IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH JANEEN ROSE

Appellant,

vs.

DAVID JOHN ROSE

Respondent.

CASE NO. 84295

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

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

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

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

Kainen Law Group, PLLC (Appellant)

Law Office of Shelly Lubritz, PLLC (Respondent)

The Cooley Law Firm (Sarah Rose)

McConnell Law, LTD. (David Rose)

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. . .

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

Dated this 23rd day of November 2022.

By: _____

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A. Negotiations Regarding the SBP

In addressing the Memorandum of Understanding ("MOU"), David has made representations which are simply not based on the facts in evidence. Sarah is not going to address each and every erroneous fact, as she has set forth the facts within her Opening Brief. Sarah is only going to address those facts which are specifically necessary for this Reply.

David claims that the entire reason the Survivor Benefit ("SBP") was left out of the MOU was because the parties had agreed he would keep it, his logic leaves much to be desired. *Respondent's Answering Brief,* page 4. First, both David and Ms. McConnell testified that while he said "no" to providing the SBP to Sarah, she never explicitly waived her interest. **APPX IX: 1746, 1777-1781**. Further Sarah testified it was her understanding that the SBP was part and parcel in the other PERS benefits that she was receiving. **APPX VII: 1219**. Additionally, David claimed that the MOU contained only those items which he was "giving up." **APPX IX: 1778-1779**. When challenged, however, he

acknowledged that other items were included in the MOU which were not things that he was "giving up," but rather, what was included was what the parties discussed. **APPX IX: 1779-1781**. He also acknowledged that many of the other necessary terms which had not been in the MOU were also not discussed. **APPX IX: 1788-1792**. But, as David also pointed out, none of the other additions impacted him financially, in a way that made him unhappy. **APPX IX:1793-1795.**

David contends that there were no discussions of the SBP prior to the Decree being finalized. *Answering Brief,* page 5. And while it is true that there were no *verbal* discussions, Ms. McConnell (whom the Court found credible despite the pending malpractice action against her **APPX VIII:1526; APPX IX: 1730-1731**) acknowledged that she was standing next to the Decree while Ms. Cooley was drafting the same and that they discussed the terms as Ms. Cooley drafted. **APPX IX:1740-1741**. Especially in light of the fact that Ms. McConnell and Ms. Cooley were revising the draft together, it was plainly apparent that there were additional negotiations and that the Decree itself reflected a counteroffer pursuant the Restatement (second) of Contracts § 59 (1978). *See also, Pravorne v. McLeod*, 79 Nev. 341, 345-346, 383 P.2d 855, 857

(1963); *Heffern v. Vernarecci,* 92 Nev. 68, 544 P.2d 1197 (1976). Despite David's claim that Sarah and Ms. Cooley had contradictory testimony regarding additional negotiations, the reality is that Sarah has a lay person's understanding of negotiations, and Ms. Cooley is familiar with the laws surrounding contracts, and the many nuances of what negotiations constitute. The testimony is not *ipso facto* contradictory, rather Sarah's testimony is simply based on a narrower definition of "negotiation."

At that point, when the Decree was given to the parties and their counsel to review, signing the same became acceptance of the counteroffer. *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970).[1]

B. There Was No Oral Agreement and No Breach

David then claims that there was an "Oral Agreement" that the Decree would not be filed, but rather that Ms. McConnell would take the same for "further review." *Answering Brief,* page 5. David's claim does match the district court's decision. **APPX VIII:1519**. However, the district court's decision was not based on the evidence that was before it. David's testimony was not that there

[1] *Campanelli* also notes that "when a party to a written contract accepts it is a contract he is bound by the stipulations and conditions expressed in it, **whether he reads them or not**." *Id,* emphasis added.

was an "agreement," but merely that Ms. McConnell *told him* that he should sign now and she would review it later (which may be a malpractice issue but is not an "agreement"). **APPX IX: 1791-1792.** However, Ms. McConnell testified that she reviewed the Decree that day, and only when pushed did she then "concede" that she had not reviewed it very closely. **APPX IX:1721-1722**. Further, neither Ms. McConnell nor Ms. Cooley testified of an agreement to hold the Decree. In fact, Ms. McConnell's preliminary testimony was that she was flipping back through the Decree a few days later, before submitting it, and that is when she "noticed" the provision. **APPX IX: 1722-1723.** Ms. McConnell's consistent testimony was that she called Ms. Cooley after to discuss the inclusion of the SBP. **APPX IX: 1723-1724.** Ms. McConnell even testified that she would not have signed the document, if she did not believe that David had reviewed the same, that she did not specifically recall anyone being rushed, and that she herself had cleared her entire day to participate in the mediation. **APPX IX: 1720-1721.** The testimony was that the Decree was drafted around 2:30 or 3:00 p.m. **APPX IX: 1720**. That left the parties and their counsel at least two hours to review the Decree. It does not make sense, and at no time did Ms. McConnell testify, that she needed more time to review the Decree. Further, there would be

no purpose in tendering a copy of the *fully executed* Decree to Ms. Cooley if it was not truly "final." If David's claim: that only Ms. McConnell intended to engage in a further review were true; there was no reason to provide an executed copy to Ms. Cooley.

David's allegation was that he signed only so he didn't have to go back to Ms. McConnell's office. **APPX IX: 1783-1784**. Therefore, there was no reason for Ms. McConnell to have signed it, prior to reviewing it, and certainly no reason to provide a copy to Ms. Cooley, if David's signature didn't yet "count."

The district court's finding of an oral agreement is not supported by the testimony and evidence offered, nor is it supported by plain logic. As such there can be no "breach," of a non-existent agreement. However, even if there were such an agreement the testimony does not support a "breach."

Continued negotiations after an agreement or a judgment, especially where a party is on notice that the other party intends to uphold to original agreement do not prevent a party from relying on a signed contract. *Heard v. Fisher's & Cobb Sales & Distributors, Inc.*, 88 Nev. 566, 502 P.2d 104 (1972); Restatement (second) of Contracts § 59, § 61 (1978); *Pravorne,* supra; *C.f. Heffern,* supra; Testimony supported that there were conversations between Ms. McConnell and

Ms. Cooley that set up that exact expectation. Both Ms. Cooley and Ms. McConnell testified that Ms. Cooley stated that it was malpractice not to address the SBP. **APPX IX:1724**. The testimony makes it clear that Ms. Cooley did not intend to simply waive the SBP. Further, Ms. Cooley testified that she attempted to have further discussions with Ms. McConnell and even gave her a deadline to respond, after which she would submit the Decree. **APPX X: 1873**. Ms. McConnell could not recall if she had received such correspondence. **APPX X:1897- 1898**.

It should be noted that David's statement to this Court: that there were emails shown/presented as exhibits at trial, is flatly false. **APPX VII: 1180; APPX IX: 1700.**Emails were discussed, but none were admitted. Additionally, although *David's Answering Brief, page* 39, claims that Ms. Cooley filed the Decree "surreptitiously," within the same brief, he admits that Ms. Cooley informed Ms. McConnell of her intention to do so.

David's admission, that Ms. Cooley informed Ms. McConnell that they would either need to renegotiate or she would file the Decree is almost identical to *Heard*, supra. Just as there, it was proper for Ms. Cooley to file the Decree. There was a signed agreement that was being withheld. Ms. Cooley notified Ms.

McConnell that without some good faith attempts to discuss the issue, she would be submitting the Decree. Ms. McConnell did not respond. Therefore, under Nevada law, Sarah was well within reason to rely on the signed agreement for which she had negotiated, and well within reason to have the same entered by the Court.

C. Contract Law

Although the linchpins of this case are David's signature and the merger of the MOU, David continues to focus on contract formation principles. However he does so through a narrow lens that simply does not encompass the reality of contract law.

David claims that there was no affirmative agreement to an offer, no acceptance, no meeting of the minds, and no consideration. But "affirmative agreement" is only one means of acceptance. A party can also accept by performance, or by signing an agreement. Restatement (second) of Contracts § 50 (1978). An "acceptance" can become a counter offer by modifying the terms of the original offer, even when the original offeree signs the modified offer prior to sending it back. Restatement (second) of Contracts § 59. The MOU was 3 pages. **APPX I: 86-88**. The Decree was 39. **APPX I: 32-70** Using merely one's

own five senses, it is abundantly clear that the original "offer," had been modified. Therefore, signing the same was in fact "affirmative acceptance" of the counteroffer. Sarah has already discussed the "meeting of the minds" in her Opening brief. As for consideration, as this court noted in *Grisham v. Grisham*, 128 Nev. 679, footnote 3, 289 P.3d 230 (2012), "although *Mack [v. Estate of Mack,* 125 Nev. 80, 206 P.3d 98 (2009)] in a contract such as this, it is appropriate consideration for an agreement that the same will terminate the marriage. *See also*, NRS 123.080. In fact, during David's examination of Sarah in his case-in-chief, that was exactly what she testified. **APPX VII:1237-1238**.

It is also important to note that David's allegations, that part of why Sarah's NRCP 52(c) motion was denied to wit: that "invoking summary judgment prior to the court's decision on the merits of the parties' intent would not comply with the law of the case," is a point of clear legal error. As this Court has stated, a District Court cannot make a decision which becomes the "law of the case." Only the appellate court can make decisions which bind the lower courts under that doctrine. *Recontrust Co., v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818-819 (2014). Further, David's statement that "there was no trial upon which an *NRCP* 52(c) motion may be properly ruled upon," is egregiously false. There was a trial.

APPX V: 864. David rested his case in chief that day. **APPX VI:1005.** Therefore, the Motion was appropriate.

D. The SBP Is Community Property

Contrary to David's assertions, there is no clear precedent, either from this Court, or the legislature, which establishes in black and white, the status of survivor benefits in a retirement account. While Henson declined to find survivor benefits as part of the pension, *unless the decree specifically provides for a survivor beneficiary interest*, that is not an unequivocal denial of the community nature of the survivor beneficiary interest - rather it is merely a statement that the term "pension" does not include what the court found to be an optional benefit. *Henson v. Henson*, 130 Nev.814, 820, 334 P.3d 933, 937. Notably, the *Henson* case did not consider the possibility of a survivor beneficiary interest being an "omitted asset," if not addressed in the divorce. Henson merely states that the survivor beneficiary interest is not part-and-parcel of the pension itself.

In *Peterson v. Peterson*, Docket No. 77478, 463 P.3d 467 (Order of Reversal and Remand May 22, 2022), while based upon the admission of the

community nature of the SBP, this Court did in fact find that the same was therefore an omitted asset.

That said, Sarah would also note, the holding in Henson is based on the premise that if the employee picks an option other than the unmodified option with no survivor benefit, that the value of the benefit would be charged only to them. That however is inaccurate, and the alternate payee can end up paying one half of that cost, because PERS' default is to take the same off the top of the pension, before calculating the division.

As for David's argument that there is no contradiction between *Henson* and later cases, because of the statements in *Henson* that the only *pension* benefit which a spouse is entitled to is their community property interest in the unmodified allowance - that analysis disregards the fact that the Court in *Henson* never stated that there were no other community interests at play. What the Court in *Henson* found was that the SBP is not a pension benefit. The Court in *Henson* did not opine on the community nature of SBP, but rather as to whether the same was specifically a pension benefit.

Sarah acknowledges the court's recent unpublished decision in *Holguin v. Holguin*, but believes the same is in error and was not based on a complete analysis of the laws at issue.

David would like to contend that there was no agreement that the SBP was community property and by doing so, attempts to distinugish *Peterson* by claiming that the case stands for the premise that when there is an agreement to consider an asset community property, it can be treated as an omitted asset.

There are many things wrong with this premise. First, it is the Courts and the legislature who determine legal conclusions - not parties. Parties cannot contract to turn a separate property asset into a community asset - at least not without a separate ***unmerged*** agreement - any more than they can make alimony non-modifiable without an unmerged agreement (NRS 125.150(8)), rewrite the law surrounding child custody (*Rivero v. Rivero,* 125 Nev. 410, 429, 216 P.3d 213, 226-227 (2009), overruled on other grounds by *Romano v. Romano*, 138 Nev. Ad. Op. 1, 501 P.3d 980 (2022)) or contract around child support law (*Fernandez v. Fernandez,* 126 Nev. 28, 222 P.3d 1031 (2010)).[2] It is for that

[2] Parties can designate terms, which if left unchallenged in Court will be allowed. *Rivero,* supra. And generally where a stipulation is entered, the Court does not "double check," the legal terms of art parties assign to different assets or debts, but that does not change their actual character under the law.

reason that unmerged agreements exist. However, as the case law also makes clear -- the Court is not required (even if the parties agree) to maintain a settlement agreement as unmerged. In fact, the Court can direct merger without the parties' approval. *Day v. Day,* 80 Nev. 386, 389-390, 395 P.2d 321, 323 (1964). This Court did. The Decree, and the MOU were in front of the Court together as a single document. The Court read the document, which included the preamble David is relying upon, and *chose* to enter the merged Decree rather than annotating the Decree to be unmerged. This Court, and all counsel involved, are aware of the law. Further, *Day* is hardly new law. The Court, and counsel ***who drafted the Decree while standing together***, must be presumed to be aware of how to maintain an unmerged Decree and settlement agreement. There were at least three people trained in the law who reviewed this document, and none of them argued that the merger was improper.

At the point at which the Decree was taken before the Court therefore, the legal terms of art are given their meaning under Nevada Law. *Rivero,* supra. The Petersons (*Peterson,* supra.) could not stipulate as to the nature of the SBP in the district court - and the Appellate Court's decision simply acknowledged that there was no issue in controversy with relation to that fact.

That said, if this Court were to determtine that the Petersons were able to stipulate, once again that case is on point with the facts herein. David *did* stipulate when he signed the Decree. He made the choice to be bound by a contract he did not read. Therefore, as to whether the SBP was community property in *this case*, *Peterson* provides the appropriate answer.

While *Carlson* addressed the naming of a beneficiary in a divorce which occurred after retirement, the principle at issue, that the surviving spouse annuity was a benefit to which the wife was entitled after divorce, is relevant.

Both the district court's and David's rationale on the legislative history of NRS 125.155 is illogical. The argument that the legislature would have added language regarding the community property nature of SBP if they had intended the same is confusing at best. The reality is that *the legislature did add that language.* The plain reading of the statute, as well as the progress of the bill drafts makes that clear.

With respect to Marshal Willick's testimony and primer, while the Court found his testimony to be "inappropriate," and "did not utilize" the same it is still in the record and can be considered by this court, despite David's success in repetitous filings until he got his way. More importantly. the primer cited by

Sarah in her Opening brief is persuasive authority which can be considered by this court.

E. Merger of the Decree.

"Generally, failure to raise an argument in the district court proceedings precludes a party from presenting the argument on appeal." *Mason v. Cuisenaire*, 122 Nev. 43, 48, 128 P.3d 446, 449 (2006). In *Mason*, the Court noted that the District Court made no findings related to the issues Ms. Cuisenaire had raised on appeal. *Id* at 48. The necessity of having issues to be addressed on appeal raised before the District Court is to ensure that "the trier of fact ha[s an] opportunity to consider" the argument. *Petrilla v. Castillo*, Docket No. 67566 (Order of Affirmance, February 12, 2016).

David never raised the propriety of the merger language in the District Court - therefore the idea that the same was improper is not an appropriate argument to make before this Court. Prior to his Answering Brief, David did not argue the merger language was improper - rather he simply disregarded *Day* throughout the district court case. But, even if David had made the argument, the same still fails. First, it fails for the same reasons his arguments as to the impropriety of the inclusion of the SBP fail.

Additionally, as addressed already, the Court is not bound to accept a parties' agreement as to whether to merge a settlement agreement. The Court's Order merged the MOU and Decree, and that is the reality in which this appeal operates, regardless of David's preferences. David's reliance on *Ballin v. Ballin,* 78 Nev. 224, 371 P.2d 32 (1962), fundamentally fails. *Ballin* holds that an agreement *and a Decree* which **both** direct survival result in a separate agreement. It is important to note - that the *Ballin* court also stated, "[h]ad the decree before us not directed survival of the agreement, we would be required to determine what effect should be accorded the provision of the approved agreement that modification could occur only by further written agreement." *Id.* at 231. It was that question which *Day* answered when it extended and clarified the *Ballin* holding to specifically state: "We now take a further step and hold that the survival provision of an agreement is ***ineffective*** unless the court decree specifically directs survival." 80 Nev. 389. The facts of *Day* are directly on point -- there the agreement directed survival but the Decree the Court ordered did not. The wife moved to enforce the Decree, and the husband moved to dismiss the proceeding for enforcement, arguing that the wife must move forward under the agreement. The Supreme Court held that the agreement had merged, and perhaps,

most importantly stated that "[a]bsent such a clear and direct expression [of survival] in the decree we shall presume that the court ***rejected*** the contract provision for survival." *Id* at 389-390.

In other words, at the time the Court entered the Decree - inclusive of the merger language, it made a decision to reject the survival language of the MOU and what the parties intended or expected was no longer the question. This Court presumes that the district court makes at least a facile review of the files before it. *Vaile v. Eighth Judicial Dist. Ct.,* 118 Nev. 262, 271-273, 44 P.3d 506, 512-514 (2002). Therefore, this Court, without any evidence in the record to the contrary before it, must assume that the district court rejected the language of non-merger when it entered the Decree.

Whether the parties "negotiated" for the "merger" language is not relevant, and is an issue not properly before the Court. That said, as with the SBP itself, and as Sarah has addressed *ad naseum*, David's failure to read the Decree also prevents relief.

A judgment of the court must be based on substantial evidence. *Devries v. Gallio*, 128 Nev. 706, 709, 290 P.3d 260, 263 (2012). *See also, Kroger*

Properties & Develop. Inc., v. Silver State Title Co., 102 Nev. 112, 114-115, 715 P.2d 1328, 1330 (1986). Where there is *no evidence* the finding cannot stand.

Further, the Court's finding that David's notice to Sarah that he did not agree to the SBP operated as an effective rescission of the Decree. Assuming, *arguendo*, that this court finds it is appropriate to apply contract principles, there is no basis in law for the rescission.

> Rescission of a contract, however does not necessarily fail because the party seeking the rescission was unreasonable in relying upon the misrepresentation made by the other party. Even negligence on the part of the party seeking rescission will not bar equitable relief ***when the misrepresentation was made intentionally*** by the other party. A party who has made a false representation knowlingly and with the intention that the other party be deceived by it should not be allowed to profit fro the credulity or negligence of the party upon whom it had its intended effect.

Pacific Maxon, Inc., v. Wilson, 96 Nev. 867. 870, 619 P.2d 816, 817-818 (1980), emphasis added, internal citations omitted.

Sarah's Opening brief addresses the issues of fraud and misrepresentation. Sarah did not commit either as a matter of law.

Therefore, the Court's findings of an "oral agreement," simply cannot stand. Further, the Court's findings that merger was inappropriate, and that David's signature was voided by his notification that he "did not agree" to the SBP provision are errors of law.

F. Parol Evidence

David's contention, that parol evidence is appropriate is nonsensical in light of the law, and directly contradicted by the law he is specifically citing. First, David cites to *Kaldi v. Farmers Ins. Exchange,* 117 Nev. 273, 283, 21 P.3d 16, 22 (2001), for the premise that where an agreement is silent, parol evidence is appropriate to prove a separate oral agreement *which is not inconsistent with its terms*. David's testimony, regarding a supposedly preceding oral agreement, is not appropriate where the Decree is ***not silent***.

Then David cites to *Silver Dollar Club v. Cosgriff Neon Co.,* 80 Nev. 108, 110, 389 P.2d 923, (1964). *Silver Dollar* discusses ***subsequent*** oral agreements. Therefore, under this case evidence of negotiations which resulted in the MOU *are still not appropriate.*

David attempts to distinguish *Yee v. Weiss,* 110 Nev. 657, 877 P.2d 510 (1194), by implying that because the decree was 39 pages, his failure to read the

same was understandable. *Answering Brief*, page 28. However, what David misses is that in *Yee,* there was a change in ownership which effectuated a new lease. In other words, not only was the pertinent document one page, but Weiss was signing a new agreement, not one which was based upon a prior agreement. The very fact that the MOU was 3 pages and the Decree was 39 alerted David that there were obviously changes to the MOU and therefore, his failure to review was not reasonable Further, 39 pages is hardly lengthy in terms of a settlement agreement/Decree of Divorce.

Sarah has already addressed that no evidence supports the finding of an agreement to hold the decree, nor of a finding that Ms. McConnell was conclusively not informed of Ms. Cooley's intention to submit the decree.

The use of parol evidence to determine whether there was an oral agreement on the SBP, and the findings related to the decree being improper are in error.

G. Meeting of the Minds

Sarah has already provided substantial proof that David's recitation of facts, such as that the SBP were intentionally omitted because he did not consent to naming Sarah the beneficiary, are not reflected by the evidence itself. Nor are

David's contentions regarding merger, consideration and negotiations, addressed herein. The reality is that the evidence and law which Sarah has provided in her Opening Brief and herein make it clear that the Decree is the only appropriate agreement.

H. NRCP 60(b)

Sarah has briefed the law surrounding mistake and excusable neglect. David provides no contravening authority, but merely conclusions which Sarah has already shown to be in error.

David's Answering Brief also cites to NRCP 60(b)(6), however NRCP 60(b)(6) is mutually exclusive of sections (1)-(5). *Vargas v. J Morales, Inc.,* 138 Nev. Ad. Op. 38, 510 P.3d 777, 782 (2022), *Byrd v. Byrd*, 137 Nev. Ad. Op. 60, 501 P.3d 458, 463 (2021). David has no basis to claim relief under NRCP 60(b)(6).

Sarah's Opening brief discusses the Court's finding of fraud in great detail. David's factual asserts have been addressed. The evidence David claims exists, simply does not. There is simply insufficient evidence to support the Court's finding of fraud, and the law does not support that finding.

As far as David's contention that Ms. Cooley and Sarah committed a fraud on the court by presenting a ***signed*** Decree to the Court after knowing that David had "objections," the law does not support that conclusion. As David pushes, Sarah stated that signing a new Decree would cost him (there would need to additional consideration) and Ms. Cooley stated that further negotiations would be necessary if the signed Decree was not filed. In other words, the parties had a valid contract; creating a new contract would mean negotiating for further consideration, just as anticipated by this court in *Zhang v. Eighth Judicial Dist. Ct.,* 120 Nev. 1037 1041, 103 P.3d 20 23 (2004), abrogated on other grounds by *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 225, 181 P.3d 670 (2008).

There was a signed agreement. It was appropriate for Sarah to provide the same to the Court for entry. A party's "buyer's remorse" is insufficient to rescind a valid agreement and allowing a party to simply rescind an agreement for the same, or based on his own negligence, will open a slew of cases *and* prevent parties from being able to rely on the benefit of the bargain made. Such a change would violate public policy regarding parties ability to rely upon the same, and the public policy allowing parties to rely on the finality of judgments.

David's attempt to turn Sarah's testimony, that she would have expected additional provisions to be pointed out to her, that she did not direct the SBP to be included in the MOU, and that she was not of the opinion that David wanted to give her the SBP into an admission of wrongdoing, is belied by the uncontroverted testimony. Sarah also testified that it was her understanding that the SBP was part-and-parcel of the PERS; although Sarah's belief may not have been correct, it shows that there was no intention to defraud or "surreptitiously" insert a provision. **APPX VII:1230-1231**. Sarah also testified that her expectation was that *her attorney* would be the one to point out any changes to her. **APPX VII:1220** . Clearly, there was no intention to "dupe" David. If there is any misconduct, it would be malpractice by David's attorney, not misconduct by Sarah or Ms. Cooley.

There was no fraud by Sarah, and no fraud or Breach of Candor by Ms. Cooley. There is no basis under the law to set aside the Decree under NRCP 60(b).

I. NRCP 52(c)

David's attempts to distinguish between a nonjury trial and an evidentiary hearing have no support, nor has he provided any citation for the

same. David's distinction appears to be grounded in the differences between a pretrial evidentiary hearing and a *jury trial*. *See Trump v. Eighth Judicial Dist. Ct.*, 109 Nev. 687, 857 P.2d 740 (1993). In Family Court, the terms "evidentiary hearing," and "trial" are used interchangeably, and operate under the same definition. The reality is that regardless of what term any of the parties or the Court used, all of the orders were clear: the proceeding was to take evidence on 1) the intent of the parties; 2) whether the SBP was community property; and 3) how the same should be addressed. That is clearly more than a *single* issue, but more importantly, David has *rested* his case-in-chief, and therefore, the Motion was appropriate as David had been fully heard on the issues on which Sarah was requesting judgment under the rule.

Part of the reason the 52(c) Motion was filed one year later was that there were several attempts to hold the second day of the trial. Further, Sarah was not required to file or orally request her Motion at the exact close of David's evidence. She is able to make that Motion at any time *after* David rested and until the time limit set forth in the rule, 28 days after service of the written judgment. NRCP 52(b)-(c).

The original first day of trial occurred in front of Judge Moss. David rested on that day. **APPX VI:1005** . Therefore, Sarah had the right, after that time to file a NRCP 52(c) Motion. The District Court had the authority to hear that Motion. Ultimately, before the trial was concluded, but after the Motion was filed, Judge Steel simply vacated and disregarded the first day of trial and restarted. Sarah's Motion was appropriate and Judge Steel's decision, that she was unable to decide the Motion on its merits and allowing David to "restart" after the close of his evidence was in error.

CONCLUSION

Based on the foregoing, Sarah requests that the Court grant reversal and remand on the issues appealed and set forth in Sarah's *Opening Brief.*

By: _____
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this appellate brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this appellate brief has been prepared in a proportionally spaced typeface using Word Perfect X5 in 14-point Times New Roman style;

2. I further certify that this appellate brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5090 words;

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

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

Dated this 23rd day of November, 2022.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23RD day of November, 2022, I caused to be served the ***Appellant's Reply Brief*** 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 Lubritz

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