IN THE SUPREME COURT OF THE STATE OF NEVADA

KYMBERLIE JOY HURD, *Appellant*, vs. MARIO OPIPARI, *Respondent*.	Supreme Court Case No. 85537 District Court Case No. D-21-622669-C

RESPONDENT MARIO OPIPARI'S FAST TRACK RESPONSE

COMES NOW Respondent, MARIO OPIPARI (hereinafter "Mario"), by and through his attorneys of record, Matthew H. Friedman, Esq., and Christopher B. Phillips, Esq. of the law firm Ford & Friedman who hereby submits the foregoing Fast Track Response ("Response").

This Response is made pursuant to NRAP 3E(d)(2) and is based on the following Points and Authorities.

I. PROCEDUREAL HISTORY

In her Fast Track Statement, Appellant Kymberlie Joy Hurd ("Kymberlie") sets out an extensive procedural history that includes references to multiple temporary orders that are not subject to appellate review by this Court. Notably, this Court previously dismissed an earlier appeal filed by Kymberlie because this Court does not have appellate jurisdiction over temporary custody orders. See *Order Dismissing Appeal*, filed June 10, 2022, Case No. 84784.

Additionally, Kymberlie's Docketing Statement filed in this matter unambiguously identifies the operative order on appeal as the district court order entered on October 17, 2022. [1] See *Docking Statement* filed on November 18, 2022 at p.18. Thus, it is unclear to Mario and his counsel why Kymberlie is attempting to challenge the district court's October 17, 2022 order by relying on facts and circumstances related to prior, temporary orders. Nevertheless, as Kymberlie seeks to rely on references to various temporary orders, Mario is obligated to address the same.

To that end, Kymberlie argues that she "was and is able to prove a vast majority of Ms. Crome's allegations and statements made in her filings as false." *Fast Track Statement* at p. 4:16-18.

Here, the initial complaint was filed in the district court on March 4, 2021. (Appellant's Appendix ("AA") 1). Thereafter, Kymberlie filed an Answer and Counterclaim on May 7, 2021. (AA 16). However, once Kymberlie filed her Answer and Counterclaim, her participation in the litigation significantly diminished. In fact, Mario's trial counsel had to file a Motion to Compel Kymberlie's compliance with pretrial discovery. See Motion to Compel filed on January 10, 2022. (AA 461-479).[2] The fact of the matter is, Kymberlie refused to participate in pretrial discovery, and

[1] The October 17, 2022 Order being challenged on appeal is the order that resulted from August 16, 2022 Evidentiary Hearing. See AA 2708-2728.

[2] Note too that the Discovery Commissioner recommended that the Motion to Compel be granted (AA 1171) and the district court later entered an order adopting the Discovery Commissioner's Report and Recommendation. (AA 1165)

now on appeal, wants to argue that she was not afforded adequate time or opportunities to provide documents, evidence, or other discovery.

Moreover, Kymberlie's procedural history further asserts that "[a]n Early Case Management Conference has never been held, discovery has never been clarified, and a scheduling order [was] never filed." *Fast Track Statement* at p. 6. Just like Kymberlie's false claim that she was not afforded adequate time to participate in discovery, her assertion that the district court never held a case management conference is also belied by the factual record.

Here, the district court issued an Order on January 10, 2022 scheduling the Case Management Conference for February 17, 2022. (AA 458). Thereafter, on January 20, 2022, Kymberlie filed a Motion to Set Aside the district court's Emergency Pick Up Order[3] that had been issued on January 11, 2022. (AA 609). Of note here is that Kymberlie subsequently requested – and the district court granted – a request for an Order Shortening Time on her Motion to Set Aside. In granting the requested Order Shorting Time, the district court specifically ordered that "[t]he Case Management Conference and Status Check scheduled for 02/17/2022 at 11:00 a.m. SHALL also be SHORTENED and heard at this time." (AA 702)(emphasis in original).

In turn, the district court conducted a consolidated hearing on Kymberlie's "Motion for Temporary Custody, Visitation, Child Support, Spousal Support and/or

[3] This pick up order is the subject of much of Kymberlie's Fast Track Statement. Mario's response to the same is addressed below in Section II(B)(1).

Exclusive Possession; [Mario's] Opposition and Countermotion Striking [Kymberlie's] Exhibit 2, for Supervised Visitation, Child Support and Attorney's Fees and Costs and Relied Relief; and Case Management Conference." (AA 2174). Following the February 15, 2022 hearing, the district court subsequently issued three (3) separate written orders based upon the outcome of the arguments presented during the February 15, 2022 hearing.

First, the district court issued an Order for Family Mediation Center Services that instructed the Family Mediation Center (FMC) to provide the parties with confidential mediation services. (AA 838). Second, the district court issued an Order for Supervised Visitation at Family First Services. (AA 839). Third, the district court entered an Order After February 15, 2022 Hearing wherein the district court specifically deferred on the issue of trial setting because the parties were referred to FMC in order to allow them an opportunity to utilize mediation to formulate a parenting agreement. (AA 2176, 2178). Within the same Order After February 15, 2022 Hearing the district court went on to schedule a status check for May 9, 2022. The May 9, 2022 status check was intended to be a return hearing on the outcome of FMC mediation, Kymberlie's drug testing results, and a report on the outcome of Kymberlie's supervised visitation. (AA 2178)[4].

[4] In so far as Kymberlie now desires to challenge the district court's order for supervised visitation, it must be noted that (1) Kymberlie was present at the February 15, 2022 hearing (AA 2174), (2) that the parties agreed to the district court ordering supervised visitation for Kymberlie (AA 2176), and (3) Kymberlie was represented by counsel at the hearing, who signed off on the form and content of the written order (AA 2180). Thus, Kymberlie's assertion that the district court erred in

However, due to the high conflict nature of the parties' pretrial litigation, the matter wound up back before the district court on April 19, 2022. It was during the April 19, 2022 hearing that the district court vacated the previously scheduled May 9, 2022 status check and set the matter for an evidentiary hearing on August 16, 2022 at 1:30 p.m. (AA 2163).

Thus, it follows that Kymberlie was on notice of – and participated in – the February 15, 2022 Case Management Conference. (AA 702). Kymberlie was also aware of the district court's decision to initially defer setting trial in favor of allowing the parties to attend mediation at FMC. (AA 838). Likewise, Kymberlie was aware that the May 9, 2022 status check on the outcome of FMC mediation was vacated in lieu of scheduling trial to be held on August 16, 2022. (AA 2163). Recall too that in the time leading up to trial, Kymberlie was compelled to participate in discovery, even though she ultimately never did so. (AA 1165, 1171, 2713)

Thus, Kymberlie's assertions that the evidentiary hearing should not have gone forward because the district court never held a case management conference, that the expectations regarding pretrial discovery were somehow unclear, or that there was never any sort of written order scheduling trial are all negated by Kymberlie's own record appendix.

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awarding her supervised visitation is disingenuous and not supported by the record on appeal.

II. ARGUMENT

A. This Court is not Situated to Decide Issues of Fact

Notwithstanding the erroneous procedural history contained in Kymberlie's Fast Track Statement, Mario also notes that a significant portion of her arguments are factual in nature; and moreover, a significant portion of her factual arguments do not contain citation to the record as required by NRAP 3E(d)(5).

Throughout her statement of facts, [5] Kymberlie makes various factual averments that cover a myriad of topics including, but not limited to:

1. That Kymberlie has been the minor child's sole caregiver for more than five years[6];

2. That Kymberlie made and transported the child to all medical, educational, and extracurricular activities[7];

3. That the minor child has been subject to some type of unspecified abuse[8];

4. That neither Mario nor the district court have any empathy or awareness of some type of unspecified trauma allegedly suffered by the child[9];

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[5] Kymberlie's fact section appears in her Fast Track Statement in response to item no. 15 pp. 6-24.

[6] See *Fast Track Statement* at pp. 6-7.

[7] See *Fast Track Statement* at p. 7.

[8] *Id*.

[9] *Id*. at p. 8.

5. That the child is speech delayed and has been diagnosed with Mixed Receptive-Expressive Language Disorder and Phonological Disorder[10];

6. That the child has used American Sign Language as her primary form of communication since she was approximately nine (9) months old[11];

7. That Mario was "secretive and aloof" about the child's unspecified behavior changes following a hearing held in the district court on June 24, 2021[12];

8. That Mario's trial counsel "fabricated" an incident that occurred during Kymberlie's February 9, 2022 visitation[13];

9. That the child has experienced "regression and substantial negative effects" while in Mario's custody[14];

10. That a supervised visitation report submitted to the district court by Family First made improper inferences regarding Kymberlie's relationship with the child as well as improper inferences concerning the child's medical care[15];

11. That Family First failed to follow certain domestic violence protocols[16];

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[10] *Id.*

[11] *Id.*

[12] *Id.* at p. 9

[13] *Id.* at p. 17

[14] *Id.* at p. 18

[15] *Id.* at p. 20

[16] *Id.*

12. That the Family First supervised visitation report omitted as many as twenty-nine (29) visits between Kymberlie and the minor child[17];

13. That the district court did not read or consider Kymberlie's various filings submitted to the district court;[18]

14. That Mario's trial counsel submitted "fabricated and altered evidence[19]; and

15. That the district court's award of sole custody to Mario has been detrimental to the minor child.[20]

On these points, Mario notes that Kymberlie's factual assertions are not supported by citations to the record on appeal[21]. Also, it is well established law that this Court is not the appropriate forum for resolution of factual issues.

Specifically, this Court has held that that as an appellate court, it is not well-suited to making factual determinations in the first instance. See *Ryan's Express v. Amador Stage Lines,* 128 Nev. 289, 279 P.3d 166, (2012) (citing *Zugel by Zugel v. Miller,* 99 Nev. 100, 101, 659 P.2d 296, 297; 16 Charles Alan Wright, Arthur R.

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[17] *Id.*

[18] *Id.* at p. 21

[19] *Id*. at p. 23.

[20] *Id.* at p. 31

[21] In the few instances where Kymberlie does cite to pages in the record, the pages cited to do not demonstrate or support the averments being made by Kymberlie.

Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3937.1 (2d ed. 1996); *see also Anderson v. Bessemer City,* 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact); *Alburquerque v. Bara,* 628 F.2d 767, 775 (2d Cir.1980) (remanding habeas petition to district court for additional fact findings because Court of Appeals was not well-suited to make factual findings). That said, it is understood that appellate courts must necessarily have the ability to resolve factual disputes that arise post-appeal. However, that is not the case here. Here, Kymberlie is presenting numerous factual averments that she could have (should have) argued to the district court had she elected to attend and participate in trial. Accordingly, Kymberlie's endless – and unsupported – factual arguments should not be considered by this Court.

B. Consolidated Response to the Numerous Issues on Appeal

In her docketing statement, Kymberlie identifies four (4) issues on appeal. See *Docketing Statement* at p. 4, item no. 9. However, in her Fast Track Statement, Kymberlie has set forth an additional thirty-four (34) alleged issues on appeal. Compare *Docketing Statement* a p. 4, item no 9 (identifying issues (a) – (d)) with *Fast Track Statement* at pp. 24-27 (identifying issues (a) – (hh)).

As set forth in Kymberlie's Fast Track Statement, it is unclear what portions of her legal arguments relate to any of the thirty-four (34) issue she enumerates in

her Fast Track Statement. Nevertheless, it appears that Kymberlie's arguments can be grouped into the following topics: (1) the district court's pick up order, (2) Kymberlie's arguments concerning whether or not she is an unfit parent, (3) Kymberlie's challenge to the district court's temporary and final orders awarding Mario sole legal and sole physical custody, (4) Kymberlie's desire for this Court to opine on an alleged lack of law regarding children with disabilities, and (5) Kymberlie's allegations that the district court improperly terminated her parental rights. Each of these topics are addressed below, in turn.

1. The District Court's Pick Up Order and Temporary Custody Orders

The biggest defect in Kymberlie's argument regarding the district court's pick up order is that Kymberlie is presenting her arguments to this Court as if the January 11, 2022 pick up order was the first time the issues underlying the need for the same had been presented to the district court. What Kymberlie fails to mention is that Mario's January 7, 2022 Ex Parte Motion for a Pick Up Order relied on evidence that had previously been presented to the district court at a hearing held on November 11, 2021. Note here that Kymberlie concedes that the district court held a hearing on these issues on November 11, 2021. See *Fast Track Statement* at p. 10.

It was only after Kymberlie's troubling behavior continued that Mario renewed his request for a pick up order in January 2022. Kymberlie also alleges that the district court had no good cause for issuing the January 11, 2022 pick up order. Yet, Kymberlie's argument is once again at odds with the factual record. Notably,

the district court made findings that (1) the minor child is a special needs child, (2) that Kymberlie had tested positive for Methamphetamine, Amphetamine, and Barbiturates and (3) that the child is in danger while in Kymberlie's custody based upon her high levels of illegal drug use. (AA 524). Thus, it was not at all unexpected that, based upon these factual findings, the district court awarded Mario with temporary sole physical custody of the child. (*Id.*).

Finally, Mario notes too that for all that Kymberlie has to say about the district court's pretrial award of sole custody, she cannot avoid the fact that the order was temporary, and this Court does not review temporary custody orders on appeal.

2. *Kymberlie's Averments Regarding Whether she is an Unfit Parent*

Kymberlie next argues that the district court erred by "not finding her unfit" before awarding Mario Sole legal custody. See *Fast Track Statement* at p. 28. In support of this point, Kymberlie attempts to rely on the United States Supreme Court's decision in *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972) for the proposition that parents are entitled to a hearing on their fitness before their children are removed from their custody; and while that is a generally true statement of law, Kymberlie's reliance on *Stanley* is misplaced because the factual circumstances in *Stanley* are significantly different that the facts at issue here.

In *Stanley*, the Court was asked to decide whether an Illinois statue that allowed for children of unwed fathers to become wards of the state upon the death of their mother violated the natural father's right to equal protection. Here,

Kymberlie is not challenging any sort of statutory scheme. Moreover, the statutory scheme in *Stanley* was challenged because the natural father's rights were put in jeopardy by operation of law, without any form of petition, motion, hearing or evidentiary proceeding.

On this point, Kymberlie's arguments read as if she was denied the opportunity to challenge the district court's decision to award Mario with temporary physical custody, even though, in fact, Kymberlie participated in the November 18, 2021 hearing. This matters because it was the arguments and evidence presented during the November 18, 2011 hearing that formed the basis for the district court's findings in the pick up order. (AA 523-26). Kymberlie also fails to mention that upon learning of the January 11, 2022 order, she immediately moved to set the pick-up order aside. Specifically, the district court's pick-up order was issued on January 11, 2022, and Kymberlie filed a Motion to Set Aside on January 14, 2022. (AA 545-48). She then proceeded to request an Order Shortening Time, which the district court granted. (AA 549-50). In turn, Kymberlie's Motion to Set Aside was heard on February 15, 2022. It was during this February 15, 2022 hearing that parties agreed to Kymberlie having supervised visitation at Family First. (AA 2176).

Plainly stated, Kymberlie unquestionably availed herself of the opportunity to be heard during both the November 11, 2021 and February 15, 2022 hearings. She cannot now fairly say that despite being present at the November 11, 2021 hearing, filing a Motion to Set Aside, filing a request for an Order Shortening Time, and

attending the February 15, 2022 hearing wherein she agreed to having supervised visitation that she was somehow denied due process or equal protection. The mere fact that she did not prevail on her claims does not mean that she was denied due process or somehow prejudiced by the district court's decision to not rule in her favor.

3. Kymberlie's Challenges Regarding Sole Custody

Kymberlie also challenges the district court's award of sole legal and sole physical custody on the theory that the district court did not make any findings that she is unfit within the meaning set forth in NRS 128.018. Notably, the matter before the district court was a child custody action governed by NRS Chapter 125 *et. seq*., and not a termination action under NRS Chapter 128. The district court was under no obligation to find Kymberlie unfit or to terminate her parental rights before awarding Mario sole legal and sole physical custody.

Additionally, and to the extent that Kymberlie's argument is that the district court failed to make adequate factual findings to support the award of sole legal and sole physical custody to Mario, the district court made the following relevant findings.

1) That the Kymberlie failed to appear for trial despite the district court having made the BlueJeans link available to her. (AA 2708)

2) That on the day of – and at the time of – trial, the district court attempted to reach Kymberlie via telephone, but Kymberlie failed to answer the call. (AA 2709).

3) That Kymberlie did not contact the court to advise of any technical difficulties preventing her from appearing for trial. *Id.*

4) That on the day of trial, August 16, 2022, Kymberlie filed an Ex Parte Motion to Continue Evidentiary Hearing, and that the same was filed minutes prior to the scheduled start of trial. (AA 2709, See also AA 2521)(showing that Kymberlie's Ex Parte Motion to Continue was filed at 1:04 p.m., just twenty-six (26) minutes prior to the scheduled trial).

5) That Kymberlie cannot validly claim to have been unaware of the evidentiary hearing because she was present at the prior hearings and was provided with notice of the date and time of the trial setting; and moreover, that her Ex Parte Motion to Continue referenced the correct date and time of trial. (AA 2711).

6) That Kymberlie did not file a pretrial memorandum. (AA 2713).

7) That Kymberlie failed to serve any disclosures and, despite being compelled to respond to Mario's Interrogatories, Request for Production of Documents, and Request for Production, Kymberlie never provided any responses to the same. (AA 2713).

It was based on these findings that the district court ordered that Kymberlie had apparently abandoned her interest in participating in the litigation. (AA 2723)

(emphasis added). At no point did the district court attempt to make any orders regarding Kymberlie's fitness as a parent. The district court based its decision on Kymberlie's steadfast and consistent refusal to participate in discovery and trial. Yet, even in the face of these adverse findings, the district court made sure to include in its order that Kymberlie could petition the district court if she was aggrieved by the district court's ruling. (AA 2723).

Kymberlie also asserts that the district court failed to take into consideration that the minor child had allegedly been in her sole care for the proceeding five years. *Fast Track Statement* at p. 29. Similarly, Kymberlie asserts that the district court failed to consider the minor child's disability. *Fast Track Statement* at p. 30. Yet, Kymberlie offers no citation to the record showing where Kymberlie offered any such information or evidence to the district court; and more importantly, Kymberlie offers no explanation of how the district court could reasonably be expected to take Kymberlie's alleged evidence into consideration when Kymberlie failed to participate in discovery, file a pretrial memorandum, or attend trial. The fact of the matter is, Kymberlie was afforded every opportunity to participate in discovery, to submit evidence, and to have her arguments considered on the merits, and she chose not to participate.

4. Protections for Children with Disabilities

Kymberlie next mentions that she was aggrieved by the district court's decisions because there is a lack of law regarding the "rights" and protections of

minor children with disabilities. See *Fast Track Statement* at p. 12. While reasonable minds can agree that protecting children – and especially those with disabilities – is a meaningful and worthy cause, the existence of, absence of, or the alleged need for additional laws concerning children with disabilities is not the subject of this appeal, nor is the establishment of any such laws within the purview of this Court.

Instead, such law making authority rests within the sound discretion of the legislature (at the both the state and federal level) and as such, Kymberlie's narrative regarding children with disabilities does not demonstrate any legal error to be addressed by this Court.

5. The District Court did not Terminate Kymberlie's Parental Rights

Finally, Kymberlie uses her extensive – and almost entirely unsupported – narrative to assert that the district court terminated her parental rights. This is not so. As note above, the matter before the district court was a child custody action governed by NRS Chapter 125 *et. seq*., and not a termination action under NRS Chapter 128.

Moreover, the district court's order does not prevent Kymberlie from maintaining a relationship with the minor child. In fact, the district court's final order awarded Kymberlie with supervised visitation, and it specifically invited Kymberlie to petition the court to conduct further proceedings if she was aggrieved by the district court's findings and conclusions that she had abandoned her interests in the litigation. (AA 2723). The mere fact that Kymberlie refuses to work with Family

First to facilitate her visitation does not mean that she is not allowed to have contact with the child or that her parental rights have been terminated.

III. CONCLUSION

Kymberlie has offered no cogent explanation or citations to the record on appeal that shows any legal error in the district court's final order entered on October 17, 2022. Instead, Kymberlie is attempting to use this Court to present nearly three-dozen factual allegations, all of which should have been presented to the district court at the time of trial. By failing to participate in discovery and trial, it necessarily follows that Kymberlie failed to advance any arguments, make any objections, or preserve any issues for appeal in the proceedings below. Consequently, all of Kymberlie's arguments should be deemed waived on appeal. See *Old Aztec Mine, Inc. 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)).

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For the foregoing reasons, the district court's final order entered on October 17, 2022 should be affirmed.

Respectfully submitted this 7th day of February, 2023.

FORD & FRIEDMAN

Matthew H. Friedman

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Fast Track Response 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 Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 365 in fourteen (14) point Times New Roman font.

2. I further certify that this fast track statement complies with the page or type volume limitations of NRAP 3E(e)(2) because it is proportionally spaced, has a typeface of 14 points or more, and contains 4,048 words, not including this Certificate of Compliance and the following Certificate of Service. A Fast Track Response is acceptable if it contains no more than 4,845 words.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a Fast Track Response and that the Supreme Court of Nevada may impose sanctions for failing to timely file the same.

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I therefore certify that the information provided in this Fast Track Response is true and complete to the best of my knowledge, information, and belief.

Dated this 7th day of February, 2023.

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CERTIFICATE OF SERVICE

I the undersigned hereby certify that on the 7th day of February, 2023, I served the above and foregoing *RESPONDENT MARIO OPIPARI'S FAST TRACK RESPONSE* by depositing a true and correct copy of the same in the U.S. Mail, postage prepared, addressed to Appellant as follows:

Kymberlie Joy Hurd
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Tracy McAuliff

_____

An employee of Ford & Friedman