IN THE SUPREME COURT OF NEVADA

JOHN DATTALA,

Appellant,

vs.

PRECISION ASSETS; ACRY DEVELOPMENT LLC; WFG NATIONAL TITLE INSURANCE COMPANY,

Respondents.

Case No. 84762

APPEAL
from the Eighth Judicial District Court, Department XIV
The Honorable Adriana Escobar, District Judge
District Court Case No. A-19-794335-C

RESPONDENT WFG NATIONAL TITLE INSURANCE COMPANY'S ANSWERING 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 judges of this court may evaluate possible disqualification or recusal.

1. Law firms that have appeared for Respondent, WFG National Title Insurance Company ("WFG"): Wright, Finlay & Zak, LLP; Wolfe & Wyman LLP

2. Any parent corporation of WFG: WFG is a wholly-owned company of Williston Financial Group.

3. Any publicly held company that owns 10% or more of WFG's stock: there is no publicly held company that owns 10% or more of WFG's stock.

DATED this 4th day of October, 2022.

WRIGHT, FINLAY & ZAK, LLP

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NRAP 17 ROUTING STATEMENT

Appellant John Dattala ("Dattala") fails to demonstrate that this appeal should be retained by the Supreme Court under any of the grounds enumerated in NRAP 17(a)(1)-(12). "[P]arty who believes that a matter presumptively assigned to the Court of Appeals should be retained by the Supreme Court may state the reasons as enumerated in (a) of this Rule in the routing statement of the briefs…" NRAP 17(d). Dattala concedes that this appeal is presumptively assigned to the Court of Appeals in his Opening Brief ("AOB"). AOB at 1. However, his Routing Statement fails to raise any applicable grounds for retention under NRAP 17(a). That this appeal "addresses matters of public policy" is not a cognizable basis for retention under NRAP 17(a). *Cf*. NRAP 17(a)(12) ("[m]atters raising as a principal issue a question of statewide public importance"). Nor does a "direct conflict between statutes" implicate NRAP 17(a). *Cf*. *Ibid*. ("an issue upon which there is an inconsistency in the published decisions…or a conflict between published decisions of the [Court of Appeals or the Supreme Court]."). Dattala fails to cite any of the grounds under NRAP 17(a) and/or cogently present reasons implicating grounds thereunder. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is Dattala's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Accordingly, WFG requests that this appeal be routed to the Court of Appeals for consideration.

I. ISSUE PRESENTED[1]

1. Whether the district court properly granted summary judgment concluding that, as a matter of law, no agency relationship existed between WFG and an independent contractor hired by WFG's vendor where the undisputed record shows that WFG did not employ, control or compensate said contractor, Dattala proffered no evidence to the contrary, and Dattala opposed summary judgment relying on a speculative interpretation of WFG's interrogatory response.

2. Whether the district court properly denied reconsideration of summary judgment where Dattala relied on evidence that he failed to obtain and disclose during discovery, evidence consisting of inadmissible hearsay, and findings deemed admitted solely against non-WFG parties for failure to defend the underlying lawsuit.

II. STATEMENT OF FACTS

On or about November 14, 2008, Dattala obtained title to 59 Sacramento Drive, Las Vegas, NV 89110 ("59 Sacramento"). 7 JA[2] 1720. WFG provided

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[1] This Answering Brief addresses only those issues arising from the district court's summary judgment, and denial of reconsideration thereof, adjudicating causes of action against WFG. Appellant also appealed from separate judgments involving causes of action against non-WFG parties not addressed herein.

[2] "JA" refers to the Joint Appendix filed concurrently with Appellant's opening brief on August 21, 2022, including its supplement filed on September 30, 2022 to include the transcript of the October 13, 2021 Prove-Up Hearing, which led to the district court's entry of the Default Judgment discussed herein (10 JA 2047-2207).

independent title analysis and escrow services for a subsequent sale involving 59 Sacramento. *See* 2 JA 262, 271; 7 JA 1722. WFG engaged Simple Signings, LLC ("Simple Signings"), a third-party vendor providing notary services, to handle Dattala's execution of an Affidavit of Grantor regarding 59 Sacramento. 7 JA 1720-21. WFG does not claim any current right, title or interest in the subject real properties, including 59 Sacramento. 7 JA 1722.

WFG generally contracts with vendors like Simple Signings to obtain signatures on documents used in escrow, and where required, the notarization of signatures. *See* 7 JA 1722, 1724; *see also* 2 JA 271, 281-84. Simple Signings, in turn, assigns independent notaries or signing agents, like Lilian Medina ("Medina"), to handle Dattala's execution and notarization of said Affidavit. *See* 7 JA 1721; *see also* 2 JA 270, 287, 304; 5 JA 1131-32. WFG did not have any control to hire or fire Medina. 7 JA 1722, 1724; 2 JA 271, 287, 304. Nor is there evidence that WFG directly contracted with Medina for any services or otherwise authorized her to act on behalf of WFG. *See* 7 JA 1722, 1724; *see also* 2 JA 271.

Moreover, Medina was not an employee of WFG and did not perform any title analysis, escrow services or insurance underwriting on behalf of WFG. 7 JA 1721-22, 1724; *see also* 2 JA 271, 308. Thus, WFG has never provided any training or supervision regarding Medina's notary activities, and WFG did not supervise the

details of her work relating to Dattala's execution and her notarization of the Affidavit in this case. 7 JA 1721-22, 1724; *see also* 2 JA 270, 308; 5 JA 1122-23, 1131-32. Nor did WFG exercise any degree of control over Medina's hours and location of employment. 7 JA 1723; *see also* 2 JA 271, 308.

Simple Signings was paid as a vendor out of the escrow funds rather than by WFG. 7 JA 1724; *see also* 2 JA 271. Medina, in turn, was paid by Simple Signings as an independent contractor for the execution and notarization of the Affidavit of Guarantor. *See* 7 JA 1721-22, 1724; *see also* 2 JA 271, 304.

III. STATEMENT OF THE CASE

A. Summary Judgment Proceedings.

Dattala commenced the underlying action on May 7, 2019, and filed his operative pleading, i.e. Second Amended Complaint, on January 31, 2021 ("SAC"). 1 JA 1, 182. The SAC alleged four causes of action against WFG, among others[3] – Quiet Title (First), Declaratory Relief (Second), Negligence Per Se (Fifth) and Failure to Supervise, Inadequate Training and Education (Sixth). *See generally* 1 JA

[3] SAC also alleged causes of action against co-defendant Medina based on alleged negligent services performed in connection with certain sale transactions handled by WFG. *See* 1 JA 193-98. Liability alleged against WFG under the Fourth and Fifth causes of action is derivative of the alleged negligent acts of Medina and rests upon Appellant's theories that Medina acted as WFG's employee or agent in regards to those acts. *See* 1 JA 183, 187-89, 194-95.

182-200. WFG filed its Answer to the SAC on February 16, 2021, specifically denying the allegations that make up the aforementioned causes of action asserted against WFG, and affirmatively stated various affirmative defenses, including that:

SEVENTH AFFIRMATIVE DEFENSE

(Direct and Proximate Result of Other Parties)

> W[FG] *[sic]* is neither liable nor responsible to Plaintiff herein for the alleged damages or injuries to Plaintiff, if any, whatsoever, because any damages or injuries sustained by Plaintiff herein were the direct and proximate result of the **independent**, intervening, superseding **negligence and/or intentional conduct** of Plaintiff and/or **other parties and their agents, servants or employees**.

See 1 JA 214-215, 217 (emphasis added).

On August 23, 2021, WFG filed its Motion for Summary Judgment ("MSJ") pursuant to NRCP 56(a), arguing that WFG is entitled to judgment as a matter of law against Dattala as to all causes of action in the SAC because (1) WFG claims no interest in the subject real properties and (2) WFG is not liable for services performed by an unknown third party/codefendant – i.e. Medina – hired by its notary services vendor, Simple Signings, whose work was not supervised, controlled or compensated by WFG. *See* 2 JA 253-255. As support, the MSJ cited and attached evidence showing that WFG contracted with an independent signing/notary services vendor to handle the allegedly negligent execution of certain affidavit by Dattala. *See* 2 JA 255, 280-87. The MSJ also cited and attached Medina's deposition

testimony confirming that she was assigned and directed by Simple Signings to perform the services at issue, she was paid by Simple Signings for said services, she is a contractor or non-employee of Simple Signings, and her only connection to WFG is that Simple Signings was referred work from WFG. *See* 2 JA 256-58, 288-335. Additionally, WFG submitted written testimony of its escrow officer who handled the transactions underlying Medina's signing/notary services corroborating Medina's testimony and confirming that WFG did not supervise the details of Medina's services, did not independently pay Medina, did not control Medina's hours and location of employment, and had no right to hire or fire Medina. *See* 2 JA 269-71.

Dattala responded with a six-page Opposition filed on September 13, 2021, defending only the Fifth and Sixth causes of action ("MSJ Opp"). *See generally* 5 JA 1092-1097. Dattala's Opposition did not dispute the absence of any employment relationship between WFG and Medina. *See* 5 JA 1093. Instead, Dattala argued that common law agency relationship imputed liability on WFG for Medina's notarial acts. *Ibid*. Specifically, Dattala contended that "WFG ratified Medina's action because it closed the escrow associated with her affidavits." *See* 5 JA 1095. Further, Dattala argued that the existence of agency is a question of fact. *See* 5 JA 1095-96. As support, Dattala cited to his own SAC wherein he alleged that Medina "was

employed and/or the agent of WFG and was within her scope of employment or her agency relationship in performing the [notarial] acts" 5 JA 1100. Confusingly, Dattala also cited a couple of WFG's responses to Requests for Admission in which WFG admitted that it did **not** provide any training or education to Medina. *See* 5 JA 1122-23. Finally, Dattala cited WFG's response to Interrogatory No. 12, in which WFG referred to Medina as "an independent notary / signing agent." 5 JA 1132.

A hearing was convened for the MSJ on September 28, 2021, during which Dattala conceded that no employment relationship existed between WFG and Medina. 9 JA 1907. In rejecting Dattala's Opposition arguments, the trial judge specifically noted that there is insufficient evidence to support any genuine issue for trial as to whether Medina was WFG's agent. 9 JA 1909 ("…I've reviewed, and frankly… I don't believe that there's sufficient…[or] any evidence that would place Ms. Medina…as an agent of WFG."). In response, Dattala proposed that WFG's response to Interrogatory No. 12 admitted the agency relationship, which the trial judge rejected. 9 JA 1910. Thus, the district court concluded that no genuine issues of material fact remained as to the alleged agency relationship, and granted WFG's MSJ as a matter of law ("MSJ Order").[4] 7 JA 1720-25.

[4] The district court also found that WFG does not claim a current interest in the subject real properties warranting summary judgment as to Plaintiff's First and

B. Denial of Summary Judgment Reconsideration.

Following the above ruling in favor of WFG on summary judgment, on November 8, 2021, Dattala filed a Motion for Reconsideration of the MSJ Order ("MFR") arguing that factual findings in a subsequent default judgment against co-defendants, including Medina ("Default Judgment"), contradicts the MSJ Order. 8 JA 1731-33. However, the Default Judgment recited that it was based on "[Medina] [failure to] participate[] in the case for many months, including failing to file a pretrial memorandum, failing to appear at calendar call and failing to appear for jury selection…" 7 JA 1534. Thus, as "appropriate sanction for Medina's failure to participate in the case", the district court ordered Medina's answer be stricken from the record and certain "paragraphs of the SAC that directly address Medina are deemed admitted". 7 JA 1543.[5] Based on the admitted allegations, the district court awarded damages in favor of Dattala against Medina. 7 JA 1554. Critically, nothing in the Default Judgment reflected the district court's intent to modify or otherwise disturb the findings adjudicated and made on WFG's MSJ. *See generally*, 7 JA 1532-1554. Nor was WFG named as a judgment debtor in relation to the damages award

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Second causes of action, which, as discussed herein, Appellant does not appear to contest in this appeal. 7 JA 1722.

[5] Similar sanctions were entered against co-defendant, Eustachius C. Bursey ("Bursey"), which is not relevant here given the focus of Appellant on those allegations deemed admitted against Medina. 7 JA 1535; *see also* AOB at 32.

recited therein. *See* 7 JA 1554.

On November 22, 2021, WFG filed its Opposition to the MFR ("MFR Opp") arguing that (1) Dattala failed to demonstrate any grounds for reconsideration and (2) Dattala's Default Judgment does not preclude WFG from disputing and obtaining summary judgment on Dattala's claims against WFG. *See* 8 JA 1798-1803. Specifically, WFG cited this Court's ruling in *LoMastro v. Am. Family Ins. Grp.* (Estate of LoMastro), 124 Nev. 1060, 1067, 195 P.3d 339, 344 (2008), which recognized that "[g]enerally, entry of default against one codefendant who fails to answer or whose answer is stricken does not preclude an answering codefendant from contesting liability." 8 JA 1802. As the Default Judgment did not name WFG and WFG was an answering codefendant contesting the same allegations deemed admitted therein, the Default Judgment did not apply to WFG warranting reconsideration of the MSJ Order. *See* 8 JA 1801-03.

In his Reply to the MFR Opp filed on December 2, 2021, Dattala maintained that inconsistency between the MSJ Order and Default Judgment meant "material factual dispute" remained. 8 JA 1807-08. Conceding that *LoMastro* applies to resolve the conflict between the MSJ Order and Default Judgment, Dattala argued, however, that WFG is subject to the Default Judgment because it failed to participate in the default judgment proceedings despite notice that it would be bound. *See* 8 JA

1810-11. Contrary to this contention, Dattala acknowledged during the October 13, 2021 prove-up hearing underlying his Default Judgment that the application for dispositive sanctions was unrelated to claims against WFG. *See* 10 JA 2051-54 ("We only have two defendants left after these summary judgment motions which there aren't orders on it… All the allegations that are unopposed against Medina and Bursey are facts. And so that pretty resolves my client's case…"). WFG similarly voiced its concerns regarding the confusion and prejudice that may occasion from facts deemed admitted against defaulting parties but not WFG. *See* 10 JA 2054-55, 2066. On this understanding, it was unnecessary for WFG to participate further in Dattala's prove-up proceeding against the defaulting co-defendants. *See* 10 JA 2079.

Despite both discovery/briefing on Dattala's MFR having been concluded, Dattala filed a Declaration of [Bursey] in support of his Reply on December 8, 2021 ("Bursey Declaration"). 8 JA 1814. In the cover pleading to the Bursey Declaration, Dattala improperly characterized the filing as evidence that "Medina 'was representing WFG and was there on behalf WFG.'" 8 JA 1814. The declaration itself purports to be Bursey's written testimony recounting certain conversations with Medina dated before Dattala's underlying lawsuit. 8 JA 1817.

On January 25, 2022, the district court entered an Order Denying Dattala's MFR ("MFR Order") addressing in detail the alleged conflict between the MSJ

Order versus the Default Judgment and the untimely Bursey Declaration. *See generally*, 8 JA 1829-33. After reciting the applicable grounds for reconsideration, the district court initially noted that Dattala did not argue reconsideration based on manifest injustice or an intervening change in law. *See* 8 JA 1830. Turning next to the Bursey Declaration, the district court found that Dattala failed to demonstrate "why this declaration was not obtained during the discovery period" and "[Dattala] could and should have obtained this testimony during the discovery period." 8 JA 1830-31. Thus, the Bursey Declaration was not "newly discovered or previously unavailable" evidence warranting reconsideration. *Ibid*. Alternatively, the district court disregarded Bursey's testimony as inadmissible hearsay. *See* 8 JA 1831. As for the purported conflict between the MSJ Order and Default Judgment, the district court agreed with WFG's analysis of *LoMastro*, reasoning that:

> Here, the Bursey/Medina Default Judgment was entered because certain allegations by Plaintiff in his complaint were deemed admitted via default against those parties only because they failed to appear and/or participate in the litigation. To the contrary, WFG has actively participated in the litigation by filing its answer and asserting affirmative defenses, defending against those same allegations deemed admitted against Bursey/Medina in discovery and presenting admissible evidence to this Court to refute Plaintiff's allegations. Further, in considering the evidence presented by WFG at the summary judgment stage to refute Plaintiff's allegations that Medina was an employee or agent of WFG, this Court found Plaintiff's allegation of an employee or agency relationship to be without merit and unsupported by the evidence presented by Plaintiff. Thus, Plaintiff has not presented this Court with any sufficient legal argument or evidence

> to support reconsideration of the WFG Order and merely reargues points previously raised in its Opposition to WFG's Motion for Summary Judgment. Accordingly, this Court rejects Plaintiff's argument.

Ibid. Thus, entry of the Default Judgment did not produce genuine issues of material fact as to the agency relationship warranting reconsideration of the MSJ Order as a manifest error of law. *See* 8 JA 1830, 1832.

Dattala's appeal followed.

IV. STANDARD OF REVIEW

"A district court's decision to grant summary judgment is reviewed de novo." *Martel v. HG Staffing, LLC*, No. 82161, 2022 Nev. LEXIS 54, at *8 (Aug. 11, 2022) (unpublished disposition) (quoting *A Cab, LLC v. Murray*, 137 Nev., Adv. Op. 84, 501 P.3d 961, 971 (2021)). "Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law." *Id*.; *see also* NRCP 56(a) (indeed, the trial judge "**shall** grant summary judgment" when this standard is met). Not all factual disputes defeat a properly supported motion for summary judgment; the dispute must be over a material fact. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005) (citing *Liberty Lobby*, 477 U.S. 242, 247-48 (1986)). Further, "[a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id*.

121 Nev. at 731, 121 P.3d at 1031. As for the burden upon the party opposing a properly supported summary judgment motion, this court has often stated that:

> [T]he nonmoving party may not defeat a motion for summary judgment by relying "on the gossamer threads of whimsy, speculation and conjecture." As this court has made abundantly clear, "when a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue."

Id., 121 Nev. at 730-31, 121 P.3d at 1030-31 (internal citations omitted).

Additionally, the district court's factual findings in a summary judgment order will not be disturbed unless they are clearly erroneous and are not based on substantial evidence. *Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., Ltd. Liab. Co.*, 130 Nev. 834, 838, 335 P.3d 211, 214 (2014) (citing *Otak Nev., L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. 799, 312 P.3d 491, 496 (2013) (quoting *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 270 P.3d 1259, 1262 (2012))). The burden rests on the Dattala to show that the findings and judgment of the trial court were not based upon substantial evidence or were clearly erroneous. *Nev. Credit Rating Bureau v. Williams*, 88 Nev. 601, 607, 503 P.2d 9, 13 (1972).

Finally, this court generally reviews the district court's decision to grant or

deny a motion for reconsideration for an abuse of discretion. *See R.J. Reynolds Tobacco Co. v. Eighth Judicial Dist. Court*, 138 Nev. Adv. Op. 55, 514 P.3d 425 (2022) (citing *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)). The same deferential standard of review applies to the district court's evidentiary rulings. *See M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008); *See Farmer v. State*, 133 Nev. 693, 702, 405 P.3d 114, 123 (2017) (evidentiary decisions by a district court are reviewed for an abuse of discretion). A district court abuses its discretion only when "no reasonable judge could reach a similar conclusion under the same circumstances." *Rubin v. Rubin* (In re *Guardianship of the Person & Estate of Rubin*), 137 Nev. Adv. Op. 27, 491 P.3d 1, 6 (2021) (quoting *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014)).

V. SUMMARY OF ARGUMENT

District court properly granted summary judgment when Dattala failed to adduce any evidence supporting his agency allegations. Dattala then attempted to fabricate a record for reconsideration, which the district court rightfully rebuffed. In lieu of presenting any applicable authority or cogent analysis of how the district court erred, Dattala's opening brief essentially argues that he should prevail because three documents contradict the MSJ Order. But as detailed herein, each of these

documents were either properly excluded from review or simply do not show for what Dattala purports them to show.

Dattala first points to WFG's interrogatory response and argues that the district court erroneously ignored it as WFG's admission that Medina was "its agent" or "[WFG's] signing agent." However, Dattala's argument irrationally, speculatively mischaracterizes the actual interrogatory response, which reads that Medina is an "independent notary / signing agent" without any relational or associational wording. Moreover, rather than ignore this purported evidence, the district court found that the phrase "signing agent" viewed in context of the suit must have been referring to Medina's job title rather than an admission of agency. Dattala did not present any evidence that the response was intended by WFG to admit that Medina was its agent, an issue that WFG had contested throughout the litigation. In short, while proof should ordinarily be construed in light most favorable to the nonmovant on summary judgment, summary judgment may not be negated by unfounded defenses that are predicated upon irrational, whimsical, or speculative arguments. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030 ("nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation and conjecture") (internal quotations omitted); *Collins v. Union Federal Savings and Loan*, 99 Nev. 284, 300, 662 P.2d 610, 621 (1983)). The district

court did not err by rejecting Dattala's irrational and speculative argument.

Dattala next highlights two new documents presented for the first time on his MFR: 1) Default Judgment against Bursey/Medina only; 2) Bursey Declaration, and argues that they, too, contradict the MSJ Order. The district court rejected the former as non-binding upon WFG and refused to consider the latter as "newly discovered evidence" or inadmissible hearsay. Dattala does not identify or discuss how the district court erred in these determinations. Instead, Dattala seem to believe that the fact these documents contradict the MSJ Order entitles him to reversal. However, neither WFG nor the Court is responsible for identifying or establishing error in the district court's decision; these burdens rest squarely upon Dattala, which he has failed to carry. *See, e.g., Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on Dattala."); *State v. Stanley*, 4 Nev. 71, 4 Nev. 73, 75 (1868) ("[T]he burden of establishing error is upon the Dattala."); *see also Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is Dattala's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

For these reasons, this Court should affirm.

VI. ARGUMENT

A. The District Court Properly Granted Summary Judgment In Favor WFG.

A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal. *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (citing *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911 (1971); *Harper v. Lichtenberger*, 59 Nev. 495, 92 P.2d 719 (1939)). Dattala's appeal of the MSJ Order essentially relies on three documents: WFG's response to Interrogatory No. 12, the Default Judgment, and the Bursey Declaration. *See* AOB 32-33. However, neither the Default Judgment nor the Bursey Declaration existed when the district court granted summary judgment in favor of WFG. Thus, neither document should be considered in determining the propriety of district court's grant of summary judgment.

Similarly, Dattala waived any argument regarding an employment relationship between WFG and Medina, e.g. liability under *respondeat superior* doctrine, as he conceded the absence of any employment relationship in opposing WFG's MSJ. *See* 5 JA 1093 ("…WFG alleges that Medina was not an employee and WFG did not supervise her; However, missing completely from the Motion is the failure to address the principal / agency relationship between WFG and Medina"); *see also* 9 JA 1907 ("…I agree that it doesn't appear that Medina was an employee [or was in] an employee relationship with WFG…"). Instead, Dattala opposed

summary judgment solely based on common law agency. As such, this Court should also disregard any argument regarding an employment relationship between WFG and Medina.

The balance of arguments lacks merit because 1) Dattala fails to demonstrate how the district court's finding that reference to a "signing agent" in WFG's interrogatory response referred to Medina's job title was clearly erroneous; and 2) the district court correctly determined that Dattala failed to establish agency by ratification.

1. The district court correctly found that WFG's reference to a "signing agent" was made to Medina's job title.

Dattala argues that summary judgment should be reversed because "WFG itself described Medina as its agent." AOB 32. Dattala contends that this fact is evidenced by WFG's response to Interrogatory No. 12. *Ibid*. (citing 5 JA 1132). Dattala asserts that despite having directed the trial judge to this fact, she "cavalierly dismissed WFG's [own] descri[ption] of Medina as their 'signing agent' as "substance over form." AOB at 6. This argument, however, relies on several mischaracterizations of the record.

First, Dattala's paraphrase blatantly mischaracterizes the actual language of WFG's response to Interrogatory No. 12, which recites:

INTERROGATORY NO. 12:

> State with specificity all actions taken and communications evidencing your supervision of Lilian Medina on April 29, 2019.
>
> **[RESPONSE TO] INTERROGATORY NO. 12:**
>
> In addition to the General Objections, WFG further objects to this Interrogatory on the grounds that it is vague and ambiguous. Without waiving any objections, after making reasonable inquiry, and on information known or readily available to it, WFG has been unable to identify information responsive to this Interrogatory. **Lilian Medina is an independent notary / signing agent and WFG has no responsibility to supervise her actions.**

5 JA 1132 (emphasis added). Nothing in WFG's actual response contain any relational language or implies that WFG viewed Medina as its agent. Nor did Dattala adduce any other evidence to demonstrate that WFG intended its response as an admission of agency relationship with Medina, although WFG took the exact opposite position in its pleading and MSJ. Thus, Dattala's paraphrase of WFG's interrogatory response as "WFG…describe[ing] Medina **as its agent**" or "…**as [WFG's] signing agent**" is a misstatement and borderline sanctionable in light of the underlying record. AOB at 6, 32; NRAP 28.2(a)(3) (in presenting his brief, Dattala's counsel certified every assertion in the briefs regarding matters in the record has support in the appendices of documents); AOB 42-43 (counsel's certification).

Second, the district court did not "cavalierly" ignore this purported evidence of agency as Dattala suggests. *See* AOB at 6. Rather, the district court specifically

addressed this purported admission of agency relationship at the summary judgment hearing, and found that WFG's interrogatory response referred to Medina's job title:

> MR. CHILDS: If you look at Exhibit 9, interrogatory 12, their response to interrogatories, Lillian Medina is an independent notary, slash, signing agent, and WFG has no responsibility to supervise her actions. They're saying she's an agent. Those are their words, signing agent. It's the very last -- it's the very last page, second, third to last page of my opposition. So they -- they use the word agent, but so I understand you've made your decision. That's one of -- I just want to make that clear on the record. It's obviously in the record. It's, like, attached. So thank you.
>
> THE COURT: Mr. Lancaster's?
>
> MR. LANCASTER: No. She was a signing agent as a third-party independent contractor. That was her job. That was her title as an independent contractor of Simple Signings. WFG --
>
> THE COURT: **I agree with that. And I think it's substance over form. And I don't believe that that agent, that name there or that word where Mr. Childs is, you know, directing us has to do with the agency relationship, the classic agency relationship that is the subject of this first motion for summary judgment. So this is granted**.

9 JA 1910 (emphasis added). Dattala does not argue that this finding was clearly erroneous and not based on substantial evidence. *Hannam*, 114 Nev. at 357, 956 P.2d at 799 (1998) ("A district court's findings [of fact] will not be disturbed unless they are clearly erroneous and are not based on substantial evidence."). Therefore, Dattala failed to establish that summary judgment should be reversed or vacated based on WFG's response to Interrogatory No. 12.

2. District court correctly determined that no agency relationship existed between WFG and Medina.

Dattala next spends five pages of his opening brief regurgitating general principles of agency law without any analysis as to which (if any) and how these principles apply to this Court's review. *See generally* AOB 33-37. Further, Dattala's conclusory assertion that that "WFG ratified Medina's action because it closed the escrow associated with her fraudulent affidavits" lacks any analysis of the elements for establishing agency by ratification. *See* AOB 38. This Court generally follows the Restatement (Third) of Agency approach governing agency by ratification. *See, e.g.*, *Deutsche Bank Nat'l Tr. Co. v. Saticoy Bay, LLC*, 134 Nev. 930, 422 P.3d 1231, 2018 Nev. Unpub. LEXIS 687, *2-3 (2018) (unpub. disp.); *Fannie Mae v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 133 Nev. 1007, 408 P.3d 543, 2017 Nev. Unpub. LEXIS 1131, *2 (2017) (unpub. disp.); *Chase Home Fin. LLC v. 10224 Black Friar CT Tr.*, 408 P.3d 554, 2017 Nev. Unpub. LEXIS 1130, *2-3 (2017) (unpub. disp.). Under this approach, ratification does not occur unless four requirements are met: (1) the act is ratifiable; (2) the person ratifying has capacity; (3) ratification is timely; and (4) ratification encompasses the act in its entirety. Restat 3d of Agency, § 4.01(3). The burden rests on the Dattala to prove facts establishing ratification. *See Henningsen v. Tonopah & G. R.R.*, 33 Nev. 208, 242, 111 P. 36, 40 (1910) ("burden is upon the party who relies upon a ratification to prove that the principal, having

such knowledge, acquiesced in and adopted the acts of the agent"); *see also* Restat 3d of Agency, § 1.02, cmt. d ("The party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence").

Initially, Dattala has failed to analyze how evidence before the district court met the Restatement standard for establishing agency by ratification. "It is Dattala's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Regardless, Dattala's agency by ratification argument fails as a matter of law for several reasons. **First**, Medina did not engage in any ratifiable act. For an act to be ratifiable, the actor must have "acted or purported to act as an agent on the [WFG]'s behalf." Restat 3d of Agency, § 4.03. Based on substantial, undisputed evidence, the district court found that Medina was an independent notary that one of WFG's vendor assigned to handle the notarial acts allegedly giving rise to Dattala's damages. 7 JA 1720-21, 1724; 2 JA 270-71, 287, 304; 5 JA 1131-32. Medina was not an employee of WFG as to these notarial acts, which as mentioned, Dattala conceded on summary judgment. 7 JA 1721-22, 1724; *see also* 2 JA 271, 308. Medina was compensated by Simple Signings for the notarial acts she performed. *See* 7 JA 1721-22, 1724; *see also* 2 JA 271, 304. WFG never provided any training

or supervision regarding Medina's notary activities. 7 JA 1721-22, 1724; *see also* 2 JA 270, 308; 5 JA 1122-23, 1131-32. Dattala neither disputed these facts nor presented any contrary facts on summary judgment showing that WFG was itself obligated to perform the notarial acts and delegated said obligation to Medina.[6] Thus, the notarial acts by Medina were not ratifiable by WFG. *Cf*. Restat 3d of Agency, § 4.03, cmt. b (property owner ratified an unauthorized agreement to lease property where he authorized his agent to negotiate terms of the lease).

Second, absent any showing that WFG was obligated to perform the notarial acts, proof of capacity to ratify becomes impossible. Existence of delegable performance is *sine qua non* to establishing capacity as the ratifying principal. *See* Restat 3d of Agency, § 4.04(1)(b), 3.04(3). The implicit precondition being that the principal must have been obligated itself to perform the act. *See Id*., § 3.04(3), cmt. c ("A person may delegate performance of an act if its legal consequences for that person are the same whether the act is performed personally or by another"). Because WFG referred its vendor to perform the notarial acts and Dattala presented no

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[6] Appellant did not present the Bursey Declaration until after the district court ruled in favor of WFG on summary judgment. As detailed below, the district court did not abuse its discretion in disregarding statements in the Bursey Declaration regarding Medina's representation that she was acting on behalf of WFG on the grounds that it did not constitute previously unavailable evidence and the statements constitute inadmissible hearsay.

evidence WFG was obligated to perform said acts itself, WFG lacked legal capacity to ratify Medina's acts. *See* 7 JA 1720-21.

Third, the mere fact that WFG closed escrow based on Medina's work product is insufficient, in and of itself, to demonstrate actual knowledge of material facts surrounding Medina's notarization. Here again, substantial, undisputed evidence led the district court to find that "WFG did not exercise any degree of supervision over the details of Medina's notarial acts regarding the Affidavit of Guarantor…did not have any control to hire or fire Medina…did not exercise any degree of control over Medina's hours and location of employment." 7 JA 1721-22, 1724; *see also* 2 JA 270, 308; 5 JA 1122-23, 1131-32. A person who has ratified is not bound by the ratification if it was made without knowledge of material facts about the act of the agent or other actor. Restat 3d of Agency, § 4.06, cmt. b. The burden of establishing that a ratification was made with knowledge is on the party attempting to establish that ratification occurred – here, Dattala. *Id*.

Ratification requires that the principal have actual knowledge, not just notice. *Id*. Thus, WFG must have been "consciously aware" of the material facts; it is not enough that it has reason to know or should know, which are encompassed in the concept of notice. *See* Restat 3d of Agency, § 1.04, cmt. d; *see, e.g., Prunty v. Arkansas Freightways, Inc*., 16 F.3d 649, 655 (5th Cir.1994) (vice-president ratified

supervisor's sexual harassment of plaintiff; vice-president "not only knew of the sexual harassment, but knew enough about the harassment to realize that [supervisor's] conduct was extreme and outrageous," despite presence of dispute as to precise details communicated to vice-president); *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 374 (6th Cir.1993) (insurer ratified agent's fraudulent sales methods when its officers attended agent's presentations and were aware of agent's methods; insurer also had warning from its counsel that agent was providing misleading tax information to prospective investors); *Streetscenes L.L.C. v. ITC Entm't Group, Inc.*, 126 Cal.Rptr.2d 754, 759-760 (Cal. App. 2002) (sufficient evidence film-production company ratified fraud against investors committed by film producer with whom company "had a special relationship, unique to the movie industry, that enabled [producer] to be an executive producer of [company] but allowed him space to do his own deals"; jury could find arrangement was created to give company "deniability" for producer's actions in light of frequent discussions and contacts between company representatives and producer and siting of preproduction work on producer's film on company premises). Therefore, the mere fact that WFG closed escrow using affidavits notarized by Medina is insufficient, as a matter of law, to demonstrate even notice (let alone WFG's actual knowledge) of how Medina performed the allegedly defective notarial acts. Nor did Dattala proffer any evidence

contrary to the district court's finding that WFG did not supervise or control how Medina performed the notarial acts at issue. Therefore, Dattala failed to demonstrate any error in the district court's summary judgment determination that no agency relationship existed between Medina and WFG.

B. The District Court Did Not Abuse Its Discretion In Denying Reconsideration.

Dattala's opening brief fails to identify or cogently argue any legal error by the district court in denying reconsideration. Dattala does not discuss how the district court erred in construing the Default Judgment as inapplicable to WFG. Nor does Dattala discuss how the district court erred in disregarding the Bursey Declaration as untimely evidence or, alternatively, as inadmissible hearsay. Dattala should be deemed to have waived any arguments regarding error in the district court's denial of reconsideration. *See, e.g.*, *Maresca*, 103 Nev. at 673, 748 P.2d at 6; *see also Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (citing NRAP 28(c) and concluding that an issue raised for the first time in an Dattala's reply brief was waived).

To the extent this Court is inclined to review district court's denial notwithstanding, the district court properly denied reconsideration because 1) the Default Judgment does not bind WFG as an answering co-defendant contesting liability as a matter of law; 2) Dattala failed to demonstrate that the Bursey

Declaration constituted newly discovered evidence; and 3) the Bursey Declaration otherwise consisted of inadmissible hearsay. Accordingly, the district court did not abuse its discretion in denying reconsideration of summary judgment.

1. The Default Judgment against Bursey and Medina does not bind WFG as an answering co-defendant contesting liability under the same allegations.

In denying reconsideration based on the Default Judgment, the district court found that "Bursey/Medina Default Judgment was entered because certain allegations by Plaintiff in his complaint were deemed admitted via default against those parties only because they failed to appear and/or participate in the litigation." *See* 8 JA 1831. This is consistent with language in the Default Judgment reciting:

> The Court finds that an appropriate sanction for Medina's failure to participate in the case as summarized above, pursuant to EDCR 2.67 and EDCR 2.69, is striking of Medina's answer, entry of default and entry of default judgment. The paragraphs of the SAC that directly address Medina set forth below are deemed admitted. These now are established facts based not only on the fact that Medina's answer has been stricken, but also based the sworn testimony of Dattala to the Court on October 13, 2021 and the documentary exhibits admitted into evidence on October 13, 2021.

7 JA 1543. At the time of the Default Judgment, WFG had already filed its Answer denying the same allegations deemed admitted against Bursey and Medina and successfully moved for summary judgment establishing as to WFG that Plaintiff's allegations of an employee or agency relationship lack merit. *See* 8 JA 1831. None

of these findings are disputed by Dattala.

"Generally, entry of default against one codefendant who fails to answer or whose answer is stricken does **not** preclude an answering codefendant from contesting liability." *LoMastro v. Am. Family Ins. Grp.* (Estate of LoMastro), 124 Nev. 1060, 1067, 195 P.3d 339, 344 (2008) (emphasis added). Rather, facts actually litigated should generally trump facts established based on non-participation of a party. *See Id*., 124 Nev. at 1067, 195 P.3d at 344-45. Such a rule comports with this Court's preference and our state's public policy for deciding cases on the merits. *See, e.g., Hansen v. Universal Health Servs., Inc.*, 112 Nev. 1245, 1247-48, 924 P.2d 1345, 1346 (1996) (citing *Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 787 (1990); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963)); *see also Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 308 (1993) ("[T]he district court must consider the state's underlying basic policy of deciding a case on the merits whenever possible.").

Here, the district court correctly applied the general rule from *LoMastro* given WFG's active efforts in contesting the same allegations deemed admitted against its codefendants through the Default Judgment. In replying to the MFR Opp, Dattala argued that *LoMastro* actually applies in his favor because WFG failed to participate in the default judgment proceedings. *See* 8 JA 1810-11. As mentioned, Dattala's

argument is factually misleading as the parties mutually understood that Dattala's default applications did not affect claims against WFG, which were already adjudicated via summary judgment motion practice. *See* 10 JA 2051-54, 2066, 2079. Further, Dattala's reliance on the intervenor exception in *LoMastro* is misplaced as, contrary to the insurer, WFG had contested Dattala's SAC allegations and obtained summary judgment ruling upon findings contrary to those stated in the Default Judgment. *Cf. LoMastro*, 124 Nev. at 1069, 195 P.3d at 345 (insurer waited to intervene until after default was entered against insured, and after insurer intervened it chose not to file a motion to set aside the default). Finally, just as evidence may be admitted against one party but not another, *LoMastro* recognizes that allegations may be admitted against one among several co-defendants. *LoMastro*, 124 Nev. at 1067 n.8, 195 P.3d at 344 ("The default of one defendant, although an admission by him of the allegations of the complaint, does not operate as an admission of such allegations as against a contesting co-defendant.") (citing *State Farm Mut. Auto. Ins. Co. v. Clark*, 544 So. 2d 1141, 1142 (Fla. Dist. Ct. App. 1989); *see also* NRS 47.110 (contemplating evidence may be admissible as to one party or for one purpose but inadmissible as to another party or for another purpose). Thus, the district court did not err in concluding that WFG was not bound by the Default Judgment against non-WFG codefendants, and its entry did not warrant reconsideration.

2. The Bursey Declaration was not previously unavailable evidence.

Dattala also sought reconsideration based on the Bursey Declaration, which the district court rejected based on his failure to demonstrate it was "newly discovered or previously unavailable" evidence. 8 JA 1830-31. On reconsideration, the district court is required only to consider a tardy affidavit (or declaration) if it constituted "newly discovered evidence" withing the meaning of Rule 59. *See Wallis v. J.R. Simplot Co*., 26 F.3d 885, 892 n.6 (9th Cir. 1994) (citing *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987)). Evidence is not newly discovered if it was in the party's possession at the time of summary judgment **or could have been discovered with reasonable diligence**. *Id*. (emphasis added); *accord Drespel v. Drespel*, 56 Nev. 368, 372, 45 P.2d 792, 793 (1935) (affirming the denial of a motion for a new trial and noting that "[t]here [wa]s no statement of facts in the affidavit showing that reasonable diligence had been exercised by the defendant prior to the trial to discover the [new evidence], nor is there an intimation of such diligence").

Here, the district court properly denied reconsideration based on the Bursey Declaration given Dattala's failure to explain why said declaration was not obtained during the discovery period. The Bursey Declaration recites events that predate Dattala's commencement of the underlying lawsuit, which Dattala could have

obtained through discovery from Bursey. *See* 8 JA 1817. Even if Dattala did not come into possession of the declaration until the same day it was filed, Dattala was required to explain why he did not obtain the written testimony before then and what diligence was exercised to obtain the written testimony. *See, e.g., Pierce v. Skolnik*, No. 3:10-CV-0239-ECR-VPC, 2012 U.S. Dist. LEXIS 1614, at *8 (D. Nev. Jan. 5, 2012) (denying defendants' motion for reconsideration finding that "defendants … present one declaration that they omitted and one new declaration intended to correct their previous error" as remedying parties' errors is plainly not the objective of reconsideration motion); *Sonntag v. Gurries*, No. 3:09-cv-00637-ECR-VPC, 2011 U.S. Dist. LEXIS 96324, at *8 (D. Nev. Aug. 26, 2011) (same). Absent such evidence, the district court was not required to consider the Dattala's untimely evidence and, as such, did not abuse its discretion in refusing to do so.

3. The Bursey Declaration consisted of inadmissible hearsay statements by Medina used to prove the truth of Medina's representation of WFG.

In addition to rejecting the Bursey Declaration as "newly discovered evidence," the district court determined that Bursey's testimony regarding oral representations made by Medina constituted inadmissible hearsay. "Hearsay" is defined as "a statement offered in evidence to prove the truth of the matter asserted. NRS 51.035(1). Hearsay statements are generally inadmissible unless it comes

within an exception. *See Deutscher v. State*, 95 Nev. 669, 684, 601 P.2d 407, 417 (1979) (citing 51.065). Traditionally, hearsay evidence has been excluded because it is not subject to the usual tests to show the credibility of the declarant. Lacking is cross-examination to ascertain a declarant's perception, memory and truthfulness. *Id*. (citing *Moore v. United States*, 429 U.S. 20, 21-22 (1976) (per curiam); *Donnelly v. United States*, 228 U.S. 243, 273 (1913)). These problems apply to the Bursey Declaration. Specifically, Bursey is testifying as to what Medina had allegedly said to him. Medina was not subject to cross-examination to test whether she, in fact, said what Bursey claims she said or as to the truthfulness of her statements. Thus, Bursey's testimony of what Medina told him is inadmissible hearsay. *See, e.g., Alexander v. State*, 84 Nev. 737, 449 P.2d 153 (1968) (defendant's testimony as to what a friend had said was hearsay); *Smith v. State*, No. 78439, 2020 Nev. Unpub. LEXIS 385, at *6 (Apr. 15, 2020) (testimony from his daughter's friend's mother about what daughter said was hearsay, though admissible as excited utterance); *Silveira v. Ney Cty.*, No. 2:18-cv-00207-MMD-NJK, 2019 U.S. Dist. LEXIS 103989, at *20 n.8 (D. Nev. June 21, 2019) (plaintiff's testimony on what his mother told him other inmates constitutes inadmissible hearsay). Further, Dattala introduced the Medina statements to prove Medina represented or was acting on behalf of WFG as she stated to Bursey. Thus, the Bursey Declaration was being offered for its

substantive purpose rather than any non-hearsay purpose; Dattala does not reasonably argue that the occurrence of Medina's statement or surrounding circumstances are relevant to prove agency. Therefore, the district court did not abuse its discretion in disregarding the Bursey Declaration as inadmissible hearsay.

C. Dattala Waived Any Argument Against the District Court's Grant of Summary Judgment Against his Quiet Title/Declaratory Relief Claims.

It is well-settled that "[i]ssues not raised in an Dattala's opening brief are deemed waived." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011); *see also* NRAP 28(c) ("A reply brief… must be limited to answering any new matter set forth in the opposing brief."); *Khoury*, 132 Nev. at 530 n.2, 377 P.3d at 88 n.2 (citing NRAP 28(c)); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (declining to consider an argument that the Dattala "raised ... for the first time in his reply brief, thereby depriving [the respondent] of a fair opportunity to respond"). Here, Dattala's opening brief omits any argument challenging the district court's grant of summary judgment in favor of WFG against his quiet title/declaratory relief claims. Therefore, Dattala must be precluded from raising them for the first time in his reply brief, if any.

VII. CONCLUSION

For these reasons, Respondent WFG respectfully requests that this Court

affirm the district court's MSJ Order and MFR Order.

DATED this 4th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

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

(a) This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font size 14.

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3. Finally, I hereby certify that I have read this 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. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), 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 if the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of October, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 4th day of October, 2022, the foregoing **RESPONDENT WFG NATIONAL TITLE INSURANCE COMPANY'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal were served with a true and correct copy via the following means:

[X] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

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John Benedict *Attorney for Respondent, ACRY Development LLC*
Benjamin Childs *Attorney for Appellant, John Dattala*
Zachary Ball *Attorney for Respondent, Precision Assets, LLC*

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Lisa Cox
An Employee of WRIGHT, FINLAY & ZAK, LLP