IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH JANEEN ROSE,	)	**Case No.: 84295**
	)	
Appellant,	)	
vs.	)	
	)	
DAVID JOHN ROSE,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWERING BRIEF

Attorney for Respondent:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH JANEEN ROSE, Appellant, vs. DAVID JOHN ROSE, Respondent.	)	**Case No.: 84295**

NRAP 26.1 DISCLOSURE

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

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

1. All parent corporations and listing any publicly held company that owns 10% or more of the party's stock or states that there is no such corporation:

There is no such corporation.

2. The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear in this Court:

LAW OFFICE OF SHELLEY LUBRITZ, PLLC

McCONNELL, LTD.

3. If any litigant is using a pseudonym, the statement must disclose the litigant's true name:

None.

DATED this 10th day of October 2022

/s/ Shelley Lubritz, Esq.

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I. JURISDICTIONAL STATEMENT

Pursuant to *NRS* Chapter 125, the Family Court in Clark County, Nevada has original jurisdiction to hear the divorce action filed by Respondent, DAVID JOHN ROSE ("**David**"), against Appellant, SARAH JANEEN ROSE ("**Sarah**"). This Court has appellate jurisdiction for the District Courts and has subject-matter jurisdiction to review final decisions of those courts. *See NRAP* 3A(b)(1) and 3A(b)(8).

II. ROUTING STATEMENT

David respectfully submits that this instant Appeal should be assigned to the Court of Appeals pursuant to *NRAP* 17(b)(1).

III. COUNTER-STATEMENT OF ISSUES ON APPEAL

David respectfully submits the following Counter-Statement of Issues relating to Sarah's instant Appeal:

1. Whether the District Court properly found, based upon well-established Nevada law, that David's Survivor Benefit Provision ("**SBP**") to his Public Employees Benefit Plan ("**PERS**") was not community property.

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2. Whether the District Court properly set aside and removed the SBP that had been surreptitiously placed by Sarah within the parties' Decree of Divorce ("**Decree**").

3. Whether the District Court properly found, based upon well established Nevada law, that the parties Memorandum of Understanding ("**MOU**") was not merged into the Decree.

4. Whether the District Court properly denied Sarah's *NRCP* 52(c) Motion, as well as the other relief requested by Sarah.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal arises from an: (1) Order After Hearing, filed June 25, 2021, denying Sarah's Motion for Judgment Pursuant to *NRCP* 52(c) or, in the alternative, Motion for Summary Judgment; and (2) the Findings of Fact, Conclusions of Law, and Order, filed on January 31, 2022 granting David's Motion to Set Aside the Paragraph Regarding SBP in the Decree pursuant to *NRCP* 60(b) ("**Judgment**"). [APPX 6:1125-47; 8:1533-50].

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STATEMENT OF FACTS/PROCEDURAL HISTORY

David and Sarah were married in Clark County, Nevada on June 17, 2006. [APPX 1:1-6]. On February 22, 2017, David filed a Complaint for Divorce in the *Eighth Judicial District Court, Family Division*, bearing Case No.: D-17-547250-D. ("**Action**") [APPX 1:1-6].

Sarah filed her Answer and Counterclaim for Divorce on September 26, 2017 [APPX 1:7-14]. On December 15, 2017, David filed a Reply to Counterclaim for Divorce. [APPX 1:28-31].

David and Sarah filed a Parenting Agreement on October 30, 2017, wherein they stipulated to most issues relative to the care and custody of their minor children. [APPX 1:15-27].

A. MEDIATION HEARING

On March 23, 2018, David, with his then counsel, Regina M. McConnell, Esq. ("**McConnell**"), and Sarah with her then counsel, Shelly Booth Cooley, Esq. ("**Cooley**"), participated in a Mediation Hearing ("**Mediation**") presided over by, then, attorney Rhonda M. Forsberg, Esq. ("**Forsberg**"). The Mediation was held to resolve issues relating to property distribution and spousal/child support. [APPX 1:86-88].

B. THE MEMORANDUM OF UNDERSTANDING

At the Mediation, which lasted all day, David and Sarah resolved all material issues relating to the pending Action, whereupon Forsberg drafted the MOU that memorialized all the material terms of the parties' agreement. [APPX 1:86 - 88; 10:1870-71].

The MOU was intended to bind the parties and not merge with the Decree. [APPX 1:86-88]. The SBP, which Sarah agreed was a material term, was intentionally left out of the MOU as David did not agree to provide Sarah with the benefit. [APPX 5:901, 908, 932; APPX 9:1715, 1763, 1767].

The MOU was fully executed at the Mediation while the parties were still at Forsberg's office. [APPX 10:1870-71]. While Cooley began drafting the Decree during the Mediation, due to a computer issue, the parties and their respective counsel left Forsberg's office and met up at another location to complete the Decree. [APPX 10:1870-71].

The MOU provided that Cooley would draft a final formal agreement incorporating the terms of the MOU and that the MOU would be ratified by the District Court, but that the MOU **shall not merge and shall retain its separate nature as a contract.** [APPX 1:86].

C. THE DECREE

After the MOU was executed, the parties remained at Forsberg's office to work on the Decree. [APPX 1:32-94] The parties and their counsel left Forsberg's office and traveled to another location after Cooley's laptop battery drained. [APPX 10:1870-71].

The mediation and drafting of the proposed Decree all occurred in the same day with the mediation starting at approximately 9:00 a.m. and distribution of the proposed Decree at approximately 2:20 p.m to 3:00 p.m. [APPX 1:152, 161, 195; 8:1517; 9:1783-1784]

At no time between the signing of the MOU and the ultimate signing of the Decree, did David or Sarah, or their then respective counsel, discuss and/or agree to modify the terms of the MOU to include the SBP or to include the SBP in the Decree. [APPX 8:1192-94; APPX 9:1718-19].

1. THE ORAL AGREEMENT

The parties signed the Decree. Cooley was given the copy version and McConnell retained the original version for further review. [APPX 1:164; 8:1517-1518; APPX 9:1723; APPX 10:1888].

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It was agreed that McConnell would retain the original version of the Decree further review and, if no changes were needed, McConnell would submit the original version of the Decree for filing with the District Court. [APPX 6:952-61; APPX 8:1517-1519, 1526-1527]. David, in reliance upon the agreement between counsel, was advised to sign the Decree so that another trip to McConnell's office would be obviated. [APPX 6:952; APPX 8:1517-1518; APPX 9:1770].

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. [APPX 8:1517-1518].

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2. BREACH OF ORAL AGREEMENT

Upon thorough review of the Decree, McConnell learned that, contrary to the terms of the MOU, Sarah was awarded the SBP to David's PERS and the Decree further contained a merger clause in violation of the MOU. [APPX 8:1523, 1525, 1526, 1539, 1541, 1543, 1544, 1630-35].

On April 2, 2018, McConnell telephoned Cooley, as well as following up with email correspondence, advising Cooley that the Decree required modification to remove the wrongfully included language, including the award of David's SBP to Sarah. [APPX 8:1580; APPX 9:1724].

Over McConnell's objection, and in breach of the oral agreement that the Decree would not be filed until McConnell had an opportunity to review it, Cooley submitted the **copy version** of the Decree to the District Court without notice to McConnell. The Decree was filed on April 11, 2018. [APPX 8:1518; 9:1723-24, 1727].

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On April 25, 2018, McConnell filed David's Motion to Set Aside the Paragraph Regarding Survivor Benefits Contained in the Decree ("**Motion to Set Aside**"), after learning that Cooley breached the oral agreement and surreptitiously submitted the copy version of the Decree for filing to the District Court. [APPX 1:188-197]. On May 10, 2018, Sarah filed her Opposition to Motion to Set Aside. [APPX 1:207-222].

On September 25, 2018, following an August 28, 2018 hearing on David's Motion to Set Aside, Senior Judge Kathy Hardcastle[1] entered an Order finding that, among other matters, that David's SBP must be removed from the Decree. [APPX 1:223-226].

On October 9, 2018, Sarah's new counsel, Racheal Mastel, Esq. ("**Mastel**"), filed a Motion to Alter or Amend Judgement or for New Trial pursuant to *NRCP* 59(a)(7) ("**Alter/Amend Motion**") regarding the September 25, 2018 Order. [APPX 1:234-247]. On October 24, 2018, David filed an Opposition to the Alter/Amend Motion. [APPX 2:252-260]. On October 30, 2018, Sarah filed her Reply to the Alter/Amend Motion. [APPX 2:261-268].

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[1] Senior Judge Hardcastle was sitting for District Court Judge Cheryl Moss.

On November 6, 2018, Judge Moss heard the Alter/Amend Motion and found Judge Hardcastle's Order to be insufficient and that an evidentiary hearing on David's *NRCP* 60(b) Motion was necessary to determine the nuanced legal questions in the matter. [APPX 2:277-79].

On January 27, 2020, an evidentiary hearing on David's *NRCP* 60(b) Motion was held before Judge Moss. [APPX 5:768-1072]. David rested and Sarah commenced the examination of her first witness. [APPX 6:1005, 1041-1070]. The evidentiary hearings were not concluded before the mandatory COVID-19 shutdown in 2020 and before Judge Moss retired in December of 2020. [APPX 2:439-440]

Approximately 3 days after the 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 renegotiations would be necessary to remove Sarah as the Survivor Beneficiary. [APPX 8:1518].

Sarah told David it would "cost him" if she re-signed the decree. [APPX 8:1518]. Sarah said, "Just to let you know (indiscernible) my new signature is going to cost you." [APPX 8:1202].

Sarah also said “I’m sorry you didn’t read the declaration.” [APPX 8:1202].

Sarah’s attorney did not file the original Stipulated Decree of Divorce, but tendered the copy in her possession for the Court's signature. [APPX 8:1518]. By so doing, Cooley reneged on the oral agreement. Specifically, McConnell would maintain possession of the original Decree to review thoroughly before filing. [APPX 8:1519]

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. [APPX 8:1524]

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. 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. [APPX 8:1524].

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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. [APPX 8:1525]

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. [APPX 8:1526]

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. [APPX 8:1526] 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. [APPX 8:1526]

On February 12, 2021, Sarah filed her Motion for Judgment Pursuant to *NRCP* 52(c) or, in the Alternative Motion for Summary Judgment ("***NRCP* 52(c) Motion**") [APPX 3:657-670], whereupon a hearing was held on April 9, 2021. [APPX 9:1674-97].[2]

D. RULING ON MOTION

Following the continued evidentiary hearings on the motion, Judge Steel issued her Judgment, dated January 31, 2022, [APPX 8:1516-1532] wherein the District Court properly found:

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[2] The *NRCP* 52(c) Motion was heard by Senior District Court Judge Dianne Steele. During the hearing, Judge Steel expressed her concerns based upon the evidentiary hearing transcripts. [APPX 6:1103]. Specifically, Judge Steel found:

> The court expressed concern to make a decision on a transcript of a prior judge's unfinished trial. The undersigned did review the transcript provided on the record and determined it was not comfortable rendering a decision based solely on that transcript. [APPX 6:1103].
>
> To invoke summary judgement prior to the court's decision on the merits of the parties' intent would not comply with the law of the case. [APPX 6:1113]

Accordingly, Judge Steel set a new evidentiary hearing for September 23, 2021 and a second hearing date was held on November 15, 2021. [APPX 9:1697; 10:1843].

1. The MOU was an enforceable contract and that no terms may be changed or added from the MOU in the final drafting of the Decree. [APPX 8:1540].

2. McConnell's testimony was more credible that that of Cooley and that Cooley violated the MOU with her "surreptitious" inclusion of the SBP and merger provisions. [APPX 8:1544]. Further, that Cooley should have specifically addressed their inclusion with McConnell before the signing of the Decree. [APPX 8:1544].

3. The SBP was never declared to be community property by the *Nevada Supreme Court* and the SBP was not an omitted asset. [APPX 8:1546-1547].

4. That the attorneys agreed to hold the signed Decree until David's attorney had a chance to review it; and that the testimony of Marshal Willick, Esq. was inappropriate and not considered in her decision. [APPX 8:1534-49].

On February 15, 2022, Sarah filed her Notice of Appeal. [APPX 10:1600-01].

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SUMMARY OF THE ARGUMENT

The District Court properly exercised its discretion and judgment in finding that the SBP, based upon well-established Nevada law, is not a component of community property within the State of Nevada.

The District Court further properly found that David's *NRCP* 60(b) Motion was timely filed and properly merited the striking and removal of the SBP from the Decree as well allowing the MOU to stand as an independent contract as provided by the express terms of the parties

The District Court properly found that the inclusion by Cooley of the SBP and merger provisions into the Decree to be done fraudulently, surreptitiously, and in bad faith. Sarah testified that she knew the provisions awarding her irrevocable Option 2 survivor benefits to David's PERS were in the proposed Decree at the time she signed it and that David did not agree to the granting of the same. The District Court properly found that David's and his counsel's reliance and mistake relating thereto merited the removal of those offending provisions.

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There was no trial upon which an *NRCP* 52(c) motion may be properly ruled upon and, nevertheless, the District Court properly considered and denied Sarah's instant motion.

It is respectfully submitted that this Court should reject each an every issue raised by Sarah on Appeal, including all relief requested by Sarah, and thereafter fully affirm the District Court's rulings and Judgment.

ARGUMENT

IV. THE DISTRICT COURT PROPERLY DETERMINED THAT THE SBP IS NOT COMMUNITY PROPERTY

Based upon well-established Nevada law, the District Court properly determined that the SBP is not community property in the State of Nevada. [APPX 8:1546-1547]. The District Court's decision should be fully affirmed.[3]

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[3] *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*).

Sarah improperly contends that the District Court erred when it failed to award her the SBP in David's PERS retirement benefit, and that it abused its discretion when it did not make specific findings in support of that decision.[4] However, since Nevada does **not** consider the SBP to be a community property asset, there is no requirement that a divorce decree provide a former spouse with a SBP.

This Court's decision in *Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014) squarely establishes that the SBP is **not** a community property interest in the State of Nevada. *Henson* states:

> Thus, Kristin would have only been entitled to a survivor beneficiary interest in Howard's pension under the divorce decree if we were to interpret the term 'pension' in this case to also include a survivor beneficiary interest. **We decline to do so.** Id., 130 Nev. 814, 820, 334 P.3d 937 (emphasis)

Sarah's citation to *Henson* improperly expands upon and is inconsistent with the holding in *Henson*.

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[4] The provision awarding Sarah the SBP to David's PERS was "surreptitiously" inserted into the Decree by Cooley. [APPX8:1525].

While Sarah argues that "the decree could include naming the non-employee spouse the beneficiary," [*See* Opening Brief, Page 11] this language is inconsistent with the facts of the instant Appeal, as there was no intention for the SBP to be provided to Sarah. [APPX 5:907-908, 932, 934, 938-939; 6:947-948; 9:1716, 1719, 1722-24, 1746, 1767].[5]

Sarah disingenuously argues that this Court contradicted itself in *Henson* by opining that the SBP can be ordered in a decree of divorce and, also, that "Nevada does not consider a survivorship interest to be a community asset." [*See* Opening Brief, Page 12]. **Not so.**

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[5] *Henson* further provides, "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." 130 Nev. at 815-16, 334 P.3d at 934; *see also Id.* 130 Nev. 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.").

In its recent unpublished decision, *Holguin v. Holguin*, 491 P.3d 735 (Table) (Nev. 2021), this Court unambiguously held that the SBP is **not** a community property asset while also confirming its holding in *Henson*.[6]

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[6] Sarah's reliance on this Court's unpublished decision *Peterson v. Peterson*, 463 P.3d 467 (2020) is misplaced. *Peterson* does not stand for the proposition that the SBP is a community property asset. The facts in *Peterson* are fundamentally different than those presented in the instant Appeal, as both parties in *Peterson* **agreed** that the SBP therein was an asset inadvertently omitted from their Decree of Divorce. This is **not** the case in the instant Appeal. *Peterson* provides that when parties agree to a provision in a divorce decree, it will be enforced. This is not the fact of the instant Appeal.

David did not consent to the SBP inclusion.[APPX 5:907-908, 932, 934, 938-939; 6:947-948; 9:1716, 1719, 1722-24, 1746, 1767]. It was inserted into the Decree through the bad conduct of Cooley and knowingly signed off by Sarah. The inclusion in the Decree of the SBP to Sarah contravened the agreement of the parties. David and McConnell each testified consistently on this issue. [APPX 5:907-908, 932, 934, 938-939; 6:947-948; 9:1716, 1719, 1722-24, 1746, 1767]. Ratifying the SBP to Sarah would unjustly enriches her, as there can only be one irrevocable survivor beneficiary, the insertion of the provision granting Sarah Option 2 SBP by Cooley with the full knowledge of Sarah would force David to provide for his former wife in direct contravention of his expressed wishes. [APPX 5:907-908, 932, 934, 938-939; 6:947-948; 9:1716, 1719, 1722-24, 1746, 1767].

Sarah's reliance on *Carlson v. Carlson*, 108 Nev. 358, 361, 832 P.2d 380, 382 (1992), is equally misplaced for the purpose of this section. *Carlson* is factually distinguishable from the instant Appeal as the employee spouse in *Carlson* retired during the marriage and selected the survivor benefit option.

Sarah improperly argues that the passage of Senate Bill 292 was addressing all benefits of the Public Employees Benefit Plan, including the Survivor Benefit or Benefit upon death. However, 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 a Decree of Divorce. [APPX 6:1547].[7]

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[7] With regard to the legislative history of Senate Bill 292, David notes that District Court Senior Judge Dianne Steel noted in the FFCL:

> 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. [APPX 6:1638].

Sarah's reliance on a primer written by Marshal Willick, Esq. should be summarily dismissed as it has no legal authority. At the evidentiary hearing, Sarah offered Willick as an expert witness on PERS law. Over David's objection and notwithstanding his Motion in Limine to Preclude the Testimony of Marshall [sic] S. Willick, Esq., he was allowed to testify at the evidentiary hearing.

In the District Court's Decision, it found:

> 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. [APPX 8:1519].

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V. THE DISTRICT COURT PROPERLY SET ASIDE THE SBP IN THE DECREE

A. NO MERGER

The instant Appeal does **not** involve a knowingly and properly merged divorce decree.[8] Sarah's arguments are premised upon the false proposition that the entirety of the Decree that was improperly filed by Sarah with the District Court was properly entered into and executed between the parties. **It was not**.

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[8] *See Kilgore v. Kilgore*, 449 P.3d 843, 846 (2019):

> Further, we review a district court's factual findings deferentially and will not set them aside unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Conclusions of law, however, we review *de novo*. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003).

See also, *Gorden v. Gorden*, 93 Nev. 494, 496, 569 P.2d 397, 398 (1977)(This court has held that in the absence of express findings, it will imply findings where the evidence clearly supports the judgment. *Hardy v. First Nat'l Bank of Nev.,* 86 Nev. 921, 478 P.2d 581 (1970); *Pease v. Taylor*, 86 Nev. 195, 467 P.2d 109 (1970)).

The provisions providing for merger and the SBP were improperly included within the Decree and placed therein without knowledge of David or his prior counsel following an all day mediation session and after the parties had entered into the MOU, which MOU did **not** include any provision for the SBP and expressly included a non-merger provision. [APPX 8:1521].

The offending provisions were **not** the result of bargaining between the parties, as they were placed within the Decree without notice or knowledge to David and his former attorney. [APPX 8:1523, 1525, 1526, 1539, 1541, 1543, 1544, 1630-35]. On the contrary, Sarah and her prior attorney had full knowledge of their inclusion and intentionally failed to advise David and his prior attorney of the same. [APPX 8:1525].[9]

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[9] *See Oh v. Wilson*, 112 Nev. 38, 39-40, 910 P.2d 276, 277-78 (1996), cited by Sarah, which states:

> As this court stated in *Chwialkowski*:
> A release may be rescinded if obtained by mutual mistake or inadequate consideration. *Hanson v. Oljar*, 231 Mont. 272, 752 P.2d 187, 190 (Mont. 1988). **Likewise, a unilateral mistake can be the basis for a rescission if 'the other party had reason to know of the mistake or his fault caused the mistake**.' *Home Savers v. United Security, Co.*, 103 Nev. 357, 358-59, 741 P.2d 1355, 1356-57 (1987) (emphasis).

The District Court so properly found. [APPX 8:1525].

Further, Sarah's reliance upon *Vaile v. Porsboll*, 128 Nev. 27, 268 P.3d 1272 (2012) is misplaced as that case did not involve a dispute such as in the instant Appeal, i.e. that the terms of the Decree were misrepresented. Also, *Mizrachi v. Mizrachi*, 132 Nev. 666, 385 P.3d 982 (2016), is not a merger case. As the MOU should not have been merged into the Decree, general contract principles should be applied. *See Wallaker v. Wallaker*, 98 Nev. 26, 27, 639 P.2d 550, 550 (1982)("Because the property settlement agreement was neither merged nor incorporated into the divorce decree, this action should have been decided on principles of general contract law.").

Sarah's arguments regarding the Decree being a "superceding contract" and references to *Restatement of Contracts* (Second) §§ 209 and 213 ignores the facts presented in this instant Appeal that **until the Decree had been fully reviewed by David's prior counsel, there was no agreement**. [APPX 8:1525, 1526, 1535, 1539, 1541, 1543-44; 9:1783-84]. This condition was triggered when David's former counsel advised Sarah's former counsel of the errors in the Decree relative to the merger and the SBP. [APPX 8:1580; APPX 9:1724].

Further, Sarah's reference to novation and citations thereto are inapplicable, as the agreement to file the Decree was conditioned upon the subsequent acceptance of the Decree upon David's former counsel's **full and complete review of the Decree for conformity with the terms of the MOU and the intentions of the parties following the mediation**. [APPX 8:1525, 1526, 1535, 1539, 1541, 1543-44; 9:1783-84]

In its Judgment, the District Court properly found:

1. 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. [APPX 8:1519]. (emphasis).

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**.

3. **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**. (emphasis).

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Sarah's primary reliance upon *Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964) for the argument that the MOU was merged into the Decree ignores a critical aspect of the holding in *Day* wherein the it states:

> In *Ballin v. Ballin*, 78 Nev. 224, 371 P.2d 32 (decided after the 1953 statute), we decided a closely related problem. There, though the decree used isolated words of merger, the agreement and the decree each specifically directed survival. We held, '**In our view, the support clause in an agreement should, in accordance with ordinary contract principles, survive a subsequent decree if the parties so intended and if the court directs such survival.' In the case before us, only the agreement directs survival; the decree does not. We now take a further step and hold that the survival provision of an agreement is ineffective unless the court decree specifically directs survival**. (emphasis).

This Court's above language in *Day*, i.e. "if the parties so intended," extinguishes any application of merger of the MOU and any inclusion of the SBP in the Decree. There was **no** such **mutual intention** by the parties. The District Court so properly found, wherein it concluded:

> 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 inclusions

> of the Survivor Benefit terms with David's prior attorney prior to the signing of the Decree. [APPX 8:1543].

Further, Sarah citation to *Brunzell v. Woodbury*, 85 Nev. 29, 449 P.2d 158 (1969), for the proposition that the MOU cannot be the "final expression" ignores the particular facts presented in the instant Appeal, i.e. that the Decree would not be filed until after David's prior counsel had reviewed and agreed to the filing of the document. [APPX 8:1525, 1526, 1535, 1539, 1541, 1543-44; 9:1783-84]. In fact, the District Court properly found, "[n]otice of the failure to agree on the Decree should have **voided** David's signature." [APPX 8:1635].

While Sarah seeks to confirm the Decree based merely upon the signatures of both David and his former attorney, the District Court properly saw through this sham, wherein it further concluded:

> 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**. [APPX 8:1636]. (emphasis).

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B. PAROL EVIDENCE

While Sarah objects to testimony based upon parol evidence rule, the District Court properly allowed such testimony. [APPX 8:1516-32]. *See Kaldi v. Farmer's Ins. Exch*.,117 Nev. 273, 21 P.3d 16 (2001), which provides in pertinent part:

> We recognize that Nevada law does allow for the admission of extrinsic oral agreements under certain circumstances. The existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol. (internal citations omitted).

Silver Dollar Club v. Cosgriff Neon Co., 80 Nev. 108, 389 P.2d 923 (1964) involved the admission of parol evidence to show a new oral contract or oral modifications to a written contract. Like in the instant Appeal, the appellant in *Silver Dollar* argued the terms of the contracts prevented subsequent oral modifications. However, in allowing for the admission of parol evidence, the *Silver Dollar* Court stated, "**[p]arol evidence is proper to show subsequent oral agreements to rescind or modify a written contract**."

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The *Silver Dollar* Court also stated, in citing to *Simpson on Contracts*:

> In any event, if a written agreement can be modified by a subsequent oral agreement any of its provisions likewise may be modified.
>
> "Parties may change, add to, and totally control what they did in the past. They are wholly unable by any contractual action in the present, to limit or control what they may wish to do contractually in the future. **Even where they include in the written contract an express provision that it can only be modified or discharged by a subsequent agreement in writing, nevertheless their later oral agreement to modify or discharge their written contract is both provable and effective to do so**." *Simpson on Contracts* § 63, at 228. *Id*., 80 Nev. at 111, 389 P.2d at 924. (emphasis).

Sarah's arguments regarding *Yee v. Weiss*, 110 Nev. 657, 877 P.2d 510 (1994), for proposition that you bound by a document signed in spite of not reading it, are unpersuasive. In *Yee*, the Court stated:

> Weiss testified that he had the estoppel certificate in his possession, but failed to make even a cursory examination of it. **Had the document been lengthy, his failure to examine it would have been understandable**. Yet this document was one page in length with a clear heading reading 'Tenants verification of Existing Lease/Estoppel Certificate,' thus making Weiss' failure to perform even a cursory examination unreasonable. *Id.*, 110 Nev. at 662, 877 P.2d at 512.

The MOU was three pages and the Decree was 39 pages. [APPX 8:1527].

The District Court properly found:

> It is disingenuous to now declare that he is bound to his signature on the Decree, citing *Yee*, **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***. [APPX 8:1528]. (emphasis)

The District Court further concluded:

> 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 <u>unwittingly signed off on contested provisions in the Decree</u>**; 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 agreement in the MOU. [APPX 8:1528]. (emphasis).

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C. CONTRACT/MEETING OF THE MINDS

In *May v. Anderson*, 119 P. 3d 1254 (2005), 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. *Id.* at 1256. On appeal, the Court held, "because a settlement agreement is a contract, its construction and enforcement are governed by principles of contract law. 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 supports the proposition that the MOU was an enforceable contract. The language specific to this case is found in the first paragraph of the MOU:

> By this memorandum, the parties desire to memorialize their agreement resolving all issues in the above referenced case. The memorandum addresses the material terms of the agreement, and is intended to bind the parties to those terms. The parties agree, however, that counsel for Sarah shall draft a final formal agreement incorporating the terms herein. That agreement shall be ratified by the Court, but shall not merge and shall retain its separate nature as a contract. [APPX 1:86].

The testimony in the instant Appeal established that David's SBP was addressed at the Mediation and intentionally omitted from the MOU, as David did not consent to naming Sarah as his SBP. [APPX 5:901, 908, 932; APPX 9:1715, 1763, 1767].

Sarah's testimony reflects that there was no meeting of the minds as to the inclusion of the SBP in the Decree. [APPX 8:1541]. There was no negotiation between the signing of the MOU and the proposed Decree nor was there any consideration. [APPX 8:1541].

Sarah testified that David wanted the Decree to be finalized that day but he was unwilling to grant her the SBP in order to finalize it. [APPX 9:1238].

The District Court properly found there was no meeting of the minds as to the additional terms included in the proposed Decree prepared by Cooley. [APPX 8:1523]. There was no negotiation and there was consideration. [APPX 8:1525].

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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 SBP to Sarah. [APPX 8:1523]. There was no offsetting consideration given in the final Decree to show an amendment to the MOU contract. Using this test, the District Court properly found no meeting of the minds to the additional terms incorporated into the proposed Decree surreptitiously by Cooley. [APPX 8:1523, 1541].

The District Court stated:

> So my order is clearly that the option 2 survivor benefits should not have been entertained in the decree, that there I a mistake by adding it in there without the consent of both parties; and it should be stricken from the decree. [APPX 10:1690].
>
> * * *
>
> So to say that we had an agreement in the morning. Someone typed something that said stipulated agreement or stipulated decree. It didn't say here's another, you know, negotiated term. I just think that - - that was too fast. I think it was wrought with the opportunity for a mistake. And I believe mistake was made. [APPX 10:1690]

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McConnell further 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 District Court, she flipped through the original Decree and saw the paragraph awarding the SBP to Sarah at which point she contacted Cooley. [APPX 9:1723]. The call took place prior to April 11, 2018. Notwithstanding their conversation, Cooley submitted a copy of the Decree for filing. [APPX 9:1723].

McConnell would retain the original version of the Decree to review. [APPX 6:952-54; 9:1770, 1783-84].

Sarah relies on a footnote to this Court's decision in *Vaile v. Porsboll*, 128 Nev. 27, 268 P.3d 1272 (2012), without providing context. In *Vaile*, terms of the parties' separation agreement were adopted and incorporated into the subject decree. An issue presented was the distinction between modification and clarification of prior family court orders. Sarah cites to *Vaile* for the proposition that contract law does not apply to decrees. But *Vaile* made the distinction that "because the parties' agreement was merged into the divorce decree, ..." *See* Footnote 7. In the instant Appeal, the MOU was not to be merged into the Decree. [APPX 1:86].

The MOU established the terms and conditions agreed to by the parties relative to property settlement. In contrast, the Decree included two (2) new terms not bargained for and no consideration for their addition was given. In *Cain v. Price*, 134 Nev. 193, 195, 415 P.3d 25, 28 (2018), this Court confirmed that To be legally enforceable, a contract "must be supported by consideration." *Jones v. SunTrust Mortg., Inc*.,128 Nev. 188, 191, 274 P.3d 762, 764 (2012). "Consideration is the exchange of a promise or performance, bargained for by the parties." Id. A party's affirmation of a preexisting duty is generally not adequate consideration to support a new agreement. See *Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980). The district court found that no such consideration was given to David for the inclusion of survivor benefits to Sarah and for the merger of the MOU which was, on its face, not to be merged.

D. FRAUD/MISTAKE - *NRCP* 60(b)

The District Court properly granted David's *NRCP* 60(b) motion.

On April 25, 2018, fourteen (14) days after the Decree was filed, McConnell filed the Motion to Set Aside and acknowledged she "inadvertently did not see" the inclusion of the SBP. [APPX 1:193].

David submits that the disputed term awarding Sarah his SBP was properly found to be invalid by the District Court. The District Court correctly ordered that the offending provisions be stricken and the Decree be amended. [APPX 8:1530-1531].

NRCP 60 provides, in pertinent part, as follows:

> Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order,

> whichever date is later. The time for filing the motion cannot be extended under Rule 6(b).

In *Carlson v. Carlson*, 108 Nev. 358, 361-62, 832 P.2d 380 (1992), this Court opined, "[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).[10]

The district properly found that David's *NRCP* 60(b) Motion was filed timely. [APPX 8:1400; 9:1696]. The larger issue is whether the District Court properly granted the Motion. **It did**.

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[10] *See Heard v. Fisher's & Cobb Sales & Distribs*., 88 Nev. 566, 568, 502 P.2d 104, 105 (1972):

> Motions under Rule 60(b) are addressed to the sound discretion of the trial court and the exercise of discretion by the trial court in granting or denying such motions is not to be disturbed on appeal absent an abuse of discretion.

See Union Petrochemical Corp. v. Scott, 96 Nev. 337, 338, 609 P.2d 323 (1980):

> The district court has wide discretion in such matters and, barring an abuse of discretion, its determination will not be disturbed.

As set forth herein, the findings of the District Court that the offending provisions should be stricken, and therefore, David's Motion should be granted based upon mistake, excusable neglect, fraud, misconduct of an opposing party, and any other reason that justifies relief.

The mistake was unilateral, in that, only Sarah and Cooley knew the offending provisions were surreptitiously added to the Decree. [APPX 8:1525].[11] David submits that excusable neglect may be found based upon his reliance that the oral agreement between Cooley and McConnell would be upheld. Specifically, that the signed Decree would not be filed until after his attorney had an opportunity to make a thorough review of the proposed Decree and that any needed changes would be made. [APPX 1:164; 8:1517-1518; APPX 9:1723; APPX 10:1888].

Fraud, and misconduct of an opposing party are intertwined and will be addressed, more fully, below.

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[11] A unilateral mistake can be the basis of a rescission if the other party had reason to know of the mistake. *Oh v. Wilson*, 112 Nev. 38, 910 P.2d 276 (1996).

The District Court properly granted the David's motion based upon fraud, misrepresentation or misconduct by an opposing party. *See NRCP* 60(b).

It would be hard to imagine a clearer case of fraud, misrepresentation and misconduct by an opposing party which would justify relief under *NRCP* 60(b).

Sarah and Cooley acted not only in breach of the express terms of the MOU, but intentionally and surreptitiously inserted the SBP and merger terms into the Decree.

Sarah and Cooley not only committed fraud on the David by giving him a Decree to sign that contained fugitive provisions, but they committed fraud on the Court also. The *Supreme Court of Nevada*, defines "fraud upon the court" as:

> [T]hat species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . and relief should be denied in the absence of such conduct.

NC-DSH, Inc. v. Garner, 125 Nev. 647, 654, 218 P.3d 853, 858 (2009) (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994)).

Relief based on fraud on the court "is addressed to the sound discretion of the district court." *Id.* at 657, 218 P.3d at 861.

The FFCL as entered by the District Court support a finding of fraud and fraud on the court. First, the Decree that was signed unknowingly by the District Court would not have been obtained but for the fraudulent and improper conduct of the Sarah and Cooley. Here Sarah's counsel seized upon the signing of the draft Decree by David and McConnell to knowingly create a Decree that was in violation of the express terms of the MOU. They then presented this fugitive Decree to the District Court under the express representation that this was a stipulated and agreed upon Decree. It was not, and they knew it. When confronted with the truth that the Decree as signed and entered by the District Court was not as represented, namely a stipulated and agreed upon Decree that followed the terms of the MOU; did Sarah and Cooley act ethically and properly to correct the Decree? The answer is a resounding NO. Instead, Sarah's reaction was "it would cost him if she re-signed the decree" [APPX 6:965]; Cooley's reaction was there would have to be "further negotiations or she would file the copy in her possession." [APPX 10:1526].

These acts, as well as the many other acts and omissions set forth herein above, without question merited relief. Cooley's conduct can only be described as a breach of her duty of candor to the court. Counsel violates his or her duty of candor to the court when counsel, "proffers a material fact that he knew or should have known to be false", *see generally Sierra Glass & Mirror v. Viking Indus., Inc.,* 107 Nev. 119, 125-26 (1991).

Here, Sarah and Cooley submitted to the District Court a Decree that was represented to be agreed and stipulated to by the parties and one that reflected the terms of the MOU that was attached thereto. The District Court would have never signed the Decree if it had known that there were terms contained in the Decree that were never agreed to and were contrary to the MOU. These are material facts that would have changed the District Court's action and judgment and both Sarah and Cooley knew this.

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The parties enter into settlement negotiations with the understanding that, once reduced to writing, the MOU will be enforced and unaltered. Denying enforcement of the MOU will have a chilling effect on many parties who may enter settlement negotiations. The knowing, willful, and surreptitious insertion of the provision granting Sarah the SBP has the effect of reducing the amount of David's monthly pension upon retirement and grants Sarah 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, David submits the following. The testimony as to whether the SBP was considered at the March 23, 2018 Mediation is clear. Sarah acknowledged that the issue was addressed and that David did not consent to designating her as the SBP to his PERS. [APPX 8:1189-91; 9:1714]. As such, the SBP were not included in the MOU. [APPX 9:1715]. The parties and McConnell testified that on March 23, 2018, David and Sarah, participated in the Mediation presided over by Forsberg who drafted an MOU memorializing the terms of the parties' agreement. [APPX 9:1517].

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Both parties and their respective counsel signed the MOU while at Forsberg's office. [APPX 9:1517].

All three testified that the Decree was drafted directly after the Mediation on March 23, 2018. [APPX 9:1517]. The parties and their respective counsel signed the Decree that day with the understanding that McConnell would maintain the original document for further review prior to its submission to the District Court. [APPX 1:164; 8:1517-18; 9:1723; 10:1888].

The wrongdoing of Cooley is at the forefront of this dispute. Sarah acted in concert with her former counsel to obtain David's signature on the Decree. Because Nevada does not recognize SBP to a retirement as community property, the only way Sarah could receive these benefits was through the Decree or other Order of the Court.

Specifically, Cooley testified that while they were "working on issues" she began drafting the Decree and made revisions as Judge Forsberg "came in and out" of the rooms. [APPX 10:1870]. The timing is of specific import. Upon being notified that David refused to grant Sarah the SBP, Cooley intentionally included the offending paragraphs in the Decree.

The District Court found McConnell to be more credible than Cooley. [APPX 8:1526]. David respectfully submits Cooley perjured herself when she testified that 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. 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. [APPX 10:1870-71] (emphasis).

Cooley's direct testimony shockingly contravened that of the parties and McConnell in the initial evidentiary hearing presided over by the Judge Moss. It also contravened the testimony of all three at the September 23, 2021 evidentiary hearing presided over by Judge Steel.

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David submits it was at this point that Sarah's current counsel should have stopped her examination of Cooley because it was so clearly false and was radically different than her own client's testimony. Rather than do so, counsel continued her examination and Cooley continued to testify.

It has long been the position of David and 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. [APPX 9:1723].

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. [APPX 10:1871].

At the September 23, 2021 evidentiary hearing, upon a review of Page 23, Paragraph B of the Decree, McConnell testified that the provision awarding Sarah the SBP was inconsistent with the parties' agreement and was not negotiated. [APPX 9:1715; 1719-20].

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. [APPX 9:1722]. Prior to submission to the District Court, she flipped through the original Decree and saw the paragraph awarding the SBP to Sarah at which point she contacted Cooley. The call took place prior to April 11, 2018. [APPX 9:1723]. Notwithstanding their conversation, Cooley submitted the copy version of the Decree for filing.

David submits that the testimony of his former wife and her counsel 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.
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.

Q. Specifically, please direct 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.

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.

Q. 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.

A. Correct.

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.

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.

[APPX 8:1189; 1191, 1193, 1237-38].

Sarah knew David did not agree to grant her the SBP to his PERS. The District Court further found that Cooley had an obligation to apprise McConnell of their inclusion prior to signing. "Without the disclosure, [Cooley] surreptitiously inserted the Survivor Beneficiary and merger terms in the Decree, informing only her client." [APPX 8:1543]. Cooley's decision to include the terms "smacks of unfair dealing and the failure to act in good faith." [APPX 8:1546]

It bears repeating that prior to any signing, there was an agreement between the attorneys, an agreement upon which David relied, that McConnell would retain the original version of the Decree for further review prior to its filing. Cooley breached this covenant when she submitted the copy version of the Decree without notifying McConnell.

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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).

Moreover, the record clearly demonstrates that the representations were the result of either mistake or fraud. A mutual mistake entitles a party to relief from a judgment. *NRCP* 60(b)(1). Such fraud is grounds for relief from the judgment pursuant to *NRCP* 60(b).

The District Court's granting of the *NRCP* 60(b) Motion was correct. It prevented Sarah's and Cooley's larceny of David's right to choose his SBP at the time of retirement by granting to his former wife something to which she would not otherwise be entitled.

Attorneys have duties: (a) the duty of candor with the tribunal (RPC 3.3); (b) fairness to opposing party (RPC 3.4); and (c) truthfulness in statements to other Rules of Professional Conduct.

Each of these obligations imply the duty that the Court characterized as fiduciary duty. The fact that the District Court may not have been exact in describing these duties as a "fiduciary duty," does not diminish them.

Cooley breached these duties by secretly adding the paragraphs awarding Sarah the SBP and merger without specifically notifying McConnell of the inclusions.[12] Such wrongdoing is another basis to support the District Court granting David's Motion to Set Aside/*NRCP* 60(b) the offending paragraphs of the Decree.

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 []**[13]** 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)

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[12] This Court may affirm the lower court on any grounds supported by the record. *See Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592 245 P.3d 1198 (2010); *Rosenstein v. Steel*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

[13] Sarah omitted the citation to §172 which is in the original quote.

VI. THE DISTRICT COURT PROPERLY DENIED THE *NRCP* 52(c) MOTION

In her Opening Brief, Sarah materially misrepresents that "After the conclusion of the first day of trial, Sarah filed a "Motion pursuant to 52(c) for judgment on partial findings." [*See* Opening Brief, Page 54]. The chronology is incorrect.

The "trial" to which Sarah refers was an evidentiary hearing on David's *NRCP* 60(b) Motion. [APPX 1:223-26, 277-79]. Judge Moss took testimony on January 27, 2020. [APPX 5:768-941]. Sarah filed her *NRCP* 52(c) Motion on February 12, 2021, or nearly one (1) year later. [APPX 3:657-670]. Additionally, prior to its filing, Sarah began her case in chief.

A trial was not held in the District Court. On April 25, 2018, David filed his Motion to Set Aside. [APPX 1:188-197]. Each proceeding thereafter were motion hearings. Judges Moss and Steele took testimony during evidentiary hearings on David's *NRCP* 60(b) Motion.

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NRCP Rule 52 provides, in pertinent part, as follows:

> (c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

An evidentiary hearing on a motion is a hearing where the judge makes a final decision about one (1) part of a case; while a trial is a final hearing where the judge will decide all remaining issues. *NRCP* 52(c) is inapplicable. It was plain error by the District Court to even hear the motion.[14]

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[14] *See Bradley v. Romero*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1996)

> The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. *See e.g. Western Indus., Inc. v. General Ins. Co.*, 91 Nev. 222, 230, 533 P.2d 473, 478 (1975). Such is the case were a statute which is clearly controlling was not applied by the trial court.

CONCLUSION/PRAYER FOR RELIEF

Based upon the above arguments, David respectfully requests that this Court reject each an every issue raised by Sarah on Appeal, including all relief requested by Sarah, and thereafter fully affirm the District Court's rulings and Judgment.

Respectfully submitted.

DATED this 10th day of October 2022

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this *Answering Brief* complies with the formatting requirements of *NRAP* 32(a)(4), the typeface requirements of *NRAP* 32(a)(5) and the type style requirements of *NRAP* 32(a)(6) because:

[x] This *Answering Brief* has been prepared in a proportionally spaced typeface using Word Perfect - Version X5 in 14 Point Times New Roman.

2. I further certify that this *Answering Brief* complies with the page or type-volume limitations of *NRAP* 32(a)(7) because it is less than 30 pages in length and, excluding the parts of the brief exempted by *NRAP* 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more and contains **9,985** words; and

3. Finally, I hereby certify that I have read this *Answering Brief* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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I further certify that this *Answering Brief* complies with all applicable *Nevada Rules of Appellate Procedure*, including *NRAP* 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the *Nevada Rules of Appellate Procedure*.

DATED this 10th day of October 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October 2022, the above-referenced **RESPONDENT'S ANSWERING BRIEF**, was filed electronically with the Clerk of the *Nevada Supreme Court* and served electronically through the Court's electronic service to the following persons:

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