IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

EDWIN ALVIN EPSTEIN,	)	
	)	
APPELLANT,	)	S.C. CASE 28590
	)	D.C. CASE 94-DI-1380
vs.	)	
	)	
URSULA ALWINE EPSTEIN,	)	
	)	
Respondent.	)	

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE CASES

MISCELLANEOUS

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN RULING THAT DEFAULT WAS ENTERED WITH SUFFICIENT AND FAIR NOTICE.

II. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE DIVISION OF COMMUNITY PROPERTY WAS NOT PROCURED BY FRAUD.

III. WHETHER THE DISTRICT COURT ERRED IN RULING THAT APPELLANT'S NEGLECT, IF ANY, WAS INEXCUSABLE

STATEMENT OF THE CASE

Appellant relies upon the Statement of the Case contained in the Opening Brief. Respondent's Answering Brief does not have a proposed Statement of the Case, per se, although it does contain a series of statements so titled which mix procedure, facts, law, and argument. Accordingly, Appellant requests that this Court refer to the Statement of the Case in his Opening Brief. NRAP 28(b).

STATEMENT OF FACTS

Appellant relies upon the Statement of Facts in his Opening Brief. It is submitted that Respondent's alternative Statement of the Case, and of Facts are not useful, primarily because this appeal is very fact-oriented, mischaracterizations of the record have a distorting effect, and because Respondent has been unable to resist mixing argument with alleged factual references.

The essence of this case is the legal meaning of the ongoing series of communications between counsel and the parties, in light of the condition of the parties (specifically, Edwin's poor health and hospitalizations), given Ursula's eventual taking of default during those negotiations, and the lower court's refusal to set that default aside and allow a trial on the merits. Everything argued by both sides goes to whether that decision should stand, or whether it should be overturned so that the case can go to trial. The key question is reasonableness.

Given this, the characterization and meaning of the communications and actions of the parties is the actual issue to be determined, and the facts are critical. This Court is as well situated to decide this question as the Court below, since it has everything the lower court had -- these parties have never appeared in court, and the correspondence and attorney's words are all the lower court had before it.

Respondent ("Ursula") claims that "As will be shown hereinbelow, Edwin did not make an appearance for purposes of NRCP 55(b)(2) and, therefore, was not entitled to the benefit of the notice requirement contained therein." Respondent's Answering Brief (RAB) at 2. A check of references in the Answering Brief to support this value judgment (which, of course, does not belong in either a "Statement of the Case" or a "Statement of Facts" in any event) reveals that they are inaccurate. The basis for some commentary in those "Statements" are not in the record at all.

Worse, the "Statement of Facts" in the Answering Brief fails to identify those matters on which there is conflicting evidence, offering instead one party's opinion or submission as factual matter; it often makes statements of "fact" citing only counsel's equally unsupported opinions and arguments below as the reference.

For example, Ursula submits the conclusion that Edwin "was aware by March 17, 1995, if not before, that Ursula intended to proceed to a default judgment if he failed to timely file an answer." RAB at 3. Yet the record does not contain a formal, file-stamped "Three Day Notice of Intent to Enter Default," and Ursula certainly does not cite to one. The record contains only general correspondence sent from one end of the state to the other via regular mail, one item of which is dated March 17, 1995, from Ursula's counsel to Edwin, an extremely ill lay man. This March 17, 1996 letter is characterized in Ursula's statement as a "formal" request to file an answer "within the next twenty (20) days" to avoid default being taken. ROA 89. Nevertheless, the same letter advises Edwin (vaguely and ambiguously) that it was Ursula's intent to "proceed with this matter, with or without your response, on or after Monday, April 10, 1995." ROA 89. The letter is neither clear nor definite as to any firm due date so that Ursula's conclusions could be stated as "factual."

Ursula's "Statement of Facts" conjectures that "negotiations had apparently reached an impasse" by March 17, 1995. RAB at 3. However, her Statement fails to note the critical fact that her next act was *not* the sending of intent to enter a default. Rather, in conjunction with her suggestion that Edwin "file an answer within twenty (20) days," Ursula followed up with additional correspondence, continuing to negotiate.

The April 4, 1995 letter, did not reaffirm that any possible twenty (20) day period was almost up, or that it was still Ursula's intent to take default on the twenty-first day. Rather, the letter invited

further negotiation, and included a first-draft seventeen page proposed settlement agreement, containing forty-eight subparts.

Ursula concedes that her attorney's letter of May 10, 1995, was based on that attorney's belief that there was "another apparent impasse in negotiations," and that Ursula's attorney again contacted Edwin and once again allegedly informed him of the need to file an answer to avoid default. RAB at 3. The referenced letter described its "deadline" only as "within the next twenty (20) days," and again threatened default. ROA 112; RAB at 3. This was the third time default was alluded to but no three-day notice was sent.

Ursula's attorney was informed that Edwin had consulted with counsel. Another invitation to continue negotiation occurred in the form of a letter dated June 7, 1995, addressed to Mr. Willick. Edwin had retained Mr. Willick in May of 1995. ROA 113. Mr. Hambsch complained that he had "not been able to do any better than speak with a lady who represented herself to be your law assistant, who indicated that she would try to get an answer on file within the next week. This is not acceptable." ROA 113. The June 7, 1995, letter requested a return telephone call from Mr. Willick and also asked "Is there any possibility of resolving this case along the lines of our proposed Marital Settlement Agreement? May I have the courtesy of you returning my call?" *Id.*

While Ursula's attorney would have this Court believe that he was being ignored by Mr. Willick, his own letter admits that he had been speaking with Mr. Willick's paralegal who had been assigned to work on Edwin's case and who advised an answer would be forthcoming.

Neither the fact that the representations made by Ursula's counsel were contradictory, nor that her attorney's recollections of the content of phone calls differed from the recollection of Mr. Willick's staff, is reflected in the "Statement of Facts" Ursula proffers.

In this regard, most of the "facts" set out at pages 3 and 4 are merely Ursula's version of events. She does not even note what the rest of the record showed. For example, Ursula argues at great length about Edwin's alleged "awareness" that she intended to take a default without noting her own attorney's ambiguous and contradictory words. Mr. Hambsch "advised" Mr. Willick regarding the "possibility of default." RAB at 4, line 6. Mr. Hambsch's vaguely passive verbiage advised "unless you communicate with me immediately to make other arrangements" (June 7, 1995 letter) or requested a "bona fide response to the proposed Marital Settlement Agreement" (July 24, 1995 letter) or advised that a "telephone" response (1995 letter) was desired. *Compare* RAB at 2-4 *with* ROA at 113-114. Ursula's proffered recitation of "facts" ignores the very words her own attorney had prepared, which showed an intention to negotiate, not litigate.

Statements in Ursula's version of the facts are not supported by the record she cites. She states that "Edwin did not make an appearance for purposes of NRCP 55(b)(2) and, therefore, was not entitled to the benefit of the notice requirement contained therein." RAB at 2. She offers no citation to the record to support what is, in essence, an ultimate question in this appeal, which is addressed below in the argument section of this brief.

Instead, Ursula asserts as fact her "intention" and Edwin's "awareness" with regard to the meaning and status of the negotiations. RAB at 3. She ascribes motivations to the parties and their attorneys for actions taken (and not taken) below, without noting the absence of any foundation for her commentary in the record. *See*, *e.g.*, RAB at 3-4 (describing the alleged motives of Edwin, Ursula, and her attorney).

Items of argument in Ursula's "Statement of Facts" are not identified as such, and some appear to be simply false. For example, Ursula's bald statement that Edwin was given "an additional

19 days notice of Ursula's intention to obtain default judgment before such judgment was entered" is either argumentative, or simply false, given the above-recited contradictory communications from Ursula's attorney as to his true intent and the vagaries of calculation of time[1] inherent in Ursula's casual and contradictory long distance correspondence. RAB at 4 and 11.

In sum, the "Statement of Facts" proffered by Respondent is inaccurate, incomplete, misleading, and improper, and should be disregarded by the Court. *See State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (quotation of legal and factual matters without citation, and reference to matters outside the record, may cause sanctions to be imposed by the Court). It is submitted that the Statement of Facts in the Opening Brief should be relied upon by this Court.

[1]See NRCP 6(e).

ARGUMENT

This case began in December 19, 1994, and was in settlement negotiations for about a year until a decree of divorce was entered by default without notice to Edwin. This appeal addresses the question of whether Edwin will have the right to present his case in court while he still lives, or will be summarily dispossessed of his property without a trial, allowing Ursula to keep everything the unilateral terms of the decree submitted gave to her -- essentially everything these parties ever had.

Ursula, in attempting to defend the district court's refusal to hear this case at all, couches her refusal to address the issues as "resist[ing] the urge to respond to Edwin's bogus accusations point by point." RAB at 1. Though Edwin does have concerns about the district court's decision and the tactics employed by opposing counsel, the issues addressed by Edwin in this appeal are procedural and *legal* in nature, and boil down to whether the court below should have set aside the default Ursula submitted under the facts of this case.

The first question in this case is the standard of this Court's review. Ursula begins her argument by reciting cases stating that this Court will defer to the "trial court" if the decision below is based on "substantial evidence." While this is an accurate statement of one of this Court's prior holdings, it has no application here -- no trial took place in this case. The district court's decision was made *despite* "substantial evidence" in the form of letters indicating that Edwin had "appeared" and that negotiations were ongoing, as well as exhibits and affidavit testimony from Edwin regarding his health problems, which had a direct bearing on his ability to participate (and the speed with which he could participate at any given moment) in the settlement and litigation process. The district court also ignored the gross inequity of the resulting community property division and the strong judicial

policy favoring a trial on the merits. All of this evidence is contained in the scant record on file in this case, and fully substantiated setting aside the default judgment.

As to the standard of review, "abuse of discretion" is the standard established to determine whether a lower court should have set aside a default judgement. *See Price v. Dunn*, 106 Nev. 100, 103, 787 P.2d 785 (1990), *citing Tahoe Village Realty v. DeSemet*, 95 Nev. 131, 134, 590 P.2d 1158, 1161 (1979); *Lentz v. Boles*, 84 Nev. 197, 200, 438 P.2d 254, 257 (1968); *Hotel Last Frontier Corp. v. Frontier Properties Inc.,* 79 Nev. 150, 153, 380 P.2d 293, 294 (1963); *Bryant v. Gibbs*, 69 Nev. 167, 170, 243 P.2d 1050, 1051 (1952). Under the standard set out in those cases, this record plainly shows an "abuse of discretion," in addition to clear legal error on the part of the lower court in not setting aside the default.

The cases state that the lower court should see whether there has been a showing of some excuse for a party's failure to answer or otherwise defend, and a showing that a meritorious defense exists to the claim for relief. Finally, this Court has made it clear that the district court should recognize the principle to which this Court has accorded the most weight: that, where the question is a close one, the basic underlying policy is to have each case decided on its merits. *See Price*, *supra*, at 104-105.

In divorce actions, this Court has held that the rule authorizing a court to set aside a default judgment is to be "very liberally applied." *See Circerchia v. Circerchia,* 77 Nev. 158, 161, 360 P.2d 839 (1961), *citing Blundin v. Blundin*, 38 Nev. 212, 147 P. 1083, 1084 (1915). The lower courts have been directed to set aside defaults in divorce actions "upon very slight showing," if application is made in due time. *See Guardia v. Guardia*, 48 Nev. 230, 230, 229 P.386 (1924) (explaining that the rule concerning defaults in divorce cases "is not as harsh" as in other cases). This Court has made

it the policy of this state that our courts are to be liberal in setting aside default where a meritorious defense is shown to exist, and where failure to answer is due to excusable mistake or negligence. *Id.*, *citation omitted.*

In recognizing that it is hard to lay down general rules as to when default should be opened, this Court noted that each case depends largely on its own facts. *Id.*, *citations omitted.* In Edwin's case, this Court has before it the facts on the record, Edwin's affidavit testimony, and Ursula's argument that Edwin had enough "fair" notice that she should be able to keep whatever of his that she has managed to get away with -- almost all his property.

Accordingly, this Court must decide whether Edwin "appeared" sufficiently to "deserve" the formal procedural notice of intent to take default provided in the Court rules to protect litigants from defaults like this one. This Court must therefore determine the correctness of the lower court's finding that no notice pursuant to NRCP 55(b)(2) was required. This Court must further determine whether Edwin had alleged a meritorious defense and whether the actions of Edwin's counsel, if neglectful, constituted excusable neglect.

The parties agree that Edwin negotiated this matter, directly, and through his attorney's office. ROA 87-90; 112. The parties also agree that Edwin filed an Answer and Counterclaim on December 1, 1995 (ROA 40-45) after Ursula entered default, as a result of Ursula's failure (fraudulent or otherwise), to give him sufficient notice of her intent to do so pursuant to NRCP 55(b)(2).

The gist of the argument to follow is the basic one that he made a sufficient "appearance" under the law to merit notice, because it *should* go without saying that one cannot negotiate with a party who has not made such an "appearance." Thus, if Ursula ever actually believed that

"negotiations had apparently reached an impasse," she should have given formal notice of intent to default, followed by entry of a default, rather than sending additional correspondence. Edwin's position is that each time Ursula continued to negotiate, she demonstrated no "clear expression of intent" to enter a default, and that ultimately he was deprived, unfairly, of a chance to present his case to the court below.

It will also be demonstrated below that Ursula apparently planned her default to take advantage of Edwin's hospitalization and absence from the continent while recuperating. *See* ROA 57.

Consequently, Edwin submits that his failure to answer was due to a reasonable, and therefore excusable, mistake of counsel based upon his reliance on a fellow member of the Nevada Bar to not enter default without notice, pursuant to NRCP 55(b)(2) and SCR 175. That reliance was obviously misplaced, and Monday morning quarterbacking could determine that Edwin's counsel was too trusting. The fact remains, however, that counsel's good faith belief was that the advantage taken of him would not be taken.

Edwin submits that the course of negotiations, performed first by Edwin on his own behalf and then by the personnel of his counsel, Mr. Willick, in conjunction with Ursula's own counsel's admissions regarding "impasses" having been reached between the parties, show that the parties held divergent positions -- in other words, that there are triable issues to be resolved. In particular, Edwin alleged a meritorious defense to Ursula's claim that she was entitled to one-half his Illinois Teacher's pension benefits. Finally, Edwin made his application for relief from judgment well within the time allowed under NRCP 60.

On this first question of standard of review, deference to the district court's decision is not warranted, since the court below ignored the pertinent facts of Edwin's case and refused to set aside the default. In so doing, the district court ignored the applicable law and strong judicial policy favoring a trial on the merits, which amounts to an abuse of discretion. Accordingly, the lower court's decision should be reversed, the default and the decree of divorce should be set aside and Edwin's case should be heard on its merits.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN RULING THAT THE DEFAULT JUDGMENT WAS ENTERED WITH SUFFICIENT AND FAIR NOTICE

The very face of the record supports reversal on the holdings of this Court establishing that the rule authorizing the setting aside of a default judgment is to be "very liberally applied" in a divorce proceeding. *Circerchia, supra* at 161.

The logical lapses in the district court's decision are clear. Ursula ignored the fact that Mr. Willick told Mr. Hambsch he would represent Edwin on May 11, 1995. Ursula's studied attempts at confusion about Edwin's being represented by counsel and her denial that Edwin intended to defend are an insult to the intelligence of all involved. In short, Ursula's actions deprived Edwin of the opportunity to participate in a meaningful dialog and ultimately a trial on the merits which should have been considered by the district court.

Instead, the judge pronounced that Edwin "demonstrated an unresponsive and dilatory approach toward resolution of the matter" and used that erroneous conclusion to rationalize denying Edwin's Motion for Relief From Judgment. ROA 193-194. This is part of the evidence of the district court's abuse of discretion.

Ursula purports to step through elements supposedly constituting an "appearance." In lieu of attempting to support the district court's conclusions, Ursula merely recites them as if repetition was self-proving. For example, in addressing "appearance," Ursula recounts the district court's vague findings (with no references to *facts* in the record whatsoever) that "it was unclear, due to the lack of attention and diligence with which this matter was treated whether Edwin's present counsel, Marshall [sic] Willick, ever intended to represent Edwin in this matter." Ursula also attempts to pass off the subjective speculation of Mr. Hambsch in stating to Mr. Willick: that "at this time I don't know if you represent Mr. Epstein" as "findings" which are "amply supported by the evidence." RAB at 6.

Ursula ignores the record and the law, as she must, since the record shows that Edwin "appeared" on his own behalf through telephone communication (ROA 87; 112) and that Mr. Willick "appeared" on behalf of Edwin through telephone and written communication. ROA 113;122. This Court has repeatedly held that attorney negotiations constitute an "appearance" for purposes of triggering the requirement of formal notice under NRCP 55(b)(2), which does not necessarily require some presentation or submission to the court. *See Gazin v. Hoy,* 102 Nev. 621, 730 P.2d 436 (1968); *Franklin v. Bartsis Realty, Inc.,* 95 Nev. 559, 598 P.2d 1147 (1979); *Christy v. Carlisle,* 94 Nev. 651, 584 P.2d 687 (1987); *Milton v. Gesler*, 107 Nev. 767, 819 P.2d 245 (1991); *McNair v. Rivera*, 110 Nev. 463, 874 P.2d 1240 (1994).

In particular, settlement negotiations and exchange of correspondence between the parties has been deemed an "appearance" within the scope of Rule 55(b)(2), requiring a three-day written notice of the application for default judgment. *Christy,* 94 Nev. at 654.

A. EDWIN ENTERED AN "APPEARANCE"

On May 11, 1995, Mr. Willick directly told Mr. Hambsch that he would be representing Edwin. ROA 113. In June of 1995, Mr. Willick's paralegal told Mr. Hambsch that the firm would try to have an answer on file "within the next week." Mr. Willick's paralegal never stated that Mr. Willick's firm did not represent Edwin, or that the representation itself was in doubt. It was, however, always made clear to Ursula's attorney that Edwin was grievously ill, often unable to communicate even with his own attorney, and in and out of the hospital.[2] *See*, *e.g.*, ROA 122. Indeed, the conversation with Mr. Willick's staff member amounts to a request for an extension of time.[3] Not only does that conversation confirm Mr. Willick's May 11, 1995, statement that he represented Edwin, it indicates a clear purpose to defend.

Ursula's counsel admitted in the June 7, 1996, letter to Mr. Willick that "you advised me that you would be representing Edwin Epstein" and then acknowledged, "I have not been able to do any better than speak with a lady who represented herself to be your law assistant, who indicated that she would try to get an answer on file within the next week. This is unacceptable."

Ursula's attorney invited more dialog, asking, "Is there any possibility of resolving this case along the lines of our proposed Marital Settlement Agreement? May I have the courtesy of you

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[2] These hospitalizations have resulted in a number of amputations and other medical procedures which are the basis for the request being made in this Court for a decision on this appeal in the shortest possible time. Presuming Edwin's success in this appeal, all will be for nothing if he does not live long enough to regain the property that Ursula has taken from him.

[3] Ursula, typically speaking in contradictions, does admit "only once, on January 31, 1995, did Ursula's counsel offer an open extension of time to Edwin in which to file his answer." ROA 87; RAB at 7. She then pats herself on the back, stating later that: "It is, at least, ironic that the numerous extensions of time to answer graciously provided by Ursula in attempting to pursue an amicable settlement." RAB 12 [emphasis added]. She wants to have it both ways -- asserting that she did, and did not, openly extend the time to answer as necessary to fit her arguments. While this verbal hat-trick was effective in swaying the district court judge, it is respectfully submitted that this Court will not be so easily misled.

returning my call? . . . at this time I don't know if you represent Mr. Epstein." ROA 113. Ursula gambles on the appearance of her own "uncertainty" that Mr. Willick represented Edwin, so long as her attorney kept asking the same question despite repeatedly receiving answers in the affirmative.

In *McNair v. Rivera*, 110 Nev. 463, 874 P.2d 1240 (1994), this Court emphasized that a course of "negotiation" between attorneys is sufficient to constitute an appearance where a defendant has indicated a clear purpose to defend the suit. *See McNair*, 110 Nev. at 469. In this case, negotiations were ongoing from January, 1995, to May, 1995, between Ursula (and her attorney) and Edwin, personally. ROA 87, 89, 90-112. Negotiations were ongoing between counsel for the parties from May, 1995, forward, if intermittently. ROA 113, 116-118, 122-123.

The record shows that from March 17, 1995, forward Ursula consistently advised that she would like either a "communication" to "make other arrangements" or a "bona fide response" or a "settlement" -- all of which effectively minimized her alleged desire for a responsive pleading and thereby relegated any mention of default to an incidental item in her correspondence.

When Ursula realized that Edwin was not in agreement with her demands, the negotiations turned nasty. Mr. Willick advised Mr. Hambsch, "After review of the Marital Settlement Agreements, and reviewing my client's prior comments, and going over them with him (a difficult task, given his hospitalization, etc.), I can respond to your proposed Marital Settlement Agreement as follows."[4] ROA 122.

[4] It should be noted that this letter contains both substantive terms and an explanation for them, making questionable the lower court's findings that the default was warranted because Ursula's attorney did not receive a "conscientious" and "good faith" response to settlement offers, the last of which was made just eleven days earlier. See ROA 191.

Ursula dismissed Edwin's fragile health at the same time she attempted to take advantage of his unavailability due his health problems, stating, "it is our understanding that Mr. Epstein has not been hospitalized over the last several weeks. At most, he has been an out-patient for on-going treatment of his diabetes. He has, however, recently returned from a recent vacation in Hawaii with his girlfriend. Is this the reason for your delay in being able to respond to our prior correspondence?" ROA 116. The Court is asked to review the letter set out at ROA 122. There is no conceivable way on the facts of this case that Edwin's communication in proper person and then Mr. Willick's communication should not be considered an "appearance" and "negotiation."

In *Milton v. Gesler*, *supra*, this Court made a point of noting that:

> NRCP 55(b)(2) is designed to protect parties from having a default judgment entered against them; it imposes an affirmative duty on the party seeking a default judgment to notify a defendant who has "appeared" about upcoming hearings. Under this rule of civil procedure, "appearance" is interpreted liberally and includes attorney negotiations "where the defendant has indicated a clear purpose to defend the suit. . . . [An] appearance . . . does not necessarily require some presentation or submission to the court."

107 Nev. at 770. The lower court, however, dismissed what ***this*** court called "an affirmative duty" as "awarding [*sic*.] form over substance." ROA 191. This Court should reverse and remand on this point, holding that it meant what it said in *Milton* and that in the absence of statutory notice of the intent to default, it must be overturned.

The lower court's impatience with the slow negotiations is obvious from its ruling. *See* ROA 189-195. The lower court's expressed pursuit of "promot[ing] efficient resolution of the action" is also laudable. ROA 194. However, as this Court has so poignantly reminded the bench and Bar:

> promptness and efficiency must not be sought at the expense of fairness. . . . a district court may not simply dispense with the adversary process . . . . Although we are eager to activate plans to streamline litigation, we also acknowledge that the

> pursuit of justice is seldom economical and uncomplicated, and that any alterations or reforms must conform with notions of due process.

Sierra Nevada Stagelines v. Rossi, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 23, Mar. 30, 1995). At the very least, those "notions of due process" must include compliance with the rules of procedure, even when it inconveniently prevents a case from being removed from the docket. This is especially true in domestic relations cases, where notice and an opportunity to be heard, "the twin hallmarks of due process," are particularly required in advance of a judicial determination. *See Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

Ursula does no better addressing Edwin's "clear purpose to defend." She presumes too much in attempting to distinguish this case from *Christy v. Carlisle*, 94 Nev. 651, 584 P.2d 687 (1978), in stating that "there was no legal duty on the part of Edwin's counsel to defend and, therefore, there was not a clear intention to defend constituting an appearance." RAB at 7.

This Court in *Christy* was not concerned with whether an attorney retained by a client has "a legal duty to defend." An attorney has both a legal and an ethical duty to protect the best interests of the client. The *Christy* opinion does not say that an appearance by an attorney will not be recognized unless there is a "legal duty to defend" (i.e., a formal court submission). Implying such a requirement would render meaningless the language quoted above from *Milton v. Gesler* (about attorney negotiations constituting an "appearance" triggering the need to comply with the rules of civil procedure). Of course, even if Ursula's attorney could ignore opposing counsel, Edwin had himself already "appeared" within the meaning of the rule when he attempted to resolve the matter by negotiating personally through telephone and letter communication with Ursula's counsel. ROA 87, 89, 112.

Ursula makes outright false statements in her discussion by reciting (with no supporting factual references) that neither Edwin nor his counsel "in any way" indicated "a clear purpose to defend suit." Even a casual review of the correspondence makes it clear that during the negotiations, Edwin did not agree with Ursula's position that his separate property[5] teacher's pension was allegedly "quasi-community property."[6] *Compare* ROA 122-123 *with* ROA 116-118. Thus, if proved, the characterization of the teacher's pension as Edwin's separate property would tend to establish a "meritorious defense" to Ursula's request for a one-half interest in the teacher's retirement benefits. *Franklin v. Bartsis Realty, Inc.*, *infra*, at 560.

In summary, on May 11, 1995, Mr. Willick told Ursula's attorney that he was representing Edwin. AOB at 5; ROA 113. Further, on June 7, 1995, when Ursula's attorney inquired about the case status, Mr. Willick's office responded without contradiction that Edwin was going to pursue and defend in this matter "within the next week." ROA 113. By the time he received the detailed counter-offer in August, ROA 122, Ursula's attorney could not have rationally held any good faith belief other than that Edwin was represented by counsel, had "appeared" in the action so as to deserve notices required by law, and was attempting to negotiate the case within the bounds of the law at whatever speed Edwin's fragile health would allow.

B. URSULA'S WORDS WERE VAGUE, CONTRADICTORY, AND AMBIGUOUS

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[5] Edwin contends that Ursula is entitled to one-half the benefits earned from 1993 forward, minus 4.2% which was acquired as a result of his pre-marital World War II and Korean War service. ROA 57, paragraph 4. That would be in keeping with Nevada law, see, e.g.,Walsh v. Walsh, 103 Nev. 287, 738 P.2d 117 (1988), but is not nearly enough for Ursula's appetite.

[6] A species of property, it should be noted, that is unknown to Nevada law.

This Court has held that where defendants had appeared in the action and plaintiff failed to serve upon defendants "written notice of its application for default judgment, such failure voided the judgment." *See Reno Raceway, Inc. v. Sierra Paving,* 87 Nev. 619, 492 P.2d 127 (1971), *citing Ray v. Stecher,* 79 Nev. 304, 311, 383 P.2d 372 (1963).

Ursula's reliance on *Franklin v. Bartsas Realty, Inc.,*95 Nev. 559, 598 P.2d 1147 (1970), *quoting Wilson v. Moore*, 564 F.2d 366 (1977) to ignore this requirement is misplaced. In *Franklin*, this Court noted "plaintiff's two-barreled warning to the defendant to secure counsel and to file an answer in the action in order to avoid a default" was "significant." *Franklin* at 565; *see* RAB at 8. The facts of the *Wilson* case are distinguishable in that the warnings in *Wilson* were clear and definite as opposed to the wishy-washy, tepid, self-contradictory letters ineffectually proffered by Ursula six times over an eight and one-half month period.

In an unmistakable double standard argument Ursula would have this Court hold that "Edwin's informal contacts do not constitute the equivalent of a formal court appearance requiring strict 55(b)(2) notice" but that, somehow, Ursula's informal, contradictory contacts by responsive phone and letter constitute sufficient and fair notice.

A party's conduct must be considered in light of the surrounding circumstances to determine his intent. *Franklin* at 565. Viewed objectively, Ursula's various letters were not "actual, unqualified notice that a delay in answering the complaint would result in default," for Edwin and counsel had reason to believe that they had "actively participated in the case," had responded to Ursula's letters and that further correspondence would follow. After the letter of August 4 from Mr. Willick, which analyzed the property of the parties in accordance with Nevada law, what ***should*** have happened is that Ursula's counsel should have looked up the law, responded on the merits of who actually had a

property claim to what property, and reformed the proposed marital settlement agreement accordingly. This is what was requested by the written correspondence, and what was expected of him, rather than the un-noticed default. *See* ROA 123.

Edwin, like the businessman in *Franklin,* gave a response in letter form which constituted an "answer" in that it spelled out Edwin's position regarding the facts upon which he based his opposition to Ursula's request for half his Illinois teacher's benefits. ROA 122-123. Edwin received no warning that his response was insufficient to prevent entry of a default judgment. The reference to default in Ursula's August 14, 1995 letter was no different than any reference contained in prior letters. None of those prior references precipitated entry of a default, and given the record of Ursula and her attorney's actions and inactions over the preceding six months, Edwin's counsel was justified (if unwise) to presume that her later letters had the same meaning as her earlier letters.

As was typical, the August 14, 1995 letter concluded with the following: "May we please have ***the courtesy of a timely reply*** in order to determine the status of the matter." ROA 118. [emphasis added]. This was an invitation to respond by letter, which was being formulated at the time Ursula took default without notice -- there was nothing in these circumstances to suggest that Edwin did not consider himself "actively participating in the case."

This Court has held that a default judgment entered without first inquiring about defense counsel's intention to proceed should be annulled and remanded for further proceeding. *See Rowland v. Lepire,* 95 Nev. 639, 640, 600 P.2d 237 (1979); *Cen Val Leasing v. Bockman*, 99 Nev. 612, 668 P.2d 1074 (1983). Also, Supreme Court Rule 175 provides that when a lawyer knows the identity of a lawyer representing an opposing party, he or she should not take advantage by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to

proceed. In *Bockman*, plaintiff's attorney was contacted by counsel for defendant and informed that defendant intended to file a response in the lawsuit. *Bockman* at 613. Because counsel for plaintiff then failed to contact counsel for defendant about his intention to proceed, the district court was required to set aside the default. *Id.*

In this case, the August 14, 1995 letter from Ursula's attorney requested "clarification" of Edwin's position regarding the Marital Settlement Agreement and requested "the courtesy of a timely reply in order to determine the status of the matter." ROA 118. How "uncertain" could any rational human being have been about the identity of counsel after receiving the August 4 letter, and responding to it on August 14? All in all, by August 14, 1995, Mr. Hambsch had negotiated with every attorney in the firm (Mr. Willick and his associate) and had received an assurance from Mr. Willick's paralegal that an answer would be filed shortly. Nevertheless, Ursula's responding letter set out no deadline upon which a filed answer was required. Accordingly, the logical assumption of counsel for Edwin was that no default would be entered without notice in the form of a "three-day notice of intent to enter default" pursuant to NRCP 55(b)(2).

Ursula cannot show that she ***ever*** gave Edwin any firm date by which he was to answer the complaint. Thus, her assertion that Edwin knew that he must file an answer is inconsistent with the facts in the record. Edwin has cited the numerous unclear statements contained in Ursula's correspondence. In contrast, Ursula has neglected to provide any substantiation for her claim that Edwin allegedly "knew" that an answer was supposedly "required."

Accordingly, Edwin was entitled to the protections of NRCP 55(b)(2). Edwin was entitled to expect that a definitive, unambiguous, formal three-day notice of intent to take default would be

served. As a result of Ursula's series of unclear requests, before Edwin formulated the "reply" to her August 14, 1995, letter, ***which she requested***, Ursula had taken her default.

Similarly, Ursula's correspondence to Edwin before he had retained counsel was unclear and imprecise. Ursula ignores the fact that letters dated January 31, 1995, March 17, 1995 and April 4, 1995, were written by her attorney, Mr. Hambsch, to Edwin, a lay person who was not familiar with NRCP 6 provisions pertaining to calculations of time and its sub-provision (e) pertaining to additional time allowed for mailing. There is some doubt from both the moving papers below and Ursula's submission to this Court that even the attorney recognizes those rules.[7]

Ursula attempts to use her own conclusion (or that of her attorney) as to what Edwin was "aware" of as the basis for her argument that sufficient notice was given of intent to take default. Ursula contradicts her own assertion that it was "clear" in March of 1995 that she intended to enter default; the very next paragraph of her Answering Brief admits that "On April 4, 1995, in a further attempt to amicably resolve this matter a proposed marital settlement agreement (MSA) was forwarded to Edwin." RAB at 3.[8]

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[7] For example, Ursula speaks of "service" of her Praecipe for Default on Edwin as of September 14, 1995. RAB at 4. It was not even signed by her attorney until that date, and not filed until the next day. ROA 11. It presumably went out in the next day's mail. Immediately, upon receipt of the Praecipe for Default, on September 19, 1995, Ms. Luttrell of Mr. Willick's office contacted Ursula's attorney by telephone and letter, and advised that an Answer and Counterclaim could be forwarded, and requested that the pleading be accepted. All this was to no avail; Ursula's attorney declared that the default had already been entered and refused the request. At that time, Edwin could not be located or spoken to, for purpose of obtaining signature on an Answer or for any other purpose. The "explanatory" letter requested by Ursula's counsel on August 14, 1995 was in draft at Mr. Willick's office when the default was filed some 23 days later. This is a large part of why this office believes it has been unfairly sandbagged.

[8] Moreover, the April 4, 1995, letter and proposed Marital Settlement Agreement were mailed from South Lake Tahoe, California, eighteen days after the March 17, 1995 letter was written. This letter was very likely received by Edwin in Las Vegas, just within the twenty day period referred to in the March 17, 1995 letter – if not on the twentieth day.

Ursula cannot have it both ways --she cannot have been simultaneously negotiating and awaiting "clarification" (as her letters state) and relying on having given notice of intent to default (as her pleadings state). In fact, Ursula has it backwards when she states (and the lower court echoes) that notice was adequate because over eight months there were "six separate and distinct notices" of possible default. RAB 4; ROA 194. This Court has made it clear that where successive notices are given the receiving party is entitled to rely upon the latter as entirely vitiating the effect of the former. *See Ross v. Giacomo*, 97 Nev. 550, 635 P.2d 298 (1981) (where respondent sent two notices of entry on two separate dates, he created a confusing situation, from which he should not be allowed to benefit). In this case, the very last communication from Ursula's counsel before default was entered was a letter requesting "clarification" and inviting a responsive letter. ROA 118.

Thus, Edwin or Mr. Willick's office, or (most likely) both of them entered an "appearance." It is not possible "from a view of the entire record" to affirm denial of a trial on the merits to Edwin, who was very ill, at great disadvantage, but to whom Judge Gibbons would award no relief. Certainly, Ursula has not disproved that she came into the marriage with nothing, but left the marriage with virtually all the cash, all the assets (including the bulk of Edwin's sole and separate property), and the superior outlook for the future. The "award" left to Edwin by Ursula was largely composed of her left-overs and cast-offs. A trial on the merits would remedy this gross injustice, which is why Ursula will do what she can to avoid such a trial.

It is submitted that the face of the procedural rules, this Court's prior holdings, public policy, and the facts of this case all indicate that Edwin's motion to set aside the default should have been granted. That is why this Court is asked to reverse the order denying that motion. Edwin also

requests that this Court, on remand, consider re-assigning this matter to a different judge. The denial of the request to set aside the default in this case was improper, unjustifiable, and requires reversal.

II. THE DISTRICT COURT ERRED IN RULING THAT THE DIVISION OF COMMUNITY PROPERTY WAS NOT PROCURED BY FRAUD

The requirement that the moving party must show some excuse for setting aside a judgment is addressed by NRCP 60(b), which provides that a court may relieve a party from a final judgment for extrinsic fraud upon a court with no time limitation. "Extrinsic fraud has been held to exist when the unsuccessful party is kept away from the court by . . . such conduct as prevents a real trial upon the issues involved, or any other act or omission which procures the absence of the unsuccessful party at the trial." *Price*, *supra*, at 104, *citations omitted.*

Ursula's failure to accord Edwin proper notice as argued in Section I, above, constituted extrinsic fraud upon the court, because she intentionally took default without sufficient or fair notice to Edwin or his counsel -- while Edwin's counsel was still replying to her last letter requesting a written response. Ursula thus "prevented a real trial on the issues," the primary one of which was the division of community property. Predictably, Ursula defends the district court's distribution of community property awarding approximately 70% of all assets to her, and urges this Court not to consider the issue at all. RAB at 16.

As stated above, there is a strong judicial policy favoring a decision on the merits which is heightened in domestic relations cases. *See Bauwens v. Evans*, 109 Nev. 537, 853 P.2d 121 (1993) (district courts should hear cases on the merits if possible, and here Father demonstrated promptness, no intent to delay, good faith, lack of knowledge of procedural requirements, and a meritorious defense, and thus satisfied NRCP 60(b)(1) excusable neglect or inadvertence); *Price v. Dunn*, 106

Nev. 100, 787 P.2d 785 (1990) ("the judicial policy favoring a decision on the merits heightens in domestic relations matters"). Nor is this policy a recent one; this Court has long made this its declared policy. *See Cicerchia v. Cicerchia,* 77 Nev. 158, 161, 360 P.2d 839, 841 (1961); *Guardia v. Guardia*, 48 Nev. 230, 229 P. 386 (1924); *Blundin v. Blundin,* 38 Nev. 212, 214, 147 P. 1083, 10084 (1951). Any doubt about the appalling practical impact of the lower court's order on Edwin will be readily observed by the trial court upon remand.

This Court's willingness to evaluate the real world impact of its decisions was illustrated in *Guardia v. Guardia*, *supra*. There the wife, residing in California, retained Reno counsel to negotiate a settlement, if possible, of defendant's claim for spousal support and child support. Reno counsel, neglected to file a response to the complaint. *Id.* at 235. The record in *Guardia* reflected the wife's "incidental claim of alimony" with no community property or separate property involved. *Id.* Thus, in deciding not to re-open that case this Court reasoned that there had been "no showing of a meritorious defense to the action." *Id.*

Edwin's case is clearly distinguishable from *Guardia* in that the real world impact suffered by Edwin is that he has been dispossessed of more than half of the community property and of much of his separate property -- a result that could not possibly stand under the law of this state if the case is allowed to reach trial. ROA 58, paragraph 8, 12, 14; 131-132, paragraph 6; *see Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983); *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988). This onerous state of affairs is far from an "incidental" result.

Though it is not possible, given the thin, pre-trial record, to set out what the precise marital holdings *were*, the letters exchanged by counsel and Edwin's affidavits show that Ursula chose to take numerous valuable items with her and sent only items she did not want back to Edwin. ROA

58, 131-32, Paragraph 3. The record does show that Edwin, at age 68, is retired, in worsening health and on a severely limited income -- much of which Ursula has now seized based on her fraudulent default judgment. It is also possible to see that Ursula is in possession of the majority of the community and separate property (of both parties). It is submitted that, at the very least, half of the community property, belongs to Edwin.

Here, the lower court's review was limited to noting that the eventual decree submitted by Ursula matched her opening offer -- and ignored all of the law indicating that it constituted gross over-reaching. *See* ROA 193. The lower court's decision to ignore Edwin's meritorious defenses to the over-reaching decree, and the harsh effects of the default decision on Edwin, was an abuse of discretion. The order denying his request for relief from judgment should be reversed.

III. THE DISTRICT COURT ERRED IN RULING THAT APPELLANT'S NEGLECT, IF ANY, WAS INEXCUSABLE

In addition to the policy of this Court that district courts should hear cases on the merits if possible, NRCP 60(b)(1) provides that a district court may relieve a party from a default judgment on the grounds of "mistake, inadvertence, surprise or excusable neglect." Though, generally, district courts enjoy some discretion in such matters, this discretion is not unfettered. Thus, this Court has established guidelines for lower courts to examine a NRCP 60(b)(1) claim. The district court must analyze whether the movant: (1) promptly applied to remove the judgment; (2) lacked intent to delay the proceedings; (3) demonstrated good faith; (4) lacked knowledge of procedural requirements; and (5) tendered a meritorious defense to the claim for relief, or some combination thereof. *See Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 380 P.2d 293 (1963). It is submitted that the district court's decision to deny the requested set aside of default must be reversed as a matter of law.

The fundamental purpose of the rule favoring orders setting aside defaults, but disfavoring orders *denying* such set-asides, was stated by this Court in *Blakeney v. Fremont Hotel, Inc.*, 77 Nev. 191, 195, 360 P.2d 1039 (1961):

> If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party who, upon hearing, might have interposed a perfectly good defense. By sustaining the default, he would forever be debarred the right of a hearing. If, then, a *nisi prius* Court refuses to set aside a default when a party shows with reasonable certainty that he has a good defense, and he has only been guilty of carelessness and inattention to his business, but no willful or fraudulent delay, it would be highly proper even for an appellate Court to come to his relief if the lower Court refused it. But when the default has been set aside the case is far different. In such case, if the plaintiff has a good cause of action and clear proof of his demand, he could generally try his case in the Court below and obtain another judgment in less time, and with far less expenses, than he could bring his case to this Court. . . . [If] the plaintiff has a good case there is no necessity of appealing. If he has a bad one, this Court ought not to be very anxious to help him keep an advantage he has obtained, not through the justice or strength of his cause, but by the accidental blunder of his opponent.

Id. At 195. This is the situation here. If the lower court's obvious displeasure with the course of negotiations is based on counsel's "blunder" rather than problems attendant to Edwin's health,[9] it still ought not to deprive him of property to which he is clearly entitled under law. Upon remand the disastrous consequences made certain by the district court's ruling depriving Edwin of a hearing on the merits will be made clear; as noted above, this Court is able on just the documents supplied to find that Ursula has clearly obtained by default a result she could not possibly reach under Nevada

[9] The lower court expressed that it "fails to see how EDWIN's health prevented Mr. Willick from conscientiously pursuing negotiations, drafting an answer to URSULA's Complaint, or in the least, providing responses to URSULA's repeated inquiries." ROA 194. Since the negotiations by phone were documented, several (but not all) of the letters responding to the legal points were presented, and the Answer was only not filed because negotiations continued, this "ruling" does not appear well founded. Even if it was, it would appear that the lower court has expressed too little regard for the special problems of obtaining information and decisions from a grievously ill, often in pain, frequently-hospitalized client on a variety of powerful medications.

law on the merits. It is the inevitability of those consequences that militate toward reversal of the lower court's decision on the request to set aside the decree.

The fact that Ursula did not take, literally, ***everything*** -- that Edwin was awarded some items of marital property -- means very little. Nothing in Ursula's Answering Brief adequately defends the district court's legally implausible ruling on the merits of the property distribution, which should be set aside as a matter of equity. *See*, *e.g.*,*Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992); *Petersen v. Petersen*, 105 Nev. 133, 771 P.2d 159 (1989);*Nevada Industrial Development, Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987).

Ursula dodges the issue, essentially arguing that it is permissible for her to have taken advantage of her husband (who was ill with diabetes complications and hospitalized periodically and facing various amputations), by asserting the "fairness" of a deal by which she got 70% of the marital assets, and he received nothing save her leftovers, because he did not "appear" to her satisfaction despite eight months of correspondence. *See* RAB at 5. She ***was***, however, already in possession of essentially all the marital property, and apparently had a premeditated game plan. ROA 57, paragraph 6; 132, paragraphs 3, 5.

This Court has recognized that the mental and physical condition of a litigant has many times been taken into account when considering setting aside default judgments. *See Wagner v. Anderson*, 63 Nev. 453, 456, 172 P.2d 612 (1946)(defendant was hospitalized due to gunshot and other wounds and unable to offer any defense and answer); *Fagin v. Fagin*, 91 Nev. 794, 544 P.2d 415 (1975) (defendant suffering from sever rheumatoidal arthritis which limited her activities and confined her largely to her household).

Besides being housebound, the defendant in *Fagin*, Ruth, was also distressed by the fact that her husband of thirty-six (36) years had left her and initiated divorce proceedings in a state some 2,000 miles away. *Id.* These facts along with Ruth's innocence in litigation were considered by the district court in setting aside the default judgment on the basis of "mistake, inadvertence or excusable neglect." *Id.*

Edwin had no intent to "delay the proceedings." Edwin, in addition to being retired with a 50% disability rating (30% of which is attributable to an eye condition), suffered from arthritis and diabetes. Edwin having had a toe amputated (ROA 150) was again hospitalized on April 4, 1994. Edwin also had been hospitalized with a leg infection on November 16, 1994. ROA 154. These problems were nearly constant, and eventually led to the loss of entire limbs, piece by piece. Edwin was again hospitalized for leg surgery (femoral artery bypass) during settlement negotiations. ROA 57; ROA 123; ROA 135; ROA 148; ROA 167(May 11, 1995 hospitalization); ROA 169.

It is submitted that Edwin's failing health, the various noxious medicines and procedures he has been forced to take, his repeated hospitalizations and attempts at convalescence, and the raw pain and fear of having doctors lop off various parts of him, are reasonable excuses making it difficult for him to be as prompt in response as the lower court found to be required. At the very least, such conditions are enough to force his able-bodied opponent to comply with every letter of the procedural rules designed to protect persons like Edwin from persons like Ursula and her attorney.

Making everything even slower was that the negotiations took place long-distance. Ursula's counsel corresponded with Edwin directly until May of 1995, and counsel have never actually met. The lower court did not take these facts properly into consideration in assessing Edwin's good faith and his lack of intent to delay the proceedings.

To specifically cite the merits of a "defense," Edwin's counsel advised in the letter dated August 4, 1996, that, with the exception of one-half of the period from 1993 forward (and less 4.2% purchased from military service), Edwin's Teacher's Retirement was his "sole and separate property." ROA 122; ROA 57. This certainly exceeds what this Court has found to be required; the defendant in *Wagner* tendered allegations, the proof of which *might have* relieved him of legal responsibility and to that extent, a "meritorious defense" was made out. *Wagner supra* at 457.

Attacking Edwin's "promptness," Ursula contends that Edwin had some eleven days notice after the default was entered and before the default judgment was entered (RAB 11) and that he applied to remove the present judgment two months after entry of that judgment. RAB 17. She further states that, "Even after she mailed a copy of the Clerk's Default to counsel and Edwin, nothing was done. Judgment was entered two weeks later." RAB 14.

Such reasoning is nonsensical, given Edwin's hospitalizations and the fact that he was recuperating in Germany in September and October of 1995, and could not even be contacted by counsel (to sign an affidavit or for any other reason) during the time in question. ROA 57, paragraph 6. The very first moment that he could be found, Edwin promptly prepared and filed his Motion for Relief From Judgment on December 1, 1995. It is worth noting that Ursula knew full well where Edwin was and what he was doing, and apparently timed her court submissions for the very purpose of ensuring that he would be unable to meaningfully respond. ROA 57.

Ursula's reliance on *Heard v. Fisher's & Cobb Sales*, 88 Nev. 566, 568, 502 P.2d 104 (1972), is misplaced. In *Heard*, the default was not set aside; however, unlike this case, the appellant there was not prevented from presenting his defense and having a full trial on the merits, and thus was not considered the "target of tactical surprise." *Id.* At 568. Edwin has not demonstrated willful intent

to delay this case, nor has the delay in filing his answer been inexcusable. These are valid reasons for setting aside the default judgment pursuant to the policy favoring trial on the merits.

For all the reasons discussed in the Opening Brief and above, it is submitted that the ruling depriving Edwin of the opportunity to present his case should be reversed. Further, Ursula's request for attorney's fees should be denied as wholly unwarranted given the record, the equities of the case, and her superior financial position.

IV. CONCLUSION

There is no way the result in this default judgment could have been entered at trial, since it exceeds the legal awards that could be made to a litigant. Ursula took advantage of Edwin's severe illness by sending a letter requesting further negotiations, and then filing default while Edwin's attorney was still drafting the response, and Edwin was hospitalized and absent.

Procedurally and factually, legally and equitably, this Court should not allow the resulting inequity to stand. It is respectfully submitted that the decree of divorce be set aside in its entirety, and the matter remanded to a different judge for a trial setting and distribution of the assets of the parties in accordance with law, with the intention of achieving equity.

Respectfully submitted,
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_____
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ATTORNEY'S CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 _____ day of _____, 1996.

_____
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to:

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by placing same in ordinary United States mail, postage prepaid, on _____, 1996.

_____
Employee of The Law Office of Marshal S. Willick, P.C.

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