agreement within the Decree is also enforceable, pursuant to caselaw. The parties may negotiate and agree at the time of the divorce to include the death benefit as part of negotiated terms within the Decree and once signed by the Court and filed in the Clerk's office it is enforceable. In this instance, testimony and the conduct of the parties betray Sarah's argument that an agreement was made regarding the Survivor Benefits and that the signatures were to be enforceable even if David's attorney discovered a mistake upon full review of the proposed Decree.

IT IS HEREBY ORDERED AND DECREED that the portion of the Stipulated Decree of Divorce, filed April 11, 2018, awarding the Survivor Benefit Option 2 selection by David to Sarah be set aside;

FURTHER ORDERED that the language be amended to delete the underlined portion of the following passage found on page 21 beginning at line 17 of the Stipulated Decree of Divorce filed 4/11/2018:

> '("QDRO"), based upon a selection of Option 2 being made at the time of the retirement so as to name SARAH JANEEN ROSE as the irrevocable survivor beneficiary of DAVID JOHN ROSE'([s] *sic)* pension benefits upon death, to divide said retirement account.'

FURTHER ORDERED that the following underlined language be inserted and should read as follows:

> '("QDRO") to divide said Pension between DAVID JOHN ROSE and SARAH JANEEN ROSE. The parties shall....'

FURTHER ORDERED that David is awarded his attorney fees in this matter upon filing a Memorandum of Fees and Costs for review by the Court pursuant to NRCP Rule 54.

SO ORDERED this 31st day of January, 2022.

Cynthia Dianne Steel,
District Court Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that on the above file stamp date, I E-Served pursuant to NEFCR 9, and/or mailed, via first-class mail, postage fully prepaid, the foregoing Decision and Order to:

Shelley Lubritz
375 E Warm Springs Rd Ste 104
Las Vegas, NV 89119
Shelley@lubritzlawoffice.com

Racheal Mastel
3303 Novat St Ste 200
Las Vegas, NV 89129
service@kainenlawgroup.com

Ruthanne Denning

Ruthanne Denning
Judicial Executive Assistant
Department I

MEMC

Shelley Lubritz, Esq.
Nevada Bar No. 5410
LAW OFFICE OF SHELLEY LUBRITZ, PLLC
375 E. Warm Springs Road Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 833-1300
Facsimile: (702) 442-9400
E-mail: shelley@lubritzlawoffice.com

Attorney for Plaintiff
David John Rose

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

DAVID JOHN ROSE, Plaintiff, vs. SARAH JANEEN ROSE, Defendant	Case No.: D-17-547250-D Dept. No.: I Hearing Date: 9/23/21 and 11/15/21 Hearing Time: 9:00 a.m.

PLAINTIFF'S MEMORANDUM OF FEES AND COSTS AND *BRUNZELL* AFFIDAVIT OF SHELLEY LUBRITZ, ESQ.

1.	Lubritz Costs (filing fees):	$981.67
2.	Lubritz Attorney's Fees:	$55,716.50
	LUBRITZ TOTAL	$56,698.17

DECLARATION OF SHELLEY LUBRITZ, ESQ.

Shelley Lubritz, Esq. states, pursuant to NRS 53.045 and under penalty of perjury, as follows:

1. I am the attorney of record for Plaintiff, David John Rose (hereinafter "David"), in Case No. D-17-547250-D. I have personal knowledge of the above fees and

costs expended, and the items contained in this Memorandum are true and correct to the best of my knowledge and belief. The fees and costs were necessarily incurred in this action and the billing invoices are attached for the Court's reference as **Exhibit "1"** and are incorporated herein by this reference. I attest that the fees and costs contained therein were reasonable, necessary, and actually incurred.

Prior to my retention, Regina McConnell, Esq. billed David attorney's fees and costs associated with her representation for the period of April, 2018 and April 2019. The Declaration of David John Rose with supporting documentation is attached hereto as **Exhibit "2"** and is incorporated herein by this reference. **Based upon the invoices in Exhibit "2" Ms. McConnell's attorney's fees were $7,562.50 with costs of $17.52**. I cannot attest that the fees and costs contained therein were reasonable, necessary, and/or actually incurred.

Relevant Procedural History

2/27/17: Complaint for Divorce filed;

9/26/17: Answer and Counterclaim filed;

10/30/17: Stipulated Parenting Plan filed;

3/23/18: Memorandum of Understanding signed by parties and their respective counsel;

4/11/18: Stipulated Decree of Divorce and Notice of Entry of Decree filed;

4/25/18: Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based upon Mistake filed;

5/10/18: Defendant's Opposition to Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based upon Mistake filed;

8/28/18: Motion granted by the Hon. Kathy A. Hardcastle;

9/25/18: Order after Hearing filed;

10/1/18: Notice of Entry of Order and Withdrawal of Counsel filed by Defendant's counsel;

10/9/18: Defendant's Motion to Alter or Amend Judgment, or in the Alternative for New Trial Pursuant to NRCP 59(a)(7) and for Attorney's Fees and Costs filed by Kainen Law Group;

10/24/18: Opposition to Defendant's Motion to Alter or Amend Judgment, or in the Alternative for a New Trial Pursuant to NRCP 59(a)(7) and for Attorney's Fees and Costs; Plaintiff's Countermotion for Attorney's Fees and Costs filed;

10/30/18: Reply to Plaintiff's Opposition to Defendant's Motion to Alter or Amend Judgment, or in the Alternative for a New Trial Pursuant to NRCP 59(a)(7) and for Attorney's Fees and Costs and Opposition to Plaintiff's Countermotion for Attorney's Fees and Costs filed;

11/6/18: Motion granted by the Hon. Cheryl B. Moss;

1/16/19: Order from Hearing on November 6, 2018, filed;

1/17/19: Notice of Entry of Order filed;

5/8/19: Plaintiff's Motion to Enforce Memorandum of Understanding and for Attorney's Fees filed;

5/22/19: Defendant's Opposition to Plaintiff's Motion to Enforce Memorandum of Understanding and for Attorney's Fees and Countermotion for Attorney's Fees and Costs filed;

6/2/19: Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion to Enforce Memorandum of Understanding and for Attorney's Fees and Opposition to Countermotion for Attorney's Fees and Costs filed;

6/18/19: Motion denied by the Hon. Cheryl B. Moss and Evidentiary date confirmed;

9/5/19: Plaintiff's Motion in Limine to Preclude Testimony of Marshal S. Willick, Esq. and to Preclude Admission of his December 20, 2018 Report filed;

9/9/19: Order from Hearing on June 18, 2019 and Notice of Entry of Order of Order from Hearing on June 18, 2019 filed;

9/19/19: Defendant's Opposition to Plaintiff's Motion in Limine to Preclude Testimony of Marshal S. Willick, Esq. and to Preclude Admission of his December 20, 2018 Report and Countermotion for Attorney's Fees and Costs filed;

10/7/19: Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion in Limine to Preclude Testimony of Marshal S. Willick, Esq. and to Preclude Admission of his December 20, 2018 Report and Opposition to Countermotion for Attorney's Fees and Costs filed;

10/23/19: Motion granted, in part, and denied, in part, by the Hon. Cheryl B. Moss;

1/13/20: Order from Hearing on October 23, 2019 and Notice of Entry of Order from Hearing on October 23, 2019, filed;

1/27/20: Evidentiary hearing (Hon. Judge Moss);

3/10/20: Settlement conference presided over by the Hon. Cheryl B. Moss;

4/10/20: Order Setting Evidentiary Hearing filed;

4/14/20: Minutes - Settlement Conference filed;

7/10/20 Order from Hearing on February 27, 2020 filed;

7/13/20: Notice of Entry of Order from February 27, 2020 filed;

2/12/21: Defendant's Motion for Judgment Pursuant to NRCP 52(c) or in the Alternative for Summary Judgment;

3/3/21: Plaintiff's Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs;

3/9/21: Reply to Plaintiff's Opposition to Defendant's Motion to for Judgment Pursuant to NRCP 52(c) or in the Alternative For Summary Judgment And Opposition to Countermotion for Attorney's Fees and Costs;

4/9/21: Motion denied;

6/25/21: Honorable Sr. Judge Cynthia Dianne Steel filed her Order after Hearing (April 9, 2021);

9/23/21: Evidentiary hearing (Hon. Sr. Judge Steel - Day 1 of 2);

11/15/21: Evidentiary hearing (Hon. Sr. Judge Steel - Day 2);

11/30/21: Plaintiff's Closing Argument;

12/13/21: Defendant's Closing Argument;

12/27/21: Plaintiff's Rebuttal Closing Argument;

1/10/22: Defendant's Rebuttal to Plaintiff's Closing Argument; and

1/31/22: Findings of Fact, Conclusions of Law and Order.

After four (4) years of motion practice, three (3) days of evidentiary hearings, and multiple settlement conferences, this matter was brought to a close upon the issuance of this Court's Findings of Fact, Conclusions of Law and Order on January 31, 2022.

As a direct result of misconduct by Defendant and her former counsel, Shelly Booth Cooley, Esq., coupled with the failings of Regina McConnell, Esq., David incurred fees and costs directly related to the wrongful inclusion of in the amount of $56,698.17.

The Court has great discretion regarding its decision to award fees and regarding the amount of fees granted. The Court's discretion is "tempered only by reason and fairness." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 427, 132 P.3d 1022, 1034 (2006) (quoting *University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1186 (1994)).

"In determining the amount of fees to award, the district court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the" *Brunzell* factors. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (citing *Haley v. Eighth Judicial Dist. Court*, 128 Nev. 171, 273 P.3d 855, 860 (2012) (internal quotations omitted)).

The Nevada Supreme Court has adopted four factors which, in addition to hourly time schedules kept by an attorney, are to be considered in determining the reasonable value of an attorney's services. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The factors the Court must consider are "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time, and attention given to the work; and (4) the result: whether the work performed by the lawyer was successful and what benefits were derived." In addition to the Brunzell factors, the court must evaluate the disparity of income between parties to family law matters. *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998).]

The qualities of the advocate:

The undersigned is well-experienced in domestic relations law having spent the majority of her 27 years, as a licensed Nevada attorney, in this field and is in good standing with the State Bar of Nevada. The undersigned also served as a Nevada Deputy Attorney General and a Special Assistant United States Attorney for the District of Columbia.

The character of the work to be done:

The work in this matter required something more than a passing knowledge of domestic relations law. Complex legal issues regarding Nevada PERS, whether survivor benefits to a pension are community property and subject to division, contract law, parol evidence rule, and other legal issues.

The work actually performed by the lawyer:

All work conducted in this case has been performed by the undersigned. The undersigned is a sole practitioner. Research, correspondence, motion practice, settlement conferences, and evidentiary hearings are among the work performed.

The result:

Defendant benefitted by the undersigned's representation and prevailed on the underlying motion and at trial.

Disparity in Income:

As of this filing, Sarah's actual income is unknown as she has not updated her Financial Disclosure Form. Therefore, a disparity if any exists, cannot be calculated.

The court can follow any rational method so long as it applies the *Brunzell* factors; it is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) Although the court must "expressly analyze each factor", no single factor should be given undue weight. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33.

After determining the reasonable value of an attorney's services analyzing the factors established in *Brunzell*, the court must then provide sufficient reasoning and findings concerning those factors in its order. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). The court's decision must be supported by "substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). Substantial evidence supporting a request for fees must be presented to the court by

"affidavits, unsworn declarations under penalty of perjury, depositions, answers to interrogatories, and/or admissions on file." EDCR 2.21(a). Sworn statements submitted pursuant to EDCR 2.21(a) must be sufficient to satisfy NRCP 56(e). EDCR 2.21(c). Unsworn statements of counsel and conclusory statements in pleadings not otherwise presented in compliance with EDCR 2.21(a) may not be considered by the court.

The Supreme Court has confirmed that the *Brunzell* factors must be presented by affidavit or other competent evidence. *Miller v. Wilfong*, 121 Nev. 619, 624, 119 P.3d 727, 730 (2005); *Katz v. Incline Vill. Gen. Improvement Dist.*, 452 P.3d 411 (Nev. 2019), cert. denied, 141 S. Ct. 253, 208 L. Ed. 2d 26 (2020) (citing *Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (holding that an affidavit documenting the hours of work performed, the length of litigation, and the number of volumes of appendices on appeal was sufficient evidence to enable the court to make a reasonable determination of attorney fees, even in the absence of a detailed billing statement); Cooke v. Gove, 61 Nev. 55, 57, 114 P.2d 87, 88 (1941) (upholding an award of attorney fees based on, among other evidence, two depositions from attorneys testifying about the value of the services rendered)). An award that is not based on such substantial evidence is subject to reversal, as the court will have no factual basis on which to base its decision. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

A total of 233.50 hours were expended in this matter for tasks performed exclusively by counsel for David at a greatly reduced hourly rate of $250.00. Please see Exhibit "1." Fees were incurred in the amount of $981.67. The request for attorney's fees and costs in the amount of $56,698.17 is reasonable under the circumstances of this matter.

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

Further, your declarant sayeth naught.

Dated this 7th day of February, 2022.

Shelley Lubritz, Esq.

Exhibit “1”

Law Office of Shelley Lubritz, PLLC

INVOICE

375 E. Warm Springs Rd.
LAS VEGAS, NV 89119

Invoice # 4
Date: 06/19/2019
Due On: 07/19/2019

Mr. David Rose
8493 Insignia Avenue, #104
Las Vegas, Nevada 89178

00017-Rose

Survivorship under PERS

Type	Date	Notes	Quantity	Rate	Total
Service	04/23/2019	Review documents: Review pleadings and Motions filed prior to my entry into the case.	0.80	$0.00	$0.00
Service	04/24/2019	Consultation - No Charge	1.40	$0.00	$0.00
Service	04/26/2019	Review documents: Telephone conference with McConnell; take Substitution of Attorney to McConnell for signature and pick up flash drive.	0.70	$200.00	$140.00
Expense	04/28/2019	eFiling Fee: Substitution of Attorney	1.00	$3.50	$3.50
Service	05/02/2019	Research: Start research.	0.80	$200.00	$160.00
Service	05/06/2019	Draft/Review Documents: Telephone conference with Mastel re: extending date discovery responses are due. Draft letter memorializing extension. Research and start outlining Motion to Enforce.	1.50	$200.00	$300.00
Service	05/07/2019	Draft/Review Documents: Continue drafting Motion to Enforce MOU and research re: contract, enforceability; review prior motions, oppositions and replies.	2.40	$200.00	$480.00
Service	05/08/2019	Draft/Review Documents: Finalize and file Motion to Enforce.	0.90	$200.00	$180.00
Expense	05/08/2019	eFiling Fee: Motion to Enforce	1.00	$3.50	$3.50
Service	05/13/2019	Review discovery requests. Draft responses. Research issue of Memorandum of Understanding as an enforceable contract. Begin Motion to Enforce MOU.	3.40	$200.00	$680.00
Service	05/22/2019	Draft/Review Documents: Read and begin to dissect Defendant's Opposition to Motion to Enforce. Notations on factual misstatements.	1.20	$200.00	$240.00
Service	05/29/2019	Research: Research Nevada Supreme Court cases and Nevada Revised Statutes re: validity of MOU, MOU merged versus not merged and enforceability, Court's	2.70	$200.00	$540.00

		jurisdiction to enforce unmerged MOU. Notations re: factual misstatements.			
Service	05/30/2019	Draft/Review Documents: Re-read and takes notes on Judge's Moss's Findings of Facts in Decree. Read Parenting Plan. Study Memorandm of Understanding. Outline Reply to Defendant's Opposition to Motion to Enforce MOU and Opposition to Countermotion. Begin draft of Reply. Begin to read prior Motion, Opposition, and Reply filed on behalf of Defendant since the Decree was entered.	2.30	$200.00	$460.00
Service	05/31/2019	Draft/Review Documents: Draft notes on factual misstatements and support my allegations by finding the actual statements made by Mr. Rose and his former counsel in prior pleadings. Research applicable District Court Rules and Nevada Revised Statutes. Revise drafts 3 and 4 to Reply.	3.20	$200.00	$640.00
Service	06/01/2019	Draft/Review Documents: Work on final draft of Reply. Additional research.	2.30	$200.00	$460.00
Service	06/02/2019	Draft/Review Documents: Final revisions to Reply.	1.00	$200.00	$200.00
Expense	06/02/2019	eFiling Fee: Reply to Opposition to Motion to Enforce	1.00	$3.50	$3.50
Service	06/06/2019	Draft/Review Correspondence: Review and respond to Dept. I emails. Draft letter to Mastel re: mediation.	0.20	$200.00	$40.00
Service	06/13/2019	Client Meetings: David Rose - Client Meeting	0.40	$200.00	$80.00
Service	06/13/2019	Research: Review modifications to EDCR 2.20. Draft Correction to Citations.	0.70	$0.00	$0.00
Service	06/17/2019	Research: Research and prepare for hearing.	2.60	$200.00	$520.00
Service	06/18/2019	Court Appearances: Prepare for and attend hearing on Motion to Enforce; discussion with client after hearing.	3.50	$200.00	$700.00

Total	**$5,830.50**
Payment (02/14/2020)	**-$4,850.00**
Credit Note	**-$980.50**
Balance Owing	**$0.00**

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due

84	03/09/2022	$33,497.17	$0.00	$33,497.17

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
4	07/19/2019	$5,830.50	$5,830.50	$0.00
			Outstanding Balance	**$33,497.17**
			Total Amount Outstanding	**$33,497.17**

Please make all amounts payable to: Law Office of Shelley Lubritz, PLLC

Please pay within 30 days.

Law Office of Shelley Lubritz, PLLC

INVOICE

375 E. Warm Springs Rd.
LAS VEGAS, NV 89119

Invoice # 13
Date: 01/29/2020
Due On: 02/28/2020

Mr. David Rose
8493 Insignia Avenue, #104
Las Vegas, Nevada 89178

00017-Rose

Survivorship under PERS

Type	Date	Notes	Quantity	Rate	Total
Service	06/26/2019	Correspondence: Draft letter re: her letter of 6/21/19. Draft responses to Requests for Admissions.	0.50	$250.00	$125.00
Service	06/27/2019	Meetings with Opposing Counsel: Meeting with Ms. Mastel re: settlement (did not bill 40 minutes in travel time.) Draft Pre-Trial Memorandum	1.70	$250.00	$425.00
Service	06/27/2019	Meetings with Opposing Counsel: Meeting with Racheal Mastel, Esq. for Early Case Conference and attempt to negotiate resolution.	1.00	$250.00	$250.00
Service	07/02/2019	Documents: Draft Stipulation and Order to Continue re: unavailability of Regina McConnell, Esq. Telephone conference with Ms. McConnell. Communication with Racheal Mastel, Esq.	0.80	$250.00	$200.00
Service	07/24/2019	Review hearing/trial videos: Start detailed review of June 18, 2019 video for June 18, 2019 Order.	1.50	$250.00	$375.00
Service	07/25/2019	Review hearing/trial videos: Detailed review video of June 18, 2019 hearing of Motion to Enforce.	2.60	$250.00	$650.00
Service	07/26/2019	Review hearing/trial videos: Finalize letter to Mastel re: June 18, 2019 Order	0.50	$250.00	$125.00
Service	08/08/2019	Documents: 3rd draft of Reply to Opposition to Motion to Enforce.	1.30	$250.00	$325.00
Service	09/05/2019	Documents: Finalize Plaintiff's Motion in Limine to Preclude Testimony of Marshall S. Willick, Esq. and to Preclude Admission of his December 20, 2018 Report.	1.20	$250.00	$300.00
Service	09/20/2019	Review Opposition to Motion in Limine and	1.20	$250.00	$300.00

		Countermotion for Attorney's Fees Begin draft of Reply to Opposition to Motion in Limine and Opposition to Countermotion.			
Service	10/05/2019	Documents: Draft Reply to Opposition to Motion in Limine and Opposition to Countermotion.	1.90	$250.00	$475.00
Service	10/16/2019	Prepare for Hearing/Trial: Meeting with client re: prepare for evidentiary hearing. Prepare for evidentiary hearing.	4.40	$250.00	$1,100.00
Service	10/23/2019	Documents: Prepare for and attend hearing on Motion in Limine. Draft Trial Subpoena. Communications with Ms. McConnell's office re: service of subpoena.	4.90	$250.00	$1,225.00
Service	11/18/2019	Correspondence: Finalize Order. Letter to Mastel re revised order from 10 23 19 order	0.60	$250.00	$150.00
Service	12/03/2019	[redacted]	[redacted]	[redacted]	[redacted]
Service	12/15/2019	[redacted]	[redacted]	[redacted]	[redacted]
Service	12/16/2019	[redacted]	[redacted]	[redacted]	[redacted]
Service	12/17/2019	[redacted]	[redacted]	[redacted]	[redacted]
Service	12/18/2019	[redacted]	[redacted]	[redacted]	[redacted]
Service	12/24/2019	[redacted]	[redacted]	[redacted]	[redacted]
Service	12/27/2019	[redacted]	1.60	$250.00	$400.00

Service	01/10/2020	Correspondence: Review letter from Mastel re: Motion to Continue. Draft letter in response to Mastel's dated 1/10/2020	0.40	$250.00	$100.00
Service	01/20/2020	Documents: Review Motion to Continue and begin preparing notes. Work on Opposition. Further research re: PERS and survivorship benefits.	3.50	$250.00	$875.00
Service	01/21/2020	Continue work on draft of Opposition Motion to Continue and prepare additional notes for evidentiary hearing. Further research re: PERS and survivorship benefits. Prepare for evidentiary hearing.	3.70	$250.00	$925.00
Service	01/23/2020	Documents: Finalize Opposition to Motion to Continue and Countermotion for Attorney's Fees and Costs. Further research re: PERS and survivorship benefits. Prepare for evidentiary hearing.	3.40	$250.00	$850.00
Service	01/25/2020	Prepare for Hearing/Trial: Prepare for trial and research Nevada Supreme Court cases.	5.40	$250.00	$1,350.00
Service	01/26/2020	Prepare for Hearing/Trial: Prepare for trial.	6.60	$250.00	$1,650.00
Service	01/27/2020	Prepare for Hearing/Trial: Prepare for trial. Meeting with Dave and Nexie Rose. Conduct trial. Meeting with Rave, Nexie, and Shirley Rose.	10.50	$250.00	$2,625.00
Expense	01/29/2020	eFiling Fee: eFiling cost for 13 documents	13.00	$3.50	$45.50

Total	**$17,370.50**
Payment (01/29/2020)	**-$5,000.00**
Payment (01/29/2020)	**-$5,000.00**
Payment (02/14/2020)	**-$150.00**
Payment (07/28/2020)	**-$2,370.50**
Payment (09/16/2020)	**-$2,370.50**
Credit Note	**-$2,479.50**
Balance Owing	**$0.00**

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
84	03/09/2022	$33,497.17	$0.00	$33,497.17

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
13	02/28/2020	$17,370.50	$17,370.50	$0.00
			Outstanding Balance	**$33,497.17**
			Total Amount Outstanding	**$33,497.17**

Please make all amounts payable to: Legal Services One, LLC

Please pay within 30 days.

The payment of $5,000.00 recorded on this account consists of a $2,500.00 credit card payment by Mr. Rose and a $2,500.00 courtesy discount. The courtesy amount was input, in error, as a payment.

Law Office of Shelley Lubritz, PLLC

INVOICE

375 E. Warm Springs Rd.
LAS VEGAS, NV 89119

Invoice # 84
Date: 02/07/2022
Due On: 03/09/2022

Mr. David Rose
8493 Insignia Avenue, #104
Las Vegas, Nevada 89178

00017-Rose

Survivorship under PERS

Type	Date	Notes	Quantity	Rate	Total
Service	01/27/2020	Client Meetings: Lengthy conversation with Dave re: settlement conference with Judge Moss. Draft notes for settlement conference.	1.60	$250.00	$400.00
Service	01/28/2020	Correspondence: Letter to Judge Moss accepting invitation to participate in a settlement conference. Mastel copied on letter.	0.10	$250.00	$25.00
Service	02/06/2020	Correspondence: Review letter from Mastel to Judge Moss re: settlement conference participation.	0.10	$250.00	$25.00
Service	02/26/2020	[redacted]	[redacted]	[redacted]	[redacted]
Expense	02/26/2020	[redacted]	[redacted]	[redacted]	[redacted]

Expense	02/26/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	02/27/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	02/28/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	03/05/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	03/10/2020	Court Appearances: Prepare for and attend brief settlement conference.	0.70	$250.00	$175.00
Service	03/18/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	03/27/2020	[redacted]	[redacted]	[redacted]	[redacted]
Expense	03/27/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	03/30/2020	Settlement Conference: Meeting with Dave. Prepare for attend settlement conference.	2.90	$250.00	$725.00
Service	04/14/2020	Court Appearances: Prepare for and attend settlement conference.	1.70	$250.00	$425.00
Service	05/21/2020	Documents: Prepare Notice of Entry of Order for April 8, 2020 Minute Order.	0.10	$250.00	$25.00
Expense	05/21/2020	eFiling Fee: eFiling Fee for Notice of Entry of April 8, 2020 Minute Order.	1.00	$3.50	$3.50
Service	06/11/2020	Documents: Prepare Ex Parte Application for Order Shortening Time and Declaration.	0.20	$250.00	$50.00
Expense	06/11/2020	eFiling Fee: eFiling Fe - Ex Parte Application for Order Shortening Time and Declaration.	1.00	$3.50	$3.50
Service	08/06/2020	Court Appearances: Prepare for and attend hearing on whether to proceed to trial via BlueJeans pursuant to Covid-19 protocols.	0.60	$250.00	$150.00
Expense	08/13/2020	eFiling Fee: eFiling Fee for Ex Parte Motion to Seal File.	1.00	$3.50	$3.50

Service	08/13/2020	Correspondence: Review AO 20-17. Review 8/6/20 Court Minutes. Letter to Mastel re: her opposition to appearing via alternative means. (Inadvertently not sent until 8/31/20). Prepare Ex Parte Motion to Seal File and Order Sealing File.	0.80	$250.00	$200.00
Expense	08/26/2020	eFiling Fee: eFiling Fee for Notice of Entry of Order Sealing File.	1.00	$3.50	$3.50
Service	08/31/2020	Correspondence: Letter to Shelly Booth Cooley, Esq., re: removal of herself from “Other Service Contacts” as case is sealed. Letter to Julie Funai, Esq. re: removal of Ms. Glad, Ms. Marquez, Ms. Nutt, and herself from “Other Service Contacts” as case is sealed. Letter to Regina McConnell, Esq., re: removal of herself from “Other Service Contacts” as case is sealed. Prepare Motion for Relief Pursuant to Administrative Order 20-17 as directed by Court. Letter to Mastel attached 8/13/20 letter and deadline re: Motion for Relief Pursuant to Administrative Order 20-17 as directed by Court.	1.90	$250.00	$475.00
Expense	09/04/2020	eFiling Fee: eFile Fee for Motion for Relief Pursuant to Administrative Order 20-17 and Other Related Relief.	1.00	$3.50	$3.50
Expense	09/04/2020	eFiling Fee: eFiling Fee - mofi for Motion for Relief Pursuant to Administrative Order 20-17 and Other Related Relief.	1.00	$3.50	$3.50
Service	09/19/2020	Documents: Review Mastel's Ex Parte Motion for Extension of Time to File Opposition. Prepare Opposition to Ex Parte Motion for Extension of Time to File Opposition and Countermotion for Attorney's Fees and Costs. Prepare Supplemental Points and Authorities. Prepare Notice of Non-Opposition and Request to Grant Motion for Relief Pursuant to Administrative Order 20-17 and for Other Related Relief.	1.80	$250.00	$450.00
Expense	09/19/2020	eFiling Fee: eFiling Fe - Opposition to Ex Parte Motion for Extension of Time to File Opposition and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Expense	09/19/2020	eFiling Fee: eFiling Fee - Supplemental Points and Authorities to Opposition to Ex Parte Motion for	1.00	$3.50	$3.50

		Extension of Time to File Opposition and Countermotion for Attorney's Fees and Costs.			
Expense	09/19/2020	eFiling Fee: eFiling Fee - Notice of Non-Opposition and Request to Grant Motion for Relief Pursuant to Administrative Order 20-17 and for Other Related Relief.	1.00	$3.50	$3.50
Service	09/20/2020	Documents: Review Defendant's Pre-Trial Memorandum. Research legal authority cited.	0.50	$250.00	$125.00
Service	09/21/2020	Documents: Review Defendant's Opposition to Motion for Relief Pursuant to Administrative Order 20-17 and Other Related Relief. Prepare Reply to Opposition to Motion for Relief Pursuant to Administrative Order 20-17 and Other Related Relief.	1.60	$250.00	$400.00
Expense	09/21/2020	eFiling Fee: eFiling Fee - Reply to Opposition to Motion for Relief Pursuant to Administrative Order 20-17 and Other Related Relief	1.00	$3.50	$3.50
Service	09/22/2020	Review documents: Review Defendant's Reply to Plaintiff's Opposition to Defendant's Ex Parte Motion for Extension of Time to File Opposition and Opposition to Countermotion for Attorney's Fees and Costs.	0.10	$250.00	$25.00
Service	10/20/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	11/08/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	11/19/2020	[redacted]	[redacted]	[redacted]	[redacted]
Service	02/12/2021	Documents: Review Defendant's Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs. Finalize Reply to Opposition to Defendant's Motion for	3.30	$250.00	$825.00

		Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs. Prepare Exhibits to Reply to Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs.			
Expense	02/12/2021	eFiling Fee: eFiling Fee - Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Expense	02/12/2021	eFiling Fee: eFiling Fee - Exhibits to Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Service	02/23/2021	Court Appearances: Prepare for and attend Pre-Trial Conference.	0.90	$250.00	$225.00
Service	03/01/2021	Documents: Review Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs. Read Volumes I and II of Transcript Re: All Pending Motions. Draft excerpts for Opposition. Research existing law. Commence drafting Plaintiff's Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs.	2.50	$250.00	$625.00
Service	03/02/2021	Documents: Finalize Plaintiff's Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs.	2.20	$250.00	$550.00
Expense	03/03/2021	eFiling Fee: eFiling Fee - Plaintiff's Opposition to Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Service	04/09/2021	Court Appearances: Prepare for and attend hearing on Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and	1.50	$250.00	$375.00

		Costs.			
Service	05/03/2021	Documents: Finalize proposed Order from April 9, 2021, hearing. Prepare letter to Mastel re: proposed Order from April 9, 2021 hearing.	3.90	$250.00	$975.00
Service	05/13/2021	Correspondence: Review letter from Mastel re: proposed changes to 4/9/21 Order. Compare proposed changes to Order.	0.20	$250.00	$50.00
Service	05/20/2021	Documents: Review video of April 9, 2021, hearing for revisions to proposed Order. Revise April 9, 2021, proposed Order. Prepared letter to Mastel re: revisions to April 9, 2021, proposed Order, her requested modifications, untimely Request for Certification, and dates for settlement talks as recommended by Judge Steele prior to filing Certification.	1.00	$250.00	$250.00
Service	05/26/2021	Correspondence: Letter to David S. Sorensen, Esq. re: competing Orders for 4/9/21 hearing. Mastel copied.	0.40	$250.00	$100.00
Expense	06/30/2021	eFiling Fee: eFiling Fee - Notice of Entry Order (4/9/21)	1.00	$3.50	$3.50
Service	06/30/2021	Correspondence: Review Mastel's letter of June 16, 2021. Prepare letter to Mastel re: her letter, Sarah listed as mother on school and camp forms, improperly opening case with District Attorney, and suspension of Dave's passport. Prepare Notice of Entry of Order (4/9/21).	0.60	$250.00	$150.00
Service	07/26/2021	[redacted]	[redacted]	[redacted]	[redacted]
Service	08/02/2021	[redacted]	[redacted]	[redacted]	[redacted]
Service	08/04/2021	[redacted]	[redacted]	[redacted]	[redacted]
Service	08/05/2021	[redacted]	[redacted]	[redacted]	[redacted]
Service	09/13/2021	Documents: Prepare Trial Subpoena - Regina McConnell.	0.20	$250.00	$50.00

		Prepare Acceptance of Service. Email to Regina McConnell.			
Service	09/18/2021	Prepare for Hearing/Trial: Trial prep.	4.50	$250.00	$1,125.00
Service	09/19/2021	Prepare for Hearing/Trial: Trial prep.	5.40	$250.00	$1,350.00
Service	09/20/2021	[redacted]	[redacted]	[redacted]	[redacted]
Expense	09/21/2021	eFiling Fee: eFiling Fee - Opposition to Defendant's Motion for Appointment of a Parenting Coordinator and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Expense	09/21/2021	eFiling Fee: eFiling Fee - mofi for Opposition to Defendant's Motion for Appointment of a Parenting Coordinator and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Expense	09/21/2021	eFiling Fee: eFiling Fee - Certificate of Service for Opposition to Defendant's Motion for Appointment of a Parenting Coordinator and Countermotion for Attorney's Fees and Costs.	1.00	$3.50	$3.50
Service	09/22/2021	Prepare for Hearing/Trial: Prepare for 9/23/21 Evidentiary Hearing. Draft Trial Memorandum.	14.70	$250.00	$3,675.00
Service	09/23/2021	Court Appearances: Prepare for and attend trial. Meeting with Dave.	8.60	$250.00	$2,150.00
Expense	10/04/2021	Court Reporter/Videographer: Partial payment 9/23/21 Trial Transcript.	1.00	$355.71	$355.71
Service	10/05/2021	Documents: Draft Trial Subpoena - Shelly Booth Cooley. Draft Acceptance of Service.	0.20	$250.00	$50.00
Expense	10/08/2021	Court Reporter/Videographer: Partial payment 9/23/21 Trial Transcript.	1.00	$35.71	$35.71
Service	10/19/2021	[redacted]	[redacted]	[redacted]	[redacted]
Expense	10/19/2021	[redacted]	[redacted]	[redacted]	[redacted]

		[redacted]			
Service	11/03/2021	[redacted]	[redacted]	[redacted]	[redacted]
Expense	11/04/2021	Court Reporter/Videographer: Partial payment 9/23/21 Trial Transcript.	1.00	$370.00	$370.00
Service	11/05/2021	[redacted]	[redacted]	[redacted]	[redacted]
Service	11/11/2021	Documents: Review Notice of Appearance by Audiovisual Transmission. Draft Plaintiff's Objection to Notice of Appearance by Audiovisual Transmission filed on Behalf of Shelly Booth Cooley, Esq.	0.50	$250.00	$125.00
Expense	11/11/2021	eFiling Fee: eFiling Fee - Plaintiff's Objection to Notice of Appearance by Audiovisual Transmission filed on Behalf of Shelly Booth Cooley, Esq.	1.00	$3.50	$3.50
Expense	11/12/2021	Court Reporter/Videographer: Partial payment 9/23/21 Trial Transcript.	1.00	$80.25	$80.25
Service	11/14/2021	[redacted] Review portions of the 9/23/21 hearing video. Review Defendant's Opposition to Plaintiff's Motion for Relief Pursuant to Administrative Order 20-17 and for Related Relief and Countermotion for Attorney's Fees and Costs filed on September 25, 2020. Prepare Reply to Defendant's Opposition to Plaintiff's Objection to Notice of Appearance by Audiovisual Transmission filed on Behalf of Shelly Booth Cooley, Esq.	3.50	$250.00	$875.00

		Trial prep.			
Expense	11/14/2021	eFiling Fee: eFiling Fee - Reply to Defendant's Opposition to Plaintiff's Objection to Notice of Appearance by Audiovisual Transmission filed on Behalf of Shelly Booth Cooley, Esq.	1.00	$3.50	$3.50
Service	11/15/2021	Court Appearances: Prepare for and attend trial. Meeting with Dave.	5.90	$250.00	$1,475.00
Service	11/18/2021	Correspondence: Letter to Mastel detailing lengthy proposed revisions to Order for Appointment of Parenting Coordinator.	0.70	$250.00	$175.00
Service	11/20/2021	Review hearing/trial videos: Commence review of transcripts from September 23, 2021, evidentiary hearing. Pull excerpts from transcript of Willick's testimony. Review portions of the 9/23/21 evidentiary hearing videos.	3.40	$250.00	$850.00
Service	11/21/2021	Review hearing/trial videos: Review portions of the 9/23/21 evidentiary hearing videos. Additional research. Review portions of 11/15/21 evidentiary hearing videos. Further review of transcripts from September 23, 2021, evidentiary hearing. Pull excerpts from transcript of Sarah Rose's testimony.	2.50	$250.00	$625.00
Service	11/24/2021	Correspondence: Review letter from Mastel re: my proposed modifications to Orders and compare to my requests.	0.40	$250.00	$100.00
Service	11/28/2021	Documents: Commence drafting Plaintiff's Closing Argument.	2.50	$250.00	$625.00
Service	11/30/2021	Documents: Finalize Plaintiff's Closing Argument.	8.70	$250.00	$2,175.00
Service	12/09/2021	Correspondence: Review letter from Mastel re: 10/20/21 Order.	0.10	$250.00	$25.00
Service	12/13/2021	Documents: Read Defendant's Closing Argument filed on 12/13/21. Begin breaking Defendant's Closing Argument into sections.	1.10	$250.00	$275.00
Service	12/14/2021	Correspondence: Letter to Judge Bailey re: competing Orders for Appointment of Parenting Coordinator.	0.20	$250.00	$50.00
Service	12/18/2021	Documents: Research and read caselaw cited by	5.20	$250.00	$1,300.00

		Defendant in her Closing Argument. Research additional caselaw and PERS statutes. Begin drafting Rebuttal Closing Argument.			
Service	12/19/2021	Documents: Continue research - Peterson v. Peterson, 463 P.3d 467 (2020), Chapter NRS 286, parol evidence, and Holguin v. Holguin, 491 P.3d 735 (Table) (Nev. 2021). Review 9/23/21 transcripts. Continue drafting Plaintiff's Rebuttal Closing Argument.	4.50	$250.00	$1,125.00
Service	12/23/2021	Documents: Review 11/15/21 testimony of Shelly Booth Cooley, Esq. Prepare excerpts from 11/15/21 hearing. Review 11/15/21 testimony of Regina McConnell, Esq. Continue drafting Plaintiff's Rebuttal Closing Argument.	4.30	$250.00	$1,075.00
Service	12/27/2021	Documents: Further review of 9/23/21 transcripts and videos of 11/15/21 hearing. Finalize Plaintiff's Rebuttal Closing Argument.	7.70	$250.00	$1,925.00
				Total	**$33,497.17**

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
84	03/09/2022	$33,497.17	$0.00	$33,497.17
			Outstanding Balance	**$33,497.17**
			Total Amount Outstanding	**$33,497.17**

Please make all amounts payable to: Law Office of Shelley Lubritz, PLLC

Please pay within 30 days.

Exhibit “2”

DECLARATION OF DAVID JOHN ROSE

David John Rose does hereby declare, pursuant to NRS 53.045 and the laws of the State of Nevada, as follows:

I am the Plaintiff in Case No. D-17-547250-D. Regina McConnell, Esq., was my attorney from the commencement of this matter until I retained Shelley Lubritz, Esq. in late April, 2019.

Attached to this Declaration are true and correct copies of bills I received from Ms. McConnell for attorney's fees and costs incurred from April of 2018 through April of 2019. They are directly related to the paragraphs inserted into the Decree of Divorce by Shelly Booth Cooley, Esq., awarding the Defendant Option 2 irrevocable survivor benefits to my PERS. Ms. Cooley is the Defendant's former attorney. Respectfully, I am asking that the Court include them in its award of attorney's fees and costs to me along with the fees and costs billed by Ms. Lubritz.

Further your declarant sayeth naught.

Dated this 7th day of February, 2022.

David John Rose

McConnell Law Ltd.

Invoice

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Date	Invoice #
2018-05-01	6080

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.25	04-02 Telephone conversation and e-mail with OC re survivor benefits for the PERS	300.00	75.00
0.5	04-04 E-mail with OC re payment of child support; Discussion with Mr. Rose re status of child support payment	300.00	150.00
0.5	04-09 Phone conversation with Shann Winsett re QDRO options; Phone conversation with Mr. Rose re case law	300.00	150.00
0.25	04-11 Receipt and review Decree and NED; Messages with Mr. Rose re filed Decree	300.00	75.00
4.25	04-25 Draft Motion to Set Aside Decree; Research the Henson case law and additional cases re survivor benefits; E-mail with Mr. Rose re attached declaration for signature; Draft appendix of exhibits for Motion; Revise, finalize and file Motion and Exhibits	300.00	1,275.00
0.25	04-26 Receipt and review e-filed motion and exhibits; Draft and file Certificate of Service	300.00	75.00
	Court Filing Fees	8.76	8.76
	Total account balance is $3,858.76		

Total **$1,808.76**

Invoice

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Date	Invoice #
2018-07-16	6125

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.5	07-06 Draft SAO to continue hearing; E-mails with OC re SAO (NO CHARGE)	0.00	0.00
0.25	07-16 Draft NTSO	350.00	87.50
	Court Filing Fees	4.38	4.38

Total **$91.88**

McConnell Law Ltd.

Invoice

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Date	Invoice #
2018-09-01	6143

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.25	07-18 Draft and send e-mail to Mr. Rose re status of continued hearing date	350.00	87.50
0.25	08-23 E-mail with Mr. Rose re issues as to paying extra-curricular activities	350.00	87.50
0.5	08-27 Phone call with Mr. Rose re hearing; Draft summary points for preparation for hearing	350.00	175.00
1.25	08-28 Attend hearing	350.00	437.50

Total **$787.50**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2018-09-18	6159

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.5	09-07 Review proposed order; Review court video and minutes; E-mails with OC re minor changes and final draft; Review and execute final Order	350.00	175.00
	The total now due on your account is $2,413.14.		

Total **$175.00**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2018-10-02	6178

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.25	09-21 Receipt and review e-mail from court clerk and OC re status of order	350.00	87.50
1.25	09-28 Draft Decree Nunc Pro Tunc	350.00	437.50
	Thank you for your recent payments. The total now due on your account is: $2,688.14.		

Total **$525.00**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2018-10-16	6198

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.5	10-03 Receipt and review NEO and WOA from OC; Draft and send e-mail to Mr. Rose re [redacted]	350.00	175.00
0.25	10-15 Receipt and review Motion to Amend Judgment	350.00	87.50
	Please note: your total account balance is now $2,950.64		

	Total	**$262.50**

Invoice

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Date	Invoice #
2018-11-02	6214

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
3	10-23 Draft Opposition to Motion for new trial or amend judgment; E-mail with Mr. Rose re approval and the status of the case	350.00	1,050.00
0.25	10-31 Receipt and review Reply brief	350.00	87.50
	Court Filing Fees	4.38	4.38
	Please note: Your account balance is now $3,842.52. We are doing our best to work with you but we need to get this account balance down in the next few days or the amount owed will exceed your retainer balance. Thank you for your prompt attention to this matter!		

Total **$1,141.88**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2018-11-16	6230

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
2.75	11-06 Attend hearing on Motion to Amend Judgement; Pre- and post-hearing discussions with Mr. Rose	350.00	962.50
	The total due on your account is now $4,805.02.		

	Total	**$962.50**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2018-12-03	6247

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.25	11-29 Receipt and review OP's List of Witnesses	350.00	87.50
	Thanks for your recent payment. However, your account is significantly past due and needs to be caught up. The total amount due is $4,392.52.		

Total **$87.50**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2019-01-03	6266

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.5	12-17 Receipt and review letter with proposed order from OC; Review court minutes and video hearing, and make changes to order; Draft and send email to OC re changes to Order	350.00	175.00
0.25	12-31 Receipt and review e-mail and revised Order from OC	350.00	87.50
	Total due on your account is $4,155.02.		

Total **$262.50**

McConnell Law Ltd.

Invoice

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Date	Invoice #
2019-02-04	6297

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.25	01-18 Receipt and review Notice of Entry of Order from November hearing	300.00	75.00
0.5	01-23 Receipt and review Marshall Willick's report and send to Mr. Rose for his review prior to hearing	300.00	150.00
2.75	01-29 Attend hearing; Pre- and Post-hearing meeting with Mr. Rose, OC and Attorney Willick to discuss options	300.00	825.00

Total **$1,050.00**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2019-03-17	6327

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.5	03-05 Review notes and preparation of conference call with OC; Conference call with OC re proposals and moving forward with possible settlement	300.00	150.00
0.25	03-13 E-mails with Mr. Rose re [redacted]	300.00	75.00

Total **$225.00**

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Invoice

Date	Invoice #
2019-04-01	6341

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
3.5	03-19 Attend status check; Pre- and Post-hearing meeting with Mr. Rose and OC re settlement options The total amount now due on your account is $1,275.	300.00	1,050.00

Total **$1,050.00**

Invoice

McConnell Law Ltd.

2505 Anthem Village Dr.
Suite E-563
Henderson, NV 89052

Phone # 7024873100

Date	Invoice #
2019-04-16	6355

Bill To
David Rose 7705 Young Harbor Drive Las Vegas, NV 89166

P.O. No.	Terms
	Due on receipt

Quantity	Description	Rate	Amount
0.5	04-15 Receipt and review OC's Discovery Requests and start drafting outline for responses	300.00	150.00

Total	**$150.00**

DECLARATION OF DAVID JOHN ROSE

David John Rose does hereby declare, pursuant to NRS 53.045 and the laws of the State of Nevada, as follows:

I am the Plaintiff in Case No. D-17-547250-D. Regina McConnell, Esq., was my attorney from the commencement of this matter until I retained Shelley Lubritz, Esq. in late April, 2019.

Attached to this Declaration are true and correct copies of bills I received from Ms. McConnell for attorney's fees and costs incurred from April of 2018 through April of 2019. They are directly related to the paragraphs inserted into the Decree of Divorce by Shelly Booth Cooley, Esq., awarding the Defendant Option 2 irrevocable survivor benefits to my PERS. Ms. Cooley is the Defendant's former attorney. Respectfully, I am asking that the Court include them in its award of attorney's fees and costs to me along with the fees and costs billed by Ms. Lubritz.

Further your declarant sayeth naught.

Dated this 7th day of February, 2022.

_____
David John Rose

Electronically Filed
2/8/2022 12:05 AM
Steven D. Grierson
CLERK OF THE COURT

CSERV

Shelley Lubritz, Esq.
Nevada Bar No. 5410
LAW OFFICE OF SHELLEY LUBRITZ, PLLC
375 E. Warm Springs Road Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 833-1300
Facsimile: (702) 442-9400
E-mail: shelley@lubritzlawoffice.com

Attorney for Plaintiff
David John Rose

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

DAVID JOHN ROSE, Plaintiff, vs. SARAH JANEEN ROSE, Defendant	Case No.: D-17-547250-D Dept. No.: I Hearing Date: Hearing Time:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February, 2022, I caused to be served *Plaintiff's Memorandum of Fees and Costs and Brunzell Affidavit of Shelley Lubritz, Esq.* to all interested parties as follows:

_____BY MAIL: Pursuant to NRCP S(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

_____BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

_____BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

__X__BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Service@KainenLawGroup.com *racheal@kainenlawgroup.com*
kolin@kainenlawgroup.com daverose08@gmail.com

Dated this 8th day of February, 2022.

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

By: _____
Shelley Lubritz, Esq.
Nevada Bar No. 5410
375 E. Warm Springs Road Suite 104
Las Vegas, Nevada 89119
Attorney for Plaintiff
David John Rose

MEMC

Shelley Lubritz, Esq.
Nevada Bar No. 5410
LAW OFFICE OF SHELLEY LUBRITZ, PLLC
375 E. Warm Springs Road Suite 104
Las Vegas, Nevada 89119
Telephone: (702) 833-1300
Facsimile: (702) 442-9400
E-mail: shelley@lubritzlawoffice.com

Attorney for Plaintiff
David John Rose

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

DAVID JOHN ROSE, Plaintiff, vs. SARAH JANEEN ROSE, Defendant	Case No.: D-17-547250-D Dept. No.: I Hearing Date: 9/23/21 and 11/15/21 Hearing Time: 9:00 a.m.

ERRATA TO PLAINTIFF'S MEMORANDUM OF FEES AND COSTS AND *BRUNZELL* AFFIDAVIT OF SHELLEY LUBRITZ, ESQ.

1. Amended Lubritz Costs (filing fees): $967.67

2. Amended Lubritz Attorney's Fees: $49,239.17

AMENDED LUBRITZ TOTAL $50,206.84

DECLARATION OF SHELLEY LUBRITZ, ESQ.

Shelley Lubritz, Esq. states, pursuant to NRS 53.045 and under penalty of perjury, as follows:

1. I am the attorney of record for Plaintiff, David John Rose (hereinafter "David"), in Case No. D-17-547250-D. I have personal knowledge of the above fees and

costs expended, and the items contained in this Memorandum are true and correct to the best of my knowledge and belief. Due to inadvertence, fees and costs associated with custodial and child support issues were not deducted from the total fees and costs set forth in *Plaintiff's Memorandum of Fees and Costs and Brunzell Affidavit of Shelley Lubritz, Esq.* Specifically, attorney's fees in the amount of $7,459.00 and costs in the amount of $14.00 should have been deducted from the totals. The amended totals are reflected above.

I apologize any inconvenience this inadvertent error caused the Court.

Exhibits "1" and **"2"** to *Plaintiff's Memorandum of Fees and Costs and Brunzell Affidavit of Shelley Lubritz, Esq.* filed on February 7, 2022 are incorporated herein by this reference.

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

Further, your declarant sayeth naught.

Dated this 15th day of February, 2022.

Shelley Lubritz, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of February, 2022, I caused to be served the *Errata to Plaintiff's Memorandum of Fees and Costs and Brunzell Affidavit of Shelley Lubritz, Esq.* to all interested parties as follows:

_____BY MAIL: Pursuant to NRCP S(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

_____BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

_____BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

__X__BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Service@KainenLawGroup.com *racheal@kainenlawgroup.com*
kolin@kainenlawgroup.com daverose08@gmail.com

Dated this 15th day of February, 2022.

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

By: _____
Shelley Lubritz, Esq.
Nevada Bar No. 5410
375 E. Warm Springs Road Suite 104
Las Vegas, Nevada 89119
Attorney for Plaintiff
David John Rose