IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

KATIE HARWOOD,	)	
	)	
Appellant/Cross-Respondent,	)	
	)	S.C. CASE 31775
vs.	)	D.C. CASE D 209693
	)	
MILTON K. HARWOOD,	)	
	)	
Respondent/Cross-Appellant.	)	

RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF

GERALD F. NEAL, ESQ.
Attorney for Appellant
Nevada Bar No. 000353
1200 South Fourth Street, Suite 1
Las Vegas, NV 89104
(702) 380-1234

MARSHAL S. WILLICK, ESQ.
Attorney for Respondent
Nevada Bar No. 2515
3551 E. Bonanza Road, Suite 101
Las Vegas, Nevada 89110
(702) 438-4100

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STATEMENT OF THE CASE

Appeal and cross-appeal from decree of divorce and follow up order dividing property and debts and awarding alimony; Hon. Robert E. Gaston, Eighth Judicial District Court, Clark County, Nevada.

After other efforts to end this marriage (discussed below) were not completed, a Complaint was filed on January 28, 1997. Katie's Appendix 25-28.[1] The case was scheduled for trial in Department B (Hon. Gloria Sanchez) on November 24, 1997, but the case was internally reassigned to Department F (Hon. Robert E. Gaston) and continued. App. 168. Calendar call was held November 10, at which time final orders relating to discovery and exhibits were made. App. 168.

It finally came to trial on December 30 and 31, 1997, at the end of which a "*Decree of Divorce*" was filed. Katie's Appendix 18-19. Closing arguments were made, and an oral decision on remaining issues was rendered, on January 2, 1998. The resulting "*Order Following Decree of Divorce*" was filed on January 22, 1998. Katie's Appendix 20-24.

Katie's Appeal and Milton's Cross-Appeal followed.

[1] References to "App." are to Milton's Appendix; those to "Katie's Appendix" are to the appendix filed with the Opening Brief. Katie's counsel never proposed any joint appendix, and what she has submitted is incomplete and not in compliance with NRAP 30, as detailed below.

STATEMENT OF FACTS[2]

In 1961 – thirty-two years prior to the marriage at issue in this case – Respondent Milton Harwood ("Milton") started a business now known as Compressor Parts & Repair, Inc. ("CPR"). Katie's Appendix 51; Transcript ("Tr.") at 35. The business was incorporated in 1962. Katie's Appendix 51.

CPR wholesales air compressors, and new and re-manufactured air conditioning and refrigeration units; it also sells parts and supplies, and rents mobile air conditioning units for short term rent. Katie's Appendix 51-52. By 1971, Milton bought land and built CPR's primary site at 1501 North Peck Road, South El Monte, California. Tr. at 215. Milton personally owns both the land and the building, which he rents to CPR. Katie's Appendix 52. The company has had other locations over the years, but now has only one other sales office, at 2726 West McDowell Road in Phoenix, Arizona. Katie's Appendix 52.

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[2] It is respectfully submitted that Katie's recitation of the facts is insufficient to allow this Court to review the case. The majority of her "facts" and conclusions are drawn from her own claims, and most were neither litigated nor established at trial.

The Opening Brief fails to acknowledge matters on which conflicting testimony was submitted, instead offering Katie's testimony (or even her attorney's argument) as "fact," even where contradicted by all other evidence. Because Appellant's recitation of the facts goes beyond inaccurate, to misleading, the Court is asked to use the Statement of Facts set forth in this Brief.

Further, Katie's Appendix excludes necessary materials essential to the decision of the issues presented by the appeal, and is believed to be "so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix," within the meaning of NRAP 30(b) and NRAP 30(g)(2). For example, Katie has argued that the decree should be set aside and the case remanded for re-trial, because of alleged error in denying her motion for continuance. Appellant's Opening Brief ("AOB") at 23-27. She neglected to include the motion for continuance filed and considered below, or the opposition filed by Milton's counsel showing the motion to be frivolous. App. 148, 167. She has included neither the pre-trial motions, nor the pre-trial order under which she obtained tens of thousands of dollars in temporary fees and allowances, even though those are ***required*** to be included. App. 15, 25, 57; NRAP 30(2)(iii). Many other similar examples are touched upon in the following Statement of Facts.

The Court is asked to note these apparently intentional, tactical omissions, and impose sanctions against Katie pursuant to NRAP 30(g)(2). *See also Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990).

In 1974, Katie Harwood ("Katie") first came to the United States from Thailand. Tr. at 245, 249. She obtained some education in both countries in business, clerical, and accounting work. Tr. 249-251. By 1978, she was working as a bookkeeper for a jewelry company, and then worked account receivables for HBO from 1980 to 1984. Tr. at 247.

Sometime in the 1980s, CPR established a defined benefit pension with Milton acting as plan trustee. Katie's Appendix 54; Tr. at 113-14. The primary asset owned by the plan was an apartment complex in Victorville that was doing well until the military closed the neighboring base, resulting first in departure of most of the tenants, and ultimately in foreclosure of the property. Katie's Appendix 54; Tr. at 117.

By early 1992, the plan failed and was frozen. Katie's Appendix 68. The federal regulatory authority found that the plan "lacked investment diversity" and required Milton, as trustee, to forfeit his entire interest in the plan and liquidate its remaining assets. Katie's Appendix 54; Tr. at 114-15, 117. Milton lost his entire pension, which he estimated at $350,000.00, but all other CPR employees were made whole, in part by requiring CPR to make additional cash payments in 1995 and 1996. Katie's Appendix 54; Tr. at 115, 117, 322. Milton estimated the total financial loss from the pension collapse at $850,000.00. Tr. at 322.

In 1989, Milton opened a Las Vegas outlet for CPR, and hired an old friend (Ron McPherson) to manage it. Katie's Appendix 54. In 1993, Mr. McPherson "took all of the accounts and opened his own business in direct competition with CPR," and by 1995, Milton was forced to close his Las Vegas operation. Katie's Appendix 54.

Katie, meanwhile, had continued in various bookkeeping, accounting, and clerical positions in Las Vegas, until July, 1993, when she met and started dating Milton, and ceased working. Tr. at 247-49; App. 153-54.[3]

Some five months later, on December 9, 1993, the parties met with attorney Michael Kelly in California, and both signed what was supposed to have been the initial draft of a prenuptial agreement provided for their review. Katie's Appendix 35. On December 23, 1993, the parties married. Katie's Appendix 25.

They spent the next four years getting divorced. About six months after the wedding, Milton had a Joint Petition for Divorce drawn up and delivered to Katie. Katie's Appendix 86-91; Tr. at 245-46. It was never completed and filed.

Milton then filed a "*Complaint for Divorce*" from Katie on April 21, 1995 (Case No. D 187184), but the case was dismissed when the parties (briefly) discussed reconciliation after a year and a half, in October, 1996. App. 27, 101.

The discussions were short-lived. Ninety days after the first action was dismissed, Milton filed a second "*Complaint for Divorce*" on January 28, 1997, again requesting a dissolution of their marriage; this is the Complaint that led to the divorce below, and this appeal.

The parties agree that they did not live together much between their marriage and the much-delayed date of divorce, although they disagree on the exact number of days. Katie testified that they spent a total of 156 days together, but Milton claimed that the total was only 120 days. Tr. at 258, 263, 304-305. The court below noted during its oral findings that Katie offered no rebuttal on this

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[3] During the litigation, however, Katie asserted that Milton ordered her to stop working once they were married (six months later). App. 15. On appeal, she contends that Milton asked her to quit her job when he proposed marriage. AOB at 3. Katie offered no evidence for any of these versions of her story other than her own testimony, while her own exhibits state that she quit work six months prior to marriage, when she started dating (and received cash and housing, transportation, etc. from) Milton.

point, and concluded that the actual time Milton and Katie spent together as "husband and wife" was "anywhere from 120 to 150 days" during the four years it took them to get divorced. Tr. at 405.

The procedural history of the divorce litigation is relevant to both parties' claims on appeal,[4] and so is detailed here.

Katie filed a motion on March 14, 1997, requesting temporary spousal support of $5,000.00 per month, $15,000.00 in preliminary attorney's fees, and exclusive possession of Milton's pre-marital home on Tenaya Way that he had already listed for sale. App. 15. She filed an Affidavit of Financial Condition supporting her monetary claims. App. 1.

Milton opposed the motion, and requested adjudication of the enforceability of the prenuptial agreement the parties had signed in California. App. 25. The Opposition attacked Katie's Affidavit of Financial Condition as "ludicrous," and requested that the costs of discovery be limited until the validity of the prenuptial agreement was determined, one way or the other. App. 28-30. Shortly before the hearing, Katie filed an "errata" reducing her claimed expenses some ten-fold. App. 41.

On April 7, Judge Sanchez heard the preliminary motions. Since Katie had no colorable claim to the house on Tenaya, she permitted Milton to sell it, but ordered Milton to pay Katie $1,200.00 per month until the residence sold, at which time alimony would increase to $2,000.00 per month. App. 57-59. The Court set an evidentiary hearing on the validity of the prenuptial for July, and awarded Katie $3,500.00 in preliminary attorney's fees to allow for discovery, preparation, and presentation at that hearing. App. 58-59.

On May 21, 1997, counsel for the parties met and completed a Joint Case Conference Report, which was filed on June 2, 1997. App. 53-56. It noted the then-upcoming evidentiary hearing on the

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[4] Katie has made a claim of abuse of discretion as to the lower court's denial of a continuance, and its use of the expert testimony at trial, and Milton claims that it was error for the court below to deny him an award of attorney's fees on the procedural facts of this case.

prenuptial agreement, and both sides confirmed that they could complete all required discovery for trial within 120 days. App. 55.

On June 12, the court issued a Scheduling Order providing that all discovery was to be completed by October 6, 1997, and that the parties were to be ready for trial on the court's earliest available date after October 27, 1997. On June 10 and June 25, Milton's counsel sent first and second sets of interrogatories to Katie's counsel. App. 111. Responses to the first set, and then some amendments to those answers, were received on July 11 and July 21. App. 112. Katie propounded no discovery of any kind, and did not respond to the second set of interrogatories.

On July 21, Judge Sanchez convened the evidentiary hearing on the validity of the prenuptial agreement, after which she found that the copy of the prenuptial was admissible in place of the original, and that both parties did indeed sign it. She found, however, that it was not enforceable because it was "a draft and not a final agreement," because it contained inaccurate statements of fact and numbering errors, because not all assets were listed, because it was discussed and signed on the same day and Katie did not have benefit of counsel (although it was offered to her), and because it was unconscionable in that Katie would have received little or nothing under its terms. Katie's Appendix 34-35.

Accordingly, the Court ruled that the prenuptial would not be enforced, and that Katie would continue to receive $2,000.00 per month spousal support until the trial (then scheduled for November 24), and an additional $8,000.00 in preliminary attorney's fees for all remaining pre-trial discovery and proceedings, but no further attorney's fees through the time of trial. Katie's Appendix 36.

In September, counsel for Milton complained by letter about the inadequacies of Katie's responses to discovery; Milton's requests and Katie's partial responses continued between September and November, 1997. App. 112. Still, Katie propounded no discovery of any kind.

There were a couple of other skirmishes indicative of the parties' motives and tactics, but not terribly relevant to the outcome of the case, which proceeded toward the trial date set for November.[5] Milton filed his pretrial memorandum on November 7. App. 100.

Calendar call was held in Department F on November 10, 1997.[6] There, Katie's attorney revealed that he wanted to take Milton's deposition, and Milton's counsel complained about Katie's failure to provide a pre-trial memo or a witness list. The trial court provided dates within which all disclosures and discovery were to be completed, and set dates for a pre-trial conference for the exchange of exhibits, and for trial on December 30 and 31, 1997. Katie's Appendix 9.

As he had requested at the calendar call, Katie's attorney was permitted to take Milton's deposition, on November 26, 1997; the attorney made no request of Milton to bring or produce anything at the deposition. Up to the date of his deposition, Milton "never received *even one* request to produce *any* discovery." App. 169. Even though no formal requests had been made, counsel for Milton agreed to give Katie's attorney any discoverable information that could be located, upon request. App. 171-73.

When the December 1 due date had come and gone without Katie's responses to discovery, Milton's counsel filed a "*Motion to Compel Discovery*" on December 4. App.108-137.

The next day, Katie finally submitted her "*Pre-Trial Memorandum*." App. 144. Katie listed only three issues for trial: "identification of any community asset or debts, and distribution of the same," "Katie's claim for spousal support," and "Katie's claim for her portion of [Milton's] pension

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[5] Milton complained about the furniture and fixtures (including the crystal chandeliers) looted by Katie when she vacated the Tenaya house. App. 76-78. Ultimately, the property was returned or accounted for. Milton also filed an "*Ex Parte Motion to Temporarily Secure Safe Deposit Box and Open Safe Deposit Box*," trying to locate missing property. App. 91-95. The motion was granted, App. 97-99, but it was already too late; one box contained only junk jewelry, and the other was empty by the time counsel got to it.

[6] By this time, the case had been reassigned from Department B to Department F, and the November 24 trial date was taken off calendar.

or profit sharing plans." App. 145. Katie's memorandum noted no jurisdictional issues, and listed a Ms. "Panny Litch" as a residency witness that Katie would call to corroborate her Nevada residency, as discussed and agreed between counsel. App. 146.

Milton's "*Motion to Compel Discovery*" came on for hearing on December 9 before Discovery Commissioner Jennifer Henry. In open court, Katie's attorney served an untimely "*Motion to Compel Discovery Responses*," complaining of alleged discovery concerns of her own. App. 138-143. Milton's counsel stipulated to having the court hear Katie's Motion then and there, "even though [Milton] has never been served with the motion." Katie's Appendix 9a,[7] 37-42. Katie's entire motion was based on Milton having answered "I don't know" when asked at deposition for his "net worth." App. 139, 172.

After reviewing Milton's discovery requests, Katie's lack of response, and noting that Katie had never made any discovery requests, Discovery Commissioner Henry determined that Katie had committed eighteen discovery violations, and Milton had committed none.[8] Katie's Appendix 9-10, 37-42. Katie was ordered to pay Milton $500 in attorney's fees. Katie's Appendix 41.

The Discovery Commissioner instructed Katie to supply all documentation and information to Milton by December 15, 1997, and further noted that since the discovery cut-off was December 10, 1997, counsel should attempt to stipulate to any documents or information that Katie's counsel now wanted, even though he had never previously requested any. Milton's counsel agreed to do so, and provided Katie's counsel with anything he requested.[9]

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[7] Actually, the Minutes for November 9 are on an un-numbered page between pages 9 and 10 of Katie's Appendix.

[8] The un-referenced statement in Katie's Opening Brief that the Discovery Commissioner made a "recommendation for further discovery against Milton," AOB 6, is indefensively inaccurate.

[9] In a December 15 filing, Milton's counsel asserted (without contradiction): "Counsel notes in passing that we have made every effort to give Mr. Neal everything he has asked for, ***despite*** the fact that the discovery deadline has passed, and ***despite*** the lack of any kind of formal request for any documentation or information."

During the discovery hearing, Katie's attorney stated that he did not have a business appraiser, but simply wanted to call "his accountant to give an opinion at trial." Katie's Appendix 41. The Commissioner told Katie's attorney that "if he wanted to make an argument about [the corporation's] value, he needed to get in and take a look at the business." Katie's Appendix 42.

Along with her "*Motion to Compel Discovery Responses*," Katie had filed a "*Motion to Continue Trial Date*," which claimed that a continuance of the trial was necessary "to allow time for hearing before the Discovery Commissioner prior to trial." App. 148, 150. Of course, that hearing had been held on December 9; her motion to continue was set for December 30. App. 148.

Like her discovery motion, the motion to continue trial complained only that at Milton's deposition, he "refused to answer any questions regarding his worth," and claimed that a continuance was necessary "so that [Katie] can be ready for trial as to [Milton's] financial condition." App. 150. Katie's attorney submitted a supporting affidavit, additionally claiming that Milton had never filed an Affidavit of Financial Condition. App. 151.

Milton opposed the continuance, noting that the hearing before the Discovery Commissioner had already been held, that Milton had filed an Affidavit of Financial Condition in April, and another in July, and that Katie had cited no authority at all in her motion. App. 167. Counsel for Milton noted that from the date the action had been filed the prior January, through the date of Milton's deposition on November 26, 1997, "we haven't received any form of a request for any information formally or informally." App. 171, n.5.

Turning to the substance of the continuance request, the Opposition stated:

> This allows us to return to Mr. Neal's second assertion, that Milton "refused to answer any questions regarding his worth" at his deposition. Again, and as kindly as it can be put, counsel is mistaken. What Milton ***actually said***, in answering Mr. Neal's question as to Milton's "net worth," was: "I don't know." [Footnote omitted.]

App. 173.

> Milton ***did*** answer Mr. Neal's question, and honestly, despite the persistent efforts by Mr. Neal to claim otherwise. As Commissioner Henry noted at the hearing a couple of days ago, the fact that Mr. Neal did not ***like*** the answer does not mean that Milton refused to answer the question.
>
> And we should pause for a moment to ask the question "so what?" Milton's personal opinion of his net worth has absolutely nothing to do with the issues in this case, which have to do with what rights Katie has to any community property accrued during the marriage.

App. 172 (the footnote omitted above referenced Milton's deposition of November 26, 1997, at page 38, where he answered the question). Finally, the Opposition noted that Milton was 73 years old and in marginal health, and was thus entitled to a preferential setting. NRS 16.025(1) & (2).

The complete transcript of the continuance motion hearing (held some hours before the trial) is set out at pages 5 to 14 of the transcript. At oral argument, Katie's attorney abandoned the rationale that he needed to determine Milton's "net worth." Instead, he argued that the law library was closed, so he could not look up *Van Camp* and *Pereira* (two very old California cases), and that he wanted to Shepardize them. Tr. at 4-7. He also argued that the residency witness he promised to call was in Hawaii, that he just discovered the existence of Ron McPherson and needed to depose him "about the pension plan," and that since the business was "unique," he had to study the case law to determine his client's interest. Tr. at 4-6.

Counsel for Milton offered Katie's attorney, in open court, copies of *Van Camp* and *Pereira* and all Nevada authority citing either case, and noted that the most recent of those was over seven years old. Tr. at 8. Counsel further noted that Mr. McPherson had nothing to do with the pension plan, and argued that Katie's failure to produce her own residency witness was not a valid ground to grant her a continuance. Tr. at 8-9. Finally, counsel noted that Milton was old and sick, and that Katie was apparently just trying to delay the completion of the divorce, so as to outlive Milton and assume ownership of his property. Tr. at 9-10.

The case proceeded to trial as scheduled on December 30-31, 1997, at the conclusion of which a divorce was granted. Katie's Appendix at 11-12. Closing arguments were made and a decision on remaining contested matters was rendered by the trial court on January 2, 1998. Katie's Appendix 12-15.

Only four people testified at trial: Katie; Milton; Katie's witness, Sheldon Rosenberg (certified in the limited capacity of a "Certified Public Accountant"); and Milton's witness, John Lowther (certified as an expert in valuations, appraisal, apportionment, employment, and asset tracing). Tr. 29, 79-80. Katie produced no rebuttal to either impeach or contradict Mr. Lowther's expert testimony on the valuation of the real property in question, the valuation of Milton's business, CPR, or as to the amount or tracing of money from asset to asset.

The bulk of trial testimony came from Mr. Lowther, and most of his testimony concerned Milton's business, CPR, and the tracing of funds invested in other assets. Tr. at 27-78. Mr. Lowther's expert report on the history and economic past and future of CPR ("Determination of the Community Property Interest of Katie Walker in Compressor Parts & Repair, Inc.") was admitted into evidence. Katie's Appendix 43-68.

Mr. Lowther found that during the term of the parties' marriage, CPR's gross sales declined by 8-11%, and the company decreased in value. Katie's Appendix 56, 58; Tr. at 43. He concluded that while the business made money in its 30 plus years, market forces and technological changes had led to essentially flat sales in the decade prior to the divorce. With inflation factored in, the business had been in a slow decline for about ten years, and was characterized as a "dying business" that would be defunct in another ten to twenty years. Katie's Appendix 52-53; Tr. at 39-40, 43, 46, 162.

After an extended explanation of the various ways in which a spousal interest in a business could be determined, Mr. Lowther concluded that the community had been fully compensated for Milton's efforts during the marriage, and that Katie had no community interest in CPR under any of

the various approaches to valuation and apportionment that might be used. Katie's Appendix 54-58; Tr. at 27-58, 59, 76-77, 80.

Asked about the legal tests for deriving a spousal interest in a business, Katie's expert, Mr. Rosenberg, said only that he had never heard of any of the cases involved in the process, could not give any opinion as to the economic benefit either party received, had no experience or expertise in appraisal, and did not know the definitions of separate property or community property under Nevada law. Tr. 330-31.

The parties did not discuss those issues at all. All evidence relating to valuation of CPR, and any interest Katie might have accrued in the company, came from Mr. Lowther, who concluded that no such interest existed. During his discussion of "reasonable compensation" in the *Van Camp* methodology, Mr. Lowther noted that, without question, Katie had received and consumed a sum in direct support and cash equal to at least half of Milton's reasonable compensation for the entire duration of the marriage. Tr. 142.

Additionally, Katie personally received at least half of the cash flow from the only income stream that could possibly be characterized as community property income. Tr. 119, 141-42. Mr. Lowther detailed how the doctrine of "substitution"[10] called for him to place a value on all direct and indirect support received and consumed by Katie, in trying to determine the community living expenses. Tr. at 239-243.

Next, Mr. Lowther reported on his analysis of tracing the source of all funds used in the acquisition of any real estate bought or sold by either party during the marriage. Tr. at 29, 79. This information was necessary because Katie asserted a claim for "one-half of the profits from sales of houses during marriage." Katie's Appendix 32.

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[10] Under *Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976).

Mr. Lowther started with the property at 6 La Sierra Drive, Pomona, California, which Milton purchased prior to marriage, in 1989, and to which he made improvements in 1990 (also before marriage). Tr. at 88-92. No money went into the property during the marriage, and ultimately, Milton "lost about $147,000" on the property. Tr. at 93.

The entirely separate property proceeds from 6 La Sierra were traced directly into the purchase of and upgrades to property at 6 Emerald Glen, Laguna Nigel, California. Tr. at 93-94. Through the date of divorce, some $10,147.00 was paid down on the mortgage to that property, which was still owned by Milton at the time of divorce. Tr. at 95.

In 1990, Milton purchased and improved property at 2962 Tenaya, in Las Vegas for some $434,000. Tr. at 95, 98. No money went into the property during the marriage. The property was sold in 1997 for $440,000, which netted $415,255 after commissions. Mr. Lowther traced the net sale proceeds directly into Milton's purchase of the "Co-Aire" company discussed below.

In 1994, a few months after the parties married, Milton bought property at 22 Emerald Glen, Laguna Nigel, Arizona, for $630,000, using $126,800 borrowed from CPR to make the down payment. Tr. at 101. There were no upgrades; he sold it four months later, taking a loss of at least $30,000. The net funds remaining were returned to CPR. Tr. at 103-104.

In 1996, Milton purchased property at 1236 North Ithica, Gilbert, Arizona, in his name alone, using $206,000 borrowed from CPR; another $25,000 was spent in upgrades. Tr. 99. When he sold it in 1997, Milton lost some $46,000 after commissions; the money that was recovered went back to CPR. Tr. at 99-100.

Similarly, Milton bought property at 14783 Avenida Anita, Chino Hills, California, in 1996, for $274,000, using $79,800 borrowed from CPR, and put another $16,000 into patio and landscaping upgrades; he sold it in 1997 for $288,000, ultimately losing some $16,100 after commissions; the remaining funds were returned to CPR. Tr. at 101-102.

Mr. Lowther differentiated from these house purchases and sales anything bearing on the land upon which CPR had long operated its re-manufacturing operation.[11] He also noted that Katie had quit claimed any interest she might have had to the Tenaya property, to the North Ithica property, to the Avenida Anita property, and to the 22 Emerald Glen property. Tr. at 98-99, 100, 102, 104.

When asked to re-cap the net result of Milton's purchase and sale of the six parcels discussed above, Mr. Lowther concluded that Milton lost money; in all, "about $237,000." Tr. at 104-105. Katie introduced no evidence refuting any part of the characterization, transactional, or tracing analysis set out by Mr. Lowther.[12]

Turning to Co-Aire, Mr. Lowther reiterated that the entire investment in the stock of the new company (which had not yet begun operations or made any money) was directly traced to funds realized by Milton's sale of an entirely sole and separate property asset (the Tenaya house discussed above). Tr. at 113, 118-19.

Mr. Lowther was also asked to evaluate whether there was any conceivable community involvement in the CPR pension plan; he gave the testimony recounted above as to the plan having been established, frozen, and failing, years before the parties married, so that there was "no conceivable community property interest in any aspect of the pension plan." Tr. at 117. The only other witness asked any questions about the pension plan was Milton, who provided the information

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[11] As discussed above, CPR does its re-manufacturing business at 1501 N. Peck Road, South El Monte, California, from land Milton has owned since 1971. Tr. at 105-109. All sums going into the mortgage on that property were directly traced by Mr. Lowther to the rent paid by CPR, and there was no investment of labor or any other conceivably "community" investment in the Peck Road property. Tr. at 109, 112.

[12] On appeal, in apparent defiance of the record, Katie asserts: "From December, 1993, when Milton and Katie were married, to their divorce in December, 1997, Milton and Katie bought and sold over a dozen pieces of real property, and the purchase of stock in one other separate business." AOB at 4. No authority is provided for either the number or the character of the transactions, or for Katie's participation in any of them, other than a citation to twenty pages of Mr. Lowther's testimony.

attributed to him that is set out above. Katie provided no rebuttal, or any evidence of any kind that there was any possible community property interest in the pension plan that failed in 1992.

While the parties disagreed about various details, such as the number of days they spent together, and the exact nature, extent, and value of the jewelry that Milton gave to Katie, there was not much in the way of factual disputes except as to whether Milton had made promises to Katie of what she would get if she married him.

Katie testified that at some unspecified time prior to marriage, she was promised (1) a house, (2) 20% of CPR Industries, (3) a car, and (4) being named on Milton's will as his sole beneficiary. Tr. 281-287; App. 19. She offered no evidence for any such promises, other than saying that she did "have a witness,"[13] but added that he has been dead since 1995. Tr. at 281-84.

Milton denied making any promises to Katie of any kind. Tr. at 308. The audiotape of the meeting that Milton and Katie had with attorney Michael Kelly was admitted into evidence. Tr. at 273-74. On the tape, in addition to repeatedly stating that she doesn't want any of Milton's money, Katie denied that Milton had promised her the items she claimed he had allegedly promised in advance of marriage, contrary to her assertions at trial. App. 221-23; Tr. at 284, 285-86.

The attorneys gave final arguments, Tr. at 351-403, after which the trial court rendered an oral ruling. Tr. at 403-429. It was memorialized in the "*Order Following Decree of Divorce*" filed on January 22, 1998. Katie's Appendix 20-24.

The trial court found CPR to be Milton's sole and separate property, and that Katie had already received the full benefit of any community property interest she might have had. Tr. at 404-409.

The trial court found that any and all remaining interest in or liability for the CPR Pension Plan was premarital and would remain Milton's sole and separate property or debt. Tr. at 414-15.

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[13] Katie never made any offer or gave any testimony as to what this alleged witness saw or heard, or when, or why whatever it was might be relevant.

The court found that the property at 2962 Tenaya, Las Vegas, Nevada, was entirely Milton's pre-marital separate property, and that the funds derived from its sale were directly paid into Co-Aire for stock in that company, so that the stock, likewise, was Milton's sole and separate property. Similarly, the Court found that the other pre-marital sole and separate property remained just that: 6 La Sierra Drive, Pomona, California; and CPR's business location at 1501 North Peck Road, South El Monte, California. Tr. at 410, 413-14.

As to 22 Emerald Glen, Laguna Niguel, California,[14] the lower court found that the invested funds came from CPR, there were no out-of-pocket improvements, and all resulting funds (there was a net loss) were returned to CPR, so that there was no community interest. Tr. at 413.

The court found 6 Emerald Glen, Laguna Niguel, California, to be Milton's sole and separate property, but found that the mortgage on the property was reduced by $10,147.00 during the marriage, apparently out of Milton's wages, and the court ordered half that sum paid to Katie. Tr. at 410-11.

As to the remaining parcels Milton bought, improved, and sold at a loss during the marriage, the trial court noted that the funds borrowed from and returned to CPR were sole and separate property. Tr. at 14. The lower court further acknowledged that as to sums lost in realtor's commissions, etc., the money was simply gone. However, the court found that since the money for those improvements had apparently come from Milton's income during the marriage, and the value of the improvements did not result in any profit, the court "would characterize this as wasted asset. . . . wasted it because he didn't get it back, he didn't return it to the community." Tr. at 412. The lower court therefore awarded a cash sum to Katie equal to half of the cost of the improvements made to properties on which he suffered *losses*: 14783 Avenida Anita, Chino Hills, California; and 1236 North Ithica, Gilbert, Arizona. Tr. at 412-13.

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[14] The trial court judge did not recite the address correctly, but from the dollar sums he referenced, it was clear that he was talking about the 22 Emerald Glen house. Tr. at 103-104.

Milton was ordered to pay to Katie $1,000 per month for six consecutive months as rehabilitative alimony. Each party was ordered to bear his or her own attorney's and expert fees.

Even though Katie had sworn in her pleadings and on the stand (and her attorney conceded) that she had been a resident of the state for about twenty years, and the decree had already been entered, Katie's attorney argued that the trial court did not have "jurisdiction" to enter a Decree of Divorce in the case. Tr. at 362, 386-388; Katie's Appendix 18-19. The court labeled Katie's jurisdictional argument as "untimely," and also "in the court's humble opinion a very frivolous argument."[15] Tr. at 403.

After both attorneys asked some follow up questions to flesh out some of the Court's rulings, the proceedings were adjourned. Tr. at 417-429. This appeal, and cross-appeal, followed.

ARGUMENT

I. ISSUES RAISED IN KATIE'S APPEAL

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THERE WAS NO COMMUNITY INTEREST IN RESPONDENT'S PRE- AND POST-MARITAL BUSINESSES

Katie asserts that the trial court abused its discretion in finding that Katie had no interest in CPR or in Co-Aire, repeatedly arguing that the court was "required" to use a "year-by-year apportionment" by *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1174 (1978), and asserting that she could

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[15] With admirable restraint, the trial court judge noted the evidence of Katie's twenty-year residence in Las Vegas, and stated:

> [Katie] had planned to bring a resident witness herself because she–there's no question, indeed, she is a resident of Nevada. Our statute allows either plaintiff or defendant to show residency here. It is conceded by the defendant that she is a resident . . . . By testifying that she had had several jobs since 1979 in Las Vegas, then agreeing to have a resident witness and not supplying the resident witness it appears to this court that she is estopped from now claiming on a jurisdictional basis that there is no residency. I think it's – well, I'll just leave it at frivolous. My thought goes beyond frivolous but I'll leave it at frivolous.

Tr. at 404.

"arguably" have been found to have a community property share of those businesses but for the court's error. AOB at 7-14. She is wrong, legally, factually, and logically.

1. Katie is Estopped from Making Her Current Argument

Cord lays down no "requirement" that a trial court do a year-by-year apportionment of anything; the case stands for the proposition that the trial court should choose the method of apportioning any increase in value to a separate property estate in accordance with whichever method is "more likely to accomplish justice." *Cord*, 94 Nev. at 26. But, even if *Cord* could be construed as setting out some required methodology, the assertions of Katie's attorney during trial prevent her from making such an argument on appeal.

At trial, Mr. Lowther's first analysis was under the methodology set out in *Pereira v. Pereira*, 103 P. 488 (Cal. 1990). He found that under its test, Katie had no interest in CPR.[16] Tr. at 51-59. More important here is that Katie's attorney made a point of interrupting the proceedings to reject the *Pereira* analysis and "stipulate to use *Van Camp*."[17] Tr. at 62.

Later in the proceedings (after it was made clear that Katie had no community property claim under either methodology), her attorney argued that the trial court did not have to use ***either*** *Pereira* ***or*** *Van Camp*, but only "do substantial justice." Tr. at 389-390, 395. The trial court judge accepted that argument; noting all the cases in the field, the court explained that while they can provide guidance, if the facts demanded it the court could still "throw all of these formulas out the window and say, look, this is a fair thing to do." Tr. at 404.

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[16] Apparently not noticing the testimony, Katie criticizes the trial court for not using the "preferred" method of apportionment set out in *Pereira*. AOB at 8.

[17] *Van Camp v. Van Camp*, 199 P. 885 (Cal. App. 1921). The trial court's response was a measured "Well, okay. The Court may choose something else but that's certainly part of the record. That's fine, Mr. Neal." Tr. at 62.

Having staked out that position, Katie is barred from arguing on appeal that the lower court erred by agreeing with her attorney. *See Tore, Ltd. v. Rothschild Management Corp.*, 106 Nev. 359, 793 P.2d 1316 (1990) (party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below); *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989) (party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below); *Tupper v. Kroc*, 88 Nev. 146, 494 P.2d 1275 (1972); *Fick v. Fick*, 109 Nev. 458, 462, 851 P.2d 445 (1993) (failure to object in the trial court bars the subsequent review of the objection).

Thus, even if Katie *could* point out some inconsistency between the lower court's ruling and this Court's prior holdings in the field, she would be estopped from claiming error. As set out below, however, the lower court's ruling fully complied with the statutory and case law of this state.

2. The Court Made No Error Regarding CPR

This Court has repeatedly held that a lower court's choice between valid analyses when determining a property award should only be reversed for "abuse of discretion." *See e.g., Johnson v. Johnson*, 89 Nev. 244, 247, 510 P.2d 625 (1973).

It has been the law of this state for over a hundred years that the "rents, profits, and issues" of separate property are separate property. NRS 123.130; *Wells v. Bank of Nevada*, 90 Nev. 192, 522 P.2d 1014 (1974). This Court's decisions in the field have noted the conflict between that principle, and the presumption that earnings during marriage are community property, whenever "a spouse devotes his time, labor, and skill to the production of income from separate property, or to the enhancement in value of that separate property." *Cord*, *supra*, 94 Nev. at 26. This Court requires that wherever there has been the production of such income, or such an enhancement of value, it is necessary to apportion it between separate property and community property. *Id*.

Taking these possibilities in reverse order, we note that the ***only*** evidence before the trial court was that there had ***been*** no "enhancement of value" in CPR; rather, the company declined in value throughout the marriage. Katie's Appendix 56, 58; Tr. at 43. The trial court so found. Tr. at 407. Thus, the only argument concerns Milton's income during marriage, and its attribution as separate, community, or mixed property.

Katie consumes the bulk of her opening brief arguing that the decision below should be reversed because a "year-by-year" apportionment between community property and separate property was necessary.[18] AOB at 7-13. She is wrong for at least two reasons.

First, Mr. Lowther ***did*** perform a year-by-year analysis of the value of CPR, and of Milton's income, and concluded that at no time was there ever an increase in value to allocate, or actual compensation to Milton of less than his "reasonable compensation," which could have created some retained community value in the company. Katie's Appendix 56-58. Katie's argument that there "must be" some community property value in Milton's separate property corporation, which then must be "carried forward" from year to year, is revealed as an error in circular reasoning. AOB at 12-13.

Second, Katie's ignores this Court's holdings and the facts of this case. This Court faced a similar situation in *Wells*, *supra*; there, too, the lower court had found that "the community was fully compensated for the [husband's] community labor through his annual salary and related benefits." 90 Nev. at 195. This Court held that, to challenge such a finding, the other spouse must show the community's total living expenses, and deduct them from the benefits the husband received; if there

[18] Katie expresses great confusion among the gross income of the business, Milton's actual income from all sources, and the concepts of "net gains" and "reasonable compensation." *See* AOB at 10, 12. Since she simply scrambles the terms that are to be looked at (such as "fluctuations" in corporate gross revenues as somehow constituting "gains" relevant to community income) much of her argument is just too irrelevant to counter point by point; no concession should be read into the ignoring of such arguments.

is leftover money, it could be presumed that the company retained some of the community property wages. *Id*. at 196; *see Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976).

In *Wells*, as in this case, the former spouse did not elicit **any** information, nor did she proffer any information regarding what the community expenses were. 90 Nev. at 196; Tr. at 408-409. In *Wells*, this Court noted that it was the wife's obligation to offer such evidence, and that, absent such evidence, the court had no base from which to make an allocation or apportionment to the community and could not be faulted for not doing so. 90 Nev. at 196. Judge Gaston noted that Katie's presentation was similarly lacking. Tr. 408-409.

In *Lucini v. Lucini*, 97 Nev. 213, 626 P.2d 269 (1981), this Court noted the prior cases in the field, from *Pereira* and *Van Camp* through *Schulman*, *supra*, *Wells*, *supra*, and *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978). Finding itself again faced with a pre-marital business that continued operations during the marriage, this Court reaffirmed its holding in *Wells* that "apportionment pursuant to the Van Camp method [is] proper to achieve substantial justice, when 'the community was fully compensated for the . . . community labor through [the husband's] annual salary and related benefits.'" 97 Nev. at 215. In *Lucini*, this Court noted the testimony of the accountants that had traced funds (against a claim of commingling), and affirmed the judgment below that the husband had "received full value" for his work, meaning that any appreciation of the business was separate property. *Id*.

In this case, the unrefuted testimony of Mr. Lowther was that there had ***been*** no appreciation of the business. He was asked to hypothetically ***presume*** that the business had appreciated, however, and determine whether Milton had been fully compensated for his labor during the marriage. Tr. at 62-77. Mr. Lowther determined a reasonable compensation range for Milton, took a number toward the high end of that range to be conservative, and determined that Milton had received at ***least*** that

sum, each and every year during the marriage. Katie's Appendix 56-58; Tr. at 73, 77. The trial court found this testimony credible.[19] Tr. at 409.

At trial, Katie's attorney, apparently not understanding the relevance of the point, brought in Katie's own witness to verify that Milton had actually received in total salary and other distributions a sum far in excess of his reasonable compensation. Tr. at 332-33.

In summary, there is ***no*** test for community property interests in a pre-marital separate property business under which Katie accumulated any interest whatsoever in CPR. Katie has not suggested one on appeal, but has only complained that an interest "might" have been found if the court below tried other analyses (which she did not offer, and for which she supplied neither authority nor argument).[20] AOB at 9-11. Katie has demonstrated no error of any kind in the trial court's conclusion that Katie had no interest in CPR.

3. The Court Made No Error Regarding Co-Aire

Katie's entire argument as to Milton's sale of his pre-marital house on Tenaya, and purchase of stock in Co-Aire with the proceeds, is that the house sold for more than its purchase price, and "the increase in value in the Tenaya property ($25,000) could have occurred during the marriage due to

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[19] We note this Court's holding that a determination of value made by a trial court, which is within the range of values presented at trial, is not an abuse of discretion. *See Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995). Here, Mr. Lowther's reasonable compensation figures were the only ones presented.

[20] Judge Gaston anticipated that Katie might seek to complain about her own failure to produce evidence:

> I'm sure that this will go up on appeal. And I want the record to reflect the frustration of the court in having to make a decision without the facts before it. I've been receiving on [Milton's] side, really the entirety of the facts. I have nothing on [Katie's] side as far as rebuttal of those facts and I have nothing as far as showing what needs to be shown on the part of [Katie] to claim her – to claim interest in the business. And that's frustrating to the court because the court has to make the decision on the facts that are presented before it. . . it also puts the Court in an unfair position because if the attorneys haven't done what they're supposed to and then give it to the Court to make the decision that is they're going to run up to the Supreme Court and say, ha ha, he made a mistake.

Tr. 406-407.

community efforts."[21] AOB at 13. Her entire argument as to Co-Aire is that it "could have also increased in value during the marriage due to community efforts." AOB at 13-14.

Mr. Lowther testified that the house was purchased years prior to the marriage, that improvements were made to it years before the marriage, and that the net proceeds after commissions was less than the money that had been put into it. Tr. at 95, 98. He was clear that no money went into the property during the marriage, and there was no possibility of accrual of a community interest. Tr. at 98-99. The trial court so found. Tr. at 411. Katie offered no rebuttal, nor did she offer any testimony that any "community effort" was expended on the house.

Mr. Lowther also found that the entire investment in Co-Aire was directly traced to the Tenaya sales proceeds. Tr. 98-99, 113. The only other testimony on the transaction came from Milton and was entirely consistent: "I had the money in a real estate piece of property, which was at 2962 Tenaya. All's I did was move my investment there into stocks into Co-Air, that's all I did." Tr. at 321. The trial court so found. Tr. at 411-12. Again, Katie offered zero evidence to support any other conclusion.

Since there was no evidence of anything other than Milton's separate property ownership of Tenaya, and the Co-Aire stock, and Katie offers no argument other than naked speculation on appeal, the only real relevance of her inclusion of the issue goes to Milton's request for attorney's fees on appeal for Katie filing a frivolous appeal. NRAP 38.

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[21] We protest Katie's apparently deliberate mis-statement of facts. The unrefuted testimony of Mr. Lowther was that the sales price of the house was $6,000.00 more than the cost of the original purchase plus improvements, and that it netted some $25,000.00 less than the total invested in it, after sales commissions. Her statement that the house gained a $25,000.00 "increase in value" is unsupportable on this record, and such deliberate mis-statements warrant sanctions. *See Sierra Glass & Mirror v. Viking Industries*, 107 Nev. 119, 808 P.2d 512 (1991).

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT APPLYING THE *MALMQUIST* FORMULA TO OTHER REAL PROPERTY

Before addressing the "merits" of Katie's appellate argument, we again note that as a procedural matter, Katie should be barred from complaining about any lack of "Malmquist"[22] analysis below, because she never requested any such analysis as to any parcel of real estate, and never introduced any evidence to support such an analysis.[23] *See Tore, Ltd. v. Rothschild Management Corp.*, *supra*; *Powers v. Powers*, *supra*; *Fick v. Fick*, *supra*.

Presuming the Court nevertheless wishes to address the issue, Katie's argument boils down to a complaint that the court below used actual purchase and sale numbers, rather than appraised values and market values, of which evidence was not submitted. AOB at 14-15.

Katie submits no authority that the trial court was somehow obligated to perform a *Malmquist* analysis in the absence of any request by either party to do so. That case, by its own terms, addresses only the reduction in mortgage balance of a separate property primary marital residence on which community property income is expended. The evidence, recounted in detail above, showed no community paydown during marriage of the one residence in which Katie lived (the Tenaya house). Tr. at 98-99.[24]

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[22] *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990).

[23] Actually, the only mentions of the *Malmquist* opinion was in a single remark by Katie's attorney at the pre-trial motion hearing that the case was not relevant to the issues before the court, Tr. at 7, and a brief humorous aside by the trial judge. Tr. at 239.

[24] This case differs from *Malmquist* in that the parties lived separately, and since he owned the house in which Katie lived before marriage, Milton's separate property income stream (and attributed community property income) were used to maintain only the house he was living in. That is the one parcel of real estate in which evidence showed a mortgage was reduced during the marriage – the $10,147.00 paid down on the mortgage to 6 Emerald Glen, Laguna Nigel, California. Tr. at 93-95. Katie was awarded half of that paydown, which award is addressed below in Milton's issues.

When asked to re-cap the net result of the real property investments, Mr. Lowther stated that Milton lost money – "about $237,000.00" Tr. 104-105. At this juncture, it is probably sufficient to state that since there is no evidence in the record below of any stream of community property mortgage payments into an ***appreciating*** parcel of real estate, the *Malmquist* attribution theory is simply inapplicable.

Assuming arguendo that Katie is permitted to share and share alike in the parcels of real estate at issue, this case would trace the "appreciation" (here, the "depreciation") of the properties in question, with the net result that Katie would owe Milton half of the $237,000.00 lost, i.e., $118,500.00. In any event, she has provided neither facts nor law, below or on appeal, that warrant reversal based on the failure of the trial court to apply an analysis that she did not request.

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING NO WASTE OR MISAPPROPRIATION OF COMMUNITY ASSETS FOR PERSONAL GAIN BY RESPONDENT'S PAYMENT OF AN ERISA PENALTY

Without any reference to any authority whatsoever, Katie argues that the district court committed reversible error by ***not*** concluding that Milton had wasted or misappropriated "community" funds, relating to the failure of CPR's pension fund discussed at length above. AOB at 15-19.

First, we note that even if what she says was true, she has given this Court no legal basis on which to predicate a reversal, in direct defiance of her ***obligation*** to cite legal authority in support of such an argument. *See* NRAP 28(a)(4); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980) (inadequate "discharge of the appellant's obligation to cite legal authority"); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered).

And, as with her other arguments, Katie's factual assertions are hollow. First, she ***assumes*** that there is a "community share" in CPR. AOB 17. Next, she takes Milton's use of the words "me" and "we" (when referring to the actions of CPR) to somehow derive that the federal payback was a personal penalty assessed against him. AOB 16-17. Finally, she ignores the fact that the pension fund was created, funded, and failed years before the parties were married. *See* Tr. at 115, 117, 322; Katie's Appendix 54, 68.

The trial court found that the entirely premarital funding and failure of the plan did not create any kind of community interest. Tr. at 414-15. The only events that overlapped the marriage was CPR's payment of the last of the money necessary to restore funding of the employees' retirements. Tr. at 114-17. Katie's actual argument appears to be that if Milton had not made a poor choice of pension plan diversification before the marriage, the corporation might have had more money during the marriage, Milton might have taken more salary, and maybe she could have got some of it. AOB at 18-19.

As Mr. Lowther noted during the trial, Katie, as a new wife, had "to take on pre-existing indebtedness . . . you take your victim as you find him." Tr. at 234-35. There is neither logic nor law to support the analysis Katie suggests on appeal, and no merit to her claim of error.

D. THE DISTRICT COURT DID NOT ERR IN ANY WAY RELATING TO THE TESTIMONY OF MILTON'S EXPERT WITNESS

Again without reference to any relevant authority whatsoever, Katie argues that the district court committed reversible error by hearing Mr. Lowther's testimony.[25] Katie asserts that in some unspecified way, the fact that Mr. Lowther is a retired attorney and a former I.R.S. fraud investigator somehow made his investigation "improper" and his testimony "prejudicial." AOB at 19-23. For the reasons set out above, this Court should not even entertain this argument. *See Weber*, *supra*.

Should the Court nevertheless choose to visit the issue, then it should note NRS 50.275[26] and conclude that the trial court properly considered Mr. Lowther's testimony. A proper foundation was laid to establish Mr. Lowther as an expert witness in fields including valuations, appraisal, apportionment, employment, and asset tracing. Tr. 29, 79-80.

Katie seems to argue that it is forbidden for an expert witness to reference a case name or legal standard when giving testimony. The trial court found otherwise, stating that it was within the scope of Mr. Lowther's expertise and assignment to refer to the valuation formulas set out in the cases when plugging the numbers into those formulas. Tr. at 239.

Katie complains that "it was solely for Judge Gaston to determine what apportionment formula, or methodology, was to be utilized." AOB 23. He did so. Tr. 404-410. In fact, Katie's entire first issue was her complaint about the trial court doing exactly that. AOB 7-14. It is submitted that Katie has made out no cogent claim of error.

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[25] With the exception of one reference to what she claims to be "Hornbook law" – a quote relating to experts not being advocates that she culled from CLE materials issued by the National Business Institute. *See* AOB at 22. The quote is irrelevant to the issue presented, but even if it was relevant, we assert that as in *Smith v. Timm*, *supra*, mere citation of sections of a legal encyclopedia (or a CLE booklet) are not adequate citations on which to support an appellate argument. *See also Carson v. Sheriff*, *supra*.

[26] "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education may testify to matters within the scope of such knowledge."

E. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT A CONTINUANCE OF THE TRIAL

Katie's final claim of error is that the trial court should not have denied her last-minute motion to continue the trial. AOB at 23-27. Once more, Katie cites no authority of any kind to support her claim of "abuse of discretion," and once again, Milton respectfully asks this Court to disregard Katie's argument under NRAP 28(a)(4), *Weber*, *Smith v. Timm*, and *Carson v. Sheriff*, *supra*.

Should the Court choose to reach Katie's argument, the Court will find it meritless. On appeal, she contends for the first time that (unspecified) "further discovery" was needed on the failed pension plan, and "concerning" Mr. McPherson's opening of a competing business and CPR's withdrawal from Nevada. AOB at 23-24. She now says for the first time that "the major reason" Katie did no discovery is that Milton asserted the validity of the prenuptial agreement, until Judge Sanchez ruled it unenforceable in August. AOB at 24; Katie's Appendix 8-9.

We note Katie's apparently deliberate omission of her motion to continue from her appendix, in violation of NRAP 30. We have enclosed it, and the opposition to it that was filed below. App. 148-152, 167-175. As detailed in the Statement of Facts above, Katie's motion to continue (which, like her appellate argument, was totally devoid of legal authorities) mentioned none of the grounds she presents to this Court. Her motion stated only that she wanted to know Milton's "net worth." App. 150. Her attorney claimed at the hearing on that motion that deposing Mr. McPherson was necessary because of some (never specified and wholly imaginary) connection to the defunct pension plan.[27] Tr. at 4-6.

[27] The details of the motion to continue, its opposition, and the arguments of counsel at the hearing, are detailed in the Statement of Facts, and not repeated here; we submit that the discussion above is sufficient to dispel any concern that the motion might have been denied in error. Katie provided no valid excuse, below or on appeal, for her failure to propagate any discovery whatsoever during the eleven months this case was pending (not to mention the year and a half that the prior, identical case was pending before it was dismissed).

At the motion hearing, Katie's attorney's claimed only that he had not read the case law on community property interests in a separate property business, and requested time to "investigate" utter irrelevancies. App. 148; Tr. at 5-14. The court below had a party before it – Milton – who was elderly, ill, and entitled to a preferential setting, and who was fully ready for trial. NRS 16.025(1)-(2).

Since the motion to continue was facially defective, the lower court ***could*** have dismissed it out of hand. *See* NRCP 7(b) (pleadings allowed; form of motions); EDCR 2.20 (motions; contents; responses and replies). The court below did not do so, but rather gave Katie's attorney a chance to set out some cogent reason for seeking a continuance. He failed to do so.

A motion for a continuance is addressed to the discretion of the trial court. *Southern Pacific Transportation Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978). The standard is "good cause," and the statutes and cases set out requirements, such as an affidavit showing the materiality of the anticipated evidence and establishing due diligence in attempting to acquire it. *See* NRS 16.010; *Thornton v. Malin*, 68 Nev. 263, 229 P.2d 915 (1951). Katie's motion was deficient in every respect.

We note that Katie's attorney stipulated that it would take him a maximum of 120 days to complete all necessary discovery. App. at 55 ("*Joint Case Conference Report*"). Even if (as alleged for the first time on appeal) Katie felt precluded from starting discovery during the eight months from the time the action was filed until a decision was made on the validity of the prenuptial agreement, she ***still had over 120 days*** from that point until the date of trial (i.e., August 22 to December 30). In that time, she did nothing until the calendar call in November, when she requested and received permission to depose Milton. She never submitted any interrogatories or requests to produce.

Where the record shows that one party is trying to delay or obstruct completion of an action, this Court has backed up the efforts of trial courts to keep cases moving reasonably to conclusion, even to the point of issuance of a default judgment. In *Hamlett v. Reynolds*, 114 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 95, Sept. 1, 1998), this court upheld entry of default where "the normal adversary

process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights."

This principle of law has long been followed. *Hamlett* cited *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973), as authority. In the analogous situation of a motion to dismiss under NRCP 41(e), nearly thirty years ago, this Court stated:

> Every man is entitled to his day in court, but a law suit is not a unilateral affair. The rights of all parties to the litigation are involved. One who is charged with a complaint and against whom substantial damages are sought is entitled to a determination of those issues within a reasonable time.

Hassett v. St. Mary's Hosp. Ass'n, 86 Nev. 900, 904, 478 P.2d 154 (1970). Here, Katie had a year and a half during the prior, identical divorce action, but requested no documents or evidence. In the second action, she had another year before the long-scheduled and already-delayed trial; again she requested nothing and examined nothing. She is in no position to claim on appeal that as of December, 1997, she was suddenly ready to begin diligent prosecution of her case, but was prevented from doing so because the court actually conducted the trial.

Katie raises two new matters which deserve brief mention. First, by overly-selective quotation, she suggests that the trial court did not know the facts about the joint petition, the first divorce case, and that the pending trial was on a second complaint. AOB at 24-26. This is disingenuous; the lower court was fully apprised of the facts, and had before it a detailed time-line chart noting all filings. Tr. at 17-18; Katie's Appendix 69. Katie's own attorney argued at some length regarding the first divorce complaint, its dismissal, and the money Katie supposedly owed her attorney for that action. Tr. at 23-26.

Second, Katie raises for the first time the astounding argument that Milton was "forum shopping" by filing for divorce in Nevada, stating that he was avoiding the California courts. AOB at 27. When Milton filed for divorce in this case, Katie had been a resident of this state for 20 years,

and both parties claimed Nevada residency, so Nevada was the ***only*** state that could have exercised jurisdiction over both parties, all their property, and issues such as alimony.[28] *See* NRS 125.020; *Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213 (1948).

If he really had a choice and was forum shopping, it would have been foolish for Milton to have chosen Nevada over California; these parties virtually never lived together, and in California, unlike Nevada, community property stops accruing on the date of final separation. *See*, *e.g.*, *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983); *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987); M. Willick, *Interstate and Multistate Litigation* (1999 LEI NATIONAL CLE CONFERENCE ON FAMILY LAW AT VAIL) 205, 208.

In summary, Katie has not provided any rational legal, factual, or logical reason why the trial court erred in any way by denying her unsupported motion to continue trial, nevertheless abused its discretion in denying the motion. She certainly has not demonstrated the constitutional due process violation of which she complains. AOB at 27.

Katie has demonstrated no error of any kind in the ruling below. We thus turn to Milton's cross-appeal.

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[28] In making this argument, Katie raises but does not directly assert her jurisdictional objection which the trial court had found "beyond frivolous" when finding her estopped from raising the point. Tr. at 404. Her failure to directly re-argue it on appeal is reasonable, since this Court has held for about a century that a party who invokes the jurisdiction of the court is estopped from denying it to attack the judgment. *Grant v. Grant*, 38 Nev. 185, 147 P. 451 (1915); *Moore v. Moore*, 75 Nev. 189, 336 P.2d 1073 (1959); *see also* NRS 54.010 (not specifying any particular kind of corroboration to testimony of residency).

II. ISSUES RAISED IN MILTON'S CROSS-APPEAL

Milton agrees that the District Court made correct findings, and resulting orders, in virtually all respects. There are four areas, however, in which Milton submits the lower court erred, and as to which a remand is requested.

A. THE DISTRICT COURT ERRED BY AWARDING KATIE HALF THE AMOUNT OF MORTGAGE PAY-DOWN ON THE 6 EMERALD GLEN PROPERTY

Mr. Lowther reported that, during the marriage, the mortgage on the real property at 6 Emerald Glen, in Laguna Nigel, California, was reduced by $10,147.00 during the marriage, and the source of the payments was Milton's salary and other compensation. Tr. at 95. The trial court concluded that since Milton's salary was, at least in part, community property, the paydown constituted a community asset, and awarded Katie a sum equal to half of the reduction. Tr. at 411.

This was error. As set out in the Statement of Facts above, Mr. Lowther concluded, without rebuttal, that the community had been fully compensated for Milton's services during the marriage, as soon as he received the first $140,000.00 in salary and dividends from CPR; all other sums received by Milton (over $100,000.00 per year) were separate property income. Katie's Appendix 56-58.

Mr. Lowther also established, again without rebuttal, that Katie had ***personally*** received and consumed a sum in direct support and cash equal to at ***least*** half of Milton's reasonable compensation for the entire duration of the marriage. Tr. at 142. Additionally, Katie personally received and consumed a sum equal to at least half of the cash flow from the only income stream that could possibly be characterized as community property income (Milton's regular salary). Tr. 119-141, 141-42; 237, 240-43. As noted above, it was Katie's burden under *Wells*, *supra*, to prove a different level of community expenses, and she presented no evidence on the issue.

What the trial court missed is that, from these facts, it ***necessarily follows*** that all ***other*** cash in Milton's hands during this period would ***have*** to be either ***his*** half of that reasonable compensation or community property income, or his separate property income.

To clarify, the parties were separated during virtually the entirety of the marriage. Tr. at 258, 263, 304-305. If Katie received half the income that could be considered community, then ***everything*** that Milton kept, or spent, must have been either the other half of the community income, or his (substantial) separate property income.

Thus the trial court erred when it concluded that Milton owed one-half of the $10,147.00 to Katie, to compensate her for "debt reduction" on the property at 6 Emerald Glen, during the term of the marriage, which was paid from either his half of the community property income, or from his separate property income stream.

B. THE DISTRICT COURT ERRED BY AWARDING KATIE AN INTEREST IN IMPROVEMENTS MADE BY MILTON ON REAL ESTATE WITH THE MONEY IN HIS POSSESSION

The lower court made the same error as to the improvements made to the real estate on Avenida Anita, in Chino Hills, California, and on North Ithica, in Gilbert, Arizona.

Specifically, because those properties were improved, and it was not proven that the source of the improvements came from a source other than Milton's wages, the trial court concluded that the value of the improvements was community property, and awarded to Katie half the sum spent on those improvements. Tr. at 412-13.

This was error for the same reason specified in the preceding section. Since the parties were separated, and unrefuted testimony showed that Katie received and consumed at least half of whatever income could be considered "community," it necessarily follows that any sums used by Milton to

make improvements to those two properties were either from his remaining half of that community income, or from his separate property income stream.

We also note Katie's execution of quit claim deeds to both those properties, Tr. at 100, 102, and this Court's recent holdings that "a spouse to spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence." *Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996) ("[m]oreover, property acquired by gift during marriage is separate property pursuant to NRS 123.130, and therefore is not community property pursuant to NRS 123.220"); *Shydler v. Shydler*, 114 Nev. ___, 954 P.2d 37 (1998) (upholding transfer of lot from wife to husband based on quit-claim deed executed during marriage).

Thus, whether the two properties made or lost money, the risk and benefit was to Milton's separate property, and the trial court erred in finding any community interest.[29]

C. THE DISTRICT COURT ERRED BY AWARDING KATIE HALF THE VALUE OF REAL ESTATE IMPROVEMENTS AS "WASTE"

The trial court found, correctly, that Milton had put $16,000.00 into improvements in the Avenida Anita property, and $25,000.00 into improvements in the North Ithica property. Tr. at 412-13; Tr. at 99-102. Likewise, the trial court correctly found that Milton lost money on both residences, after sales commissions. *Id*.

The trial court erred, however, in concluding that Milton owed to Katie any money because of these transactions. The court inquired directly on the matter:

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[29] When asked, Mr. Lowther (correctly) identified the "arguable" claim that there could be a community property claim against the 6 Emerald Glen property, if the property had appreciated, but was interrupted before he could explain why the claim would not be proper. Tr. at 95. He attempted, somewhat obliquely, to explain the point further on cross-examination, concluding that even if the precise source of any particular improvement to any particular parcel could not be identified with certainty, "under our theory of this case, it doesn't make a penny's worth of difference." Tr. 212-15. Since the money going in was not community property, it made no difference whether money was lost or gained on their purchase or sale.

THE COURT: 14783 Avenida Anita, Chino Hills, California. It was purchased in 1960–1996 during the course of the marriage for $274,000. The down payment was $79,800 from CPR. The improvements $16,000. Same source for improvements?

MR. HARWOOD: (No audible response)

THE COURT: Okay. It was sold for $288,000 and Mr. Harwood claims a loss of $16,100. I am assuming that he's claiming the loss from the improvements.

UNIDENTIFIED SPEAKER: That's correct.

UNIDENTIFIED SPEAKER: No, it's not.

UNIDENTIFIED SPEAKER: If I may clarify, your Honor, the loss occurred because of the expense of the sale. Real estate commissions–

MR. HARWOOD: Oh, yeah, I'm sorry.

THE COURT: The commissions and so forth...

Tr. at 356-57.

From the testimony, the Court reasoned, when turning to the Avenida Anita property, that:

> There's sixteen thousand dollars improvement . . . [Milton] claims there's a sixteen thousand dollar loss from it because of commissions or whatever. . . . [T]he improvements were made from his income which was a community asset. . . . All I can say -- I would characterize this as wasted asset. That he used sixteen thousand dollars of the community, wasted it because he didn't get it back, he didn't return it to the community.

Tr. at 412. The trial court made the same finding as to the North Ithica property, reasoning that there had been $25,000.00 in improvements from Milton's wages which were "never returned to the community" and thus constituted "community waste." Tr. at 413.

These conclusions were in error for two reasons. First, as set out in the preceding section, the money used by Milton for the improvements can only have been from his half of the community

income, or from his separate property income stream. Thus, there was nothing to ***return*** to the community.

Second, even presuming some community property investment in the improvements, the lower court erred by equating a loss on that investment with "waste," in the absence of any evidence at all of wrongful behavior. Specifically, Nevada law pertaining to the concept of "community waste" requires a finding of some financial misconduct by the offending spouse in order to substantiate a finding of "waste" and resulting disproportionate division of community assets. *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996); *see also Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

Here, the trial court's sole ground for a finding of waste was that Milton failed to realize a profit on the parcels after making improvements made to them. This was error. In Nevada's community property scheme, the parties have joint control of the community property, and neither is a guarantor of successful profit-taking. NRS 123.230.

The lower court's mistake was as much an error of logic as of law, and its unfairness is demonstrated by a brief review of facts. Since Katie directly received and consumed at least half of whatever income could have been considered "community," the ***entirety*** of the funds lost must have come from either Milton's half of that community property income, or from his separate property income stream. In either event, Milton – alone – bore the loss. By ordering Milton to pay Katie half again of whatever sum he already lost, the trial court made Milton's loss on the properties 150% of the sum expended on improvements. Nothing in Nevada community property law supports imposing such a loss.

Putting numbers on it, Milton already lost $62,100.00 between the sale of the North Ithica property ($46,000.00), and the Avenida Anita property ($16,100.00). If Milton, in addition, has to pay Katie a sum equal to half the cost of improvements to those properties, his losses will increase by

another $20,500.00. Tr. at 412-13. Even if Katie is not required to share in these losses, as she sought to share in any gains, it can clearly be said that the result reached by the court below on this issue is unreasonable under community property law.

D. THE DISTRICT COURT ERRED BY FAILING TO AWARD ATTORNEY'S FEES TO MILTON

It is understood that the awarding of attorney's fees is highly discretionary with the trial court. *Love v. Love*, 115 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 64, May 19, 1998); *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994). In this case, however, the failure to award fees to Milton was unreasonable, and the product of the trial court's misplaced deference to the presumed desire of another judge. Accordingly, this Court should find that fees should have been awarded, and remand for a determination of the appropriate sum.

Specifically, as recounted in the Statement of Facts, Judge Sanchez had made a preliminary award of fees to Katie of $3,500.00 to prepare for the evidentiary hearing on the validity of the prenuptial agreement, and made a further award of $8,000.00 to allow for full discovery and trial preparation after the prenuptial was set aside. App. 58-59; Katie's Appendix 36.

Katie's attorney did neither. By the day of trial, he had still sent out not one interrogatory or request for production, and claimed to have not even read the controlling cases. Tr. at 5. In pre-trial procedures, Katie failed to respond adequately to the discovery propounded to her, resulting in Milton having to file additional correspondence and pleadings with the court, and ultimately a "*Motion to Compel Discovery*" with the Discovery Commission. Katie's Appendix 37-42; App. 108-137.

Katie filed a "*Motion to Continue*" that was unsupported by any legal authority at all, but which still required the time of Milton's counsel to oppose. App. 148-152, 167-175.

The behavior of Katie's attorney during the trial was derelict; he was repeatedly admonished for making meaningless, meandering objections, interrupting the proceedings without cause, and propounding arguments that were "beyond frivolous." *See*, *e.g.*, Tr. at 48-49,[30] 62, 82-83, 86-87, 121-122, 135, 139-140, 271-72. Counsel pointed out that the billings submitted by Katie's attorney were fraudulent on their face, including 1.5 hours for preparing a document actually created by Milton's counsel, Tr. 289-290, and three hours to add 42 words to, and reprint, a motion from the first divorce action. Tr. at 382-83. The trial court observed that Katie provided no useful facts. Tr. at 406.

Yet, despite all that, Judge Gaston ruled at end of the case:

> Each party is to bear their own attorney fees. I'm not going to determine whether -- you know, who earned them and who didn't. I guess that's between the parties and their counsel but I'm not going to -- I'm not going to scrutinize whether the money that was already given was appropriately used or not. But it was already ordered, the Court's not going to disturb the order of Judge Sanchez.

Tr. at 416.

Counsel certainly understands the desire of district court judges not to contradict or appear to criticize one another's orders. On the other hand, this Court has been less hesitant to address fees charged when they clearly have not been earned. In *Toigo v. Toigo*, 109 Nev. 350, 849 P.2d 259 (1993), this Court labeled attorney's fees of over $13,000.00 as "excessive" where the attorney performed minimal discovery, and called no witnesses except his client. The only differences in this case is that the sum (after the evidentiary hearing on the prenuptial) is $8,000.00, and the attorney also called his own personal accountant to testify about the meaning of tax returns. *See also Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994) (commenting on the oppressiveness of attorney's fees where not justified).

[30] Mr. Neal's objection to using Nevada law because CPR's main building is in California.

It is respectfully submitted that, on the entirety of the record, it was an abuse of the lower court's discretion regarding fees to not make an award to Milton at least equal to the sum that had been provided for the pre-trial discovery and trial preparation that was not performed.

CONCLUSION

Katie stipulated at trial to use of the *Van Camp* analysis to determine her interest in CPR, and later argued that the trial court was free to reject all precedent-based formulas and "do substantial justice." She is estopped from now arguing that the court below was obligated to use one particular approach.

The unrefuted expert testimony was that under every analytical approach ever devised, Katie accumulated no interest in Milton's pre-marital business, CPR, which declined in value throughout the marriage. Co-Aire had not even begun operation at the time of the divorce, and the stock in the new company purchased by Milton was directly traced by unrefuted expert testimony to the proceeds of a pre-marital, entirely separate property asset (the Tenaya house), in which two judges determined Katie to have no interest.

Katie never requested that the various other parcels of real estate be evaluated under the *Malmquist* test, and should be estopped from complaining about the lack of such an analysis in the record. In any event, here, Katie supplied no evidence that "community property" was expended on the real estate, all of which lost money, and simple logic shows that when real estate decreases in value, there can be no *Malmquist* community property share in "appreciation."

Katie provides neither authority nor any cogent argument for any claim to Milton's entirely pre-marital pension plan through CPR, which was funded, and failed, long before the parties married.

Similarly, she provides neither law nor logic to support her claim that the trial court should not have permitted the testimony of the only expert witness with relevant information who was offered at trial (Mr. Lowther), and she points to nothing to substantiate her claim that the lower court's ability to reason was somehow clouded by the force of Mr. Lowther's testimony.

Katie makes no valid claim of error regarding the trial court's denial of her motion to continue. Her motion was procedurally and substantively defective, she never gave the court below anything that could reasonably be considered "good cause" to continue the trial, and the motion was discretionary. Her omission of materials from her appendix that is necessary for this Court's review of the issue merits sanctions.

The trial court did, however, mis-perceive one fact, which led the court into a few errors. The uncontroverted testimony below was that the parties were separated, and that Katie had directly received and consumed a sum during each year of the marriage greater than half of any community property income. Therefore, given the doctrine of substitution, any money Milton spent must have come from Milton's half of his "community" income, or from his separate property income stream.

Accordingly, the lower court erred in characterizing the paydown of the mortgage on the 6 Emerald Glen property as having been made with community funds, and erred in concluding that Katie should be reimbursed half that sum.

The lower court likewise erred in finding that money Milton spent on improvements to other real estate, on which money was lost, could be characterized as having come from "community income." Since there is no guarantee of making a profit, the court also erred in characterizing as "waste" the money spent on those improvements, which was not recovered when houses sold at a loss after sales commissions. For both these reasons, the award to Katie of half the cost of the improvements was error.

Finally, the lower court erred in denying to Milton an award of attorney's fees, at least equal to the preliminary fees awarded to Katie (by another judge) for discovery, but not spent for that purpose, given the additional work required of Milton's counsel by the lack of preparation and utterly frivolous positions and objections argued by Katie's attorney at trial. Further fees should be assessed for the additional work required in this appeal by the failure of Katie's attorney to accurately summarize the facts, or even include all necessary documents in her appendix.

It is respectfully submitted that this Court should deny the appeal in all respects, find that Katie had no community interest in any of the three properties from which she was awarded "reimbursement," and remand this case for entry of a corrected decree and an award of appropriate attorney's fees to Milton.

Respectfully submitted,
LAW OFFICE OF MARSHAL S. WILLICK, P.C.

_____
MARSHAL S. WILLICK, ESQ.
Attorney for Respondent/Cross-Appellant

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 February, 1999.

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 002515
3551 East Bonanza Road, Suite 101
Las Vegas, NV 89110-2198
Attorney for Respondent/Cross-Appellant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of THE LAW OFFICE OF MARSHAL S. WILLICK, P.C., and on the ____ day of February, 1999, I deposited in the United States Mail, postage prepaid, by regular first-class mail to the individual listed below, at Las Vegas, Nevada, a true and correct copy of "Respondent/Cross-Appellant's Answering Brief," in addition to a true and correct copy of the "Appendix of Respondent Milton K. Harwood," to:

Gerald F. Neal, Esq.
1200 South Fourth Street, Suite 106
Las Vegas, NV 89104
Attorney for Appellant/Cross-Respondent

_____
Employee of The Law Office of Marshal S. Willick

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