Case Number CV 10597 and CV 10598

IN THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LANDER

MICHAEL MARKING and ELIZABETH FLEMING, Appellants v. VIRGINIA (SISSIE) GALLEGOS, Respondent	APPELLANTS' OPENING BRIEF (Austin Justice Court Case Nos. 09 PO 002/003)

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Appellants, and hereby submit their APPELLANTS' OPENING BRIEF.

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Statement of the Issues

This is an appeal of an Order and Opinion (sometimes hereinafter, "O&O") denying an unopposed Rule 60(b) Motion to Vacate Judgment in a TPO case heard in Austin Justice Court. Appellants contest the following aspects of the O & O, asserting assert that:

1. The Austin Court was wrong to deny the Motion to Vacate Judgment. Ostensibly, the Motion was denied due to issue preclusion and expiration of the time to make the Motion to Vacate Judgment. Appellants argue herein that neither doctrine applies.
2. The Order and Opinion completely mis-stated the grounds for the Motion to Vacate. The Motion to Vacate was made on the grounds that Applicant failed to reveal to the judge that she and Judge Dory share a daughter (the failure constituting extrinsic fraud on the court), whereas the Order and Opinion apparently believe the basis was the relationship itself.
3. The Order and Opinion inextricably conflate this TPO case with another, very different case, filed a year later, which latter case concerned collection of a debt.
4. The Order and Opinion rely on abuse of judicial notice, and almost all of that Order and Opinion are improper and must be stricken from the record; what is left will not support Judge Schaeffer's decision.
5. The Order and Opinion pronounced on issues which were irrelevant to the Rule 60(b) motion, and which were never argued before the Austin Court in any case. Appellants argue herein that the Austin Court had no authority to rule on such issues.
6. The Order and Opinion made false statements of fact which contradict the undisputed record of the instant case and of another case involving the same parties as the instant case. Appellants argue that the Austin Court had no authority to make such statements.

In all these errors, Judge Schaeffer, of the Austin Court, abused his discretion and exceeded

his authority, seriously and repeatedly.

Appellants ask this District Court to reverse the decision regarding the Rule 60(b) Motion to Vacate Judgment, and to order the irrelevant and improper matter in the Order and Opinion to be rescinded or stricken from the record.

Statement of the Case

1. Applicant, who is Appellee in this matter, sought and obtained TPOs from Austin Justice Court against the Adverse Parties (who are Appellants). Adverse Parties moved to dissolve the TPO. (Appendix A.2009.08.25.A) A hearing was held, the TPO was modified but not dismissed. After expiration of the TPO, Adverse Parties went to file an appeal to the Sixth Judicial District Court, but the Austin Clerk refused to file the Notice of Appeal.

2. Adverse Parties filed an action in the Sixth Judicial District Court, requesting the District Court to docket the matter as an appeal, and seeking a Writ of Mandamus compelling the Austin Clerk to take steps necessary to perfect the appeal. (*Marking and Fleming v. Gallegos*, Sixth Judicial District Court, Case No. CV 9953, filed 17 Sept. 2009; Appendix C.2009.09.14.A, C.2009.09.14.B) The District Court granted the petition for Writ of Mandamus, but concluded that, absent statutory authority, there was no possible appeal. (Appendix C.2009.10.16)

3. After an unsuccessful Rule 59 motion in the District court action (C.2009.12.07), Adverse Parties appealed to the Nevada Supreme Court solely on the question of whether or not the TPO could be appealed. (Appendix D.2010.06.29) Despite having designated the entire record on appeal, the District court failed to include the TPO in its transmission to the Supreme Court. (Appendix D.2011.02.28) The Supreme Court, based largely on that technical

error, declined to rule on the issue of appealability, which was the sole issue brought before it. (Appendix D.2011.09.15)

4. As a consequence of the District court's decisions and error, no notice of appeal was filed in the Austin Court, and no review was ever made of the merits of this case. The only issue considered by the District court was appealability, and the Supreme Court did not review the District Court's decision.

5. In 2010, after the above-described District Court petition for a writ, Applicant and her husband filed a different and separate debt collection action (Austin case 10 CV 002), which is connected to this TPO case in four ways: (i) the parties in both cases were the same (except for the addition of Ruben Gallegos as a plaintiff in the debt case); (ii) the judge and venue were the same; (iii) an offer was made by Respondents (Appellants), and accepted in principle by Gallegoses, to settle both cases together (but Gallegoses did not follow through); and (iv) in the course of the trial in the debt collection case, Virginia "Sissie" Gallegos admitted that then-Judge Joe Dory, who also had sat on this TPO case, was the father of her daughter Mary Hammon.

6. Notwithstanding the connections between the two cases, there are also some significant differences: (v) the subject matter was completely different; and (vi) Respondents/Adverse Parties (Appellants) strongly disagreed with the accusations made in the TPO case, while in the debt case, they argued that they, in fact, owed *more* than was claimed in the complaint.

7. We note that, after Judge Dory's term expired at the end of 2012, he was succeeded by Judge Schaeffer.

8. The Rule 60(b) Motion to Vacate Judgment (Appendix A.2015.03.25) is based on the failure of Applicant to make her disclosure (item (iv) in the paragraph above) in this earlier, TPO case, denying Adverse Parties (Appellants) their right to disqualify Judge Dory, which in turn denied them a fair hearing.

9. The Rule 60(b) Motion to Vacate Judgment was denied by Judge Schaeffer, in his Opinion and Order, (Appendix A.2015.08.27) which brings us to this Appeal. (Appendix A.2015.09.09)

ARGUMENT

10. Disqualification of a judge. Both the statutes (NRS 1.225) and the Code of Judicial Conduct (NCJC 2.11(A)(2)) disqualify a judge if he or she is closely related to any of the parties. The statute declares that such a situation constitutes "implied bias", and allows no rebuttal: it cannot be argued that, despite the relationship, bias does not exist. NCJC 2.11(C) allows the parties to consider, "outside the presence of the judge and court staff, court officials and others subject to the judge's direction and control, whether to waive disqualification", and permits the judge to sit on the case if such waivers are given. Clearly, the court is not to influence, in any way, consideration of whether the parties may, in their own discretion, waive the disqualification. Certainly, under such restrictions, it is not the court's prerogative to waive such disqualification itself.

11. Disqualification and waivers are handled separately for each case. The NCJC says that disqualification occurs "in any proceeding", not in "all proceedings". The NRS provides procedures and time limits applicable to individual cases, which cannot be interpreted as applying to more than one case at a time. Moreover, there is nowhere in the rules or statutes any mechanism allowing a disqualification or waiver made in one case, to apply to any subsequent, parallel, (or previous) case. As will be shown below in this Brief, because the

issues are not the same from one case to the next, issue preclusion (such as *res judicata*) cannot apply to any waiver.

12. In fact, the only issue can be, "is the judge disqualified under the facts and the law in a particular case?" Given an answer "yes", then the parties may, on a case by case basis using the procedures described by statute and in the code of conduct, elect whether or not to waive the disqualification. The waiver, or absence thereof, isn't itself an issue: it's part of a procedure.

13. The parties to a case are free to treat each case differently with respect to waivers. To maintain otherwise would be a denial of due process. "Fundamental requisites of due process are the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision making body the reasons for such choice." (*Trinity Episcopal Corp. v. Romney*, D.C.N.Y., 387 F.Supp 1044; emphasis added) A party may decide to waive the disqualification in one matter, and to press the issue in another.

14. Because the hearing in this TPO case was conducted without a waiver, it was *de facto* illegal, in violation of NRS 1.225.

15. Extrinsic fraud and Rule 60(b). Nevada defines "extrinsic fraud" this way: "The most widely accepted definition, which we adopt, holds that the concept embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . and relief should be denied in the absence of such conduct." (*NC-DSH, Inc. v. Garner*, 218 P.3d 853 (Nev. 10/29/2009), emphasis added). The hearing in this TPO case was conducted by a judge with "implied bias", according to NRS 1.225: by law, the judgment was not "impartial". Elsewhere, it has been held that failure to disclose conflicts of interest, even in the absence of any other breach of

duty, constitutes extrinsic fraud. (See, for example, *Potter v. Moran*, 239 Cal. App. 2d 873, 49 Cal. Rptr. 229 (Cal.App.Dist.2 02/03/1966))

16. The remedy is to be applied flexibly. "Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 64 S. Ct. 997, 322 U.S. 238 (U.S. 05/15/1944))

17. Issue preclusion. The Opinion and Order (pg. 1, lines 23..25) maintains that, under the doctrines of *res judicata*, *stare decisis*, and collateral estoppel, Appellants are precluded from "re-litigating" their claim of extrinsic fraud in this TPO case. Judge Schaeffer didn't do his homework regarding the requirements of issue preclusion.

18. "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits." (*Costello v. United States*, 81 S. Ct. 534, 365 U.S. 265 (U.S. 02/20/1961); quoting *Hughes v. United States*, 4 Wall. 232, 237)

19. In 2008, Nevada clarified its requirements for claim and issue preclusion. "Accordingly, the following factors are necessary for application of issue preclusion: '(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final;... (3) the party against whom the judgment is asserted must have been a party or in privity with a party

to the prior litigation'; [...] and (4) the issue was actually and necessarily litigated. [...] issue preclusion only applies to issues that were actually and necessarily litigated and on which there was a final decision on the merits." (*Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 10/30/2008); footnote omitted) Note: Nevada's clarification followed Federal clarification in *Taylor*, 128 S.Ct. 2161 (2007).

20. Subsequent to *Five Star Capital*, Nevada further clarified these guidelines, explaining the meanings of "actual" and "necessary" litigation. "When an issue is properly raised ... and is submitted for determination, ... the issue is actually litigated...." (*Frei ex rel. Litem v. Goodsell*, 305 P.3d 70, 129 Nev. Adv. Op. 43 (Nev. 07/03/2013), quoting *Restatement (Second) of Judgments 27* (1982)). Regarding "necessarily litigated", "Nevada law provides that only where 'the common issue was ...necessary to the judgment in the earlier suit,' will its relitigation be precluded. *Tarkanian*, 110 Nev. at 599, 879 P.2d at 1191 (emphasis added)." (also *Frei ex rel. Litem*)

21. Judge Schaeffer's assertion that collateral estoppel applies completely fails all four tests required by the Nevada Supreme Court: (a) the issue isn't identical, and can't be, because no claim of fraud has ever before been raised; (b) there has never before been a trial on the merits, and no decision has appeared in any final judgment (any dispute was waived in the debt case); (c) the defendants to a fraud claim aren't the same (Sissie Gallegos in the TPO case, and – if the issue had been litigated -- in the debt case, it would have been against both Sissie and Ruben); and (d) the issue has never before been litigated, and wasn't necessary to any other litigation.

22. Accordingly, neither collateral estoppel, nor *res judicata*, nor *stare decisis*, nor issue preclusion, nor claim preclusion can apply.

23. There has never been an appeal of this TPO case. An appeal is defined as "Resort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court

or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed." (*Black's Law Dictionary*, 6th Edition)

24. No other court, no appellate court, has ever ruled on whether or not an error was made in this TPO case. The "appeals" cited by Judge Schaeffer in his opinions were not appeals of the TPO case; some (such as the District Court case) weren't even appeals: they were completely different cases, considering whether or not the TPO was was appealable. The only appeal among all of the cases was in the Nevada Supreme Court itself, and it wasn't a ruling on whether there was an error in the TPO case, it was a determination that the District Court decision regarding appealabilty. (Appendix D.2010.06.29, D.2011.09.15) That's not the same as an appeal of the TPO itself. All the way up to the Nevada Supreme Court, the ruling was that the TPO case wasn't appealable. Since it wasn't appealable – and this was consistently held – there never has been an appeal of this TPO case.

25. Not only was an appeal of this TPO case never allowed, the merits of this TPO case were never even argued in any brief or motion by Appellants outside of the TPO case itself.

26. Judge Schaeffer is perhaps the most confused when he writes in his O & O, on pg. 3, lines 9..11: "The Defendants simultaneously sought a writ of mandamus and appealed the District Court ruling to the Nevada Supreme Court which dismissed the writ and affirmed the District Court ruling on the appeal on September 15, 2011." That wasn't what happened. Judge Wagner refused to allow an appeal of the District Court case to the Nevada Supreme Court, so Appellants sought a writ. (Appendix E.2010.02.16) The Nevada Supreme Court denied the writ, but said in a footnote to their opinion that if the District Court didn't eventually allow the appeal, then the Nevada Supreme Court would entertain another petition for a writ. (Appendix E.2010.03.10) The District Court took the hint, and promptly changed its position, allowing the appeal to go forward. The petition for a writ in the Supreme Court

wasn't about TPOs at all, it was about appealing a district court decision. It is only necessary to read the petition and denial to see this. Apparently, Judge Schaeffer didn't read the very short documentation on the writ case which he mentioned.

27. (We note here, to explain what is otherwise implausible, that Judge Wagner himself did his best to avoid having his own order appealed. He refused to allow his clerk to file the appeal, until threatened with a writ. Then, by omitting the TPO itself from the record, he sabotaged the appeal. Judge Wagner violated several of the statutes regarding judicial notice, requiring that the parties be notified before his decision and giving them a chance to contest, which were violated by Judge Schaeffer, as described *infra*.)

28. Judge Schaeffer's misunderstanding of the basis of the Motion to Vacate. The Motion to Vacate Judgment is based on the failure of Applicant to disclose her relationship to Judge Dory in this TPO case, which would have allowed Adverse Parties to disqualify Judge Dory in this matter. (Appendix A.2015.03.25) The Motion to Vacate Judgment is not about the relationship itself, it isn't about whatever happened between them four decades or four years ago, it isn't about the conduct of the TPO hearing, it isn't about whether Judge Dory properly or improperly granted the TPO. It's about Sissie Gallegos' failure to disclose that Judge Dory was disqualified.

29. As a rough analogy, it's not necessarily illegal to have a business and make a profit, but it <u>is</u> illegal to fail to disclose the profit on your income tax return. It's not illegal to be a witness to a crime, but it <u>is</u> illegal to lie under oath about what you saw, and it may in some cases (such as child abuse) be a criminal offense to fail to report the crime. There is a difference between being in business and committing tax fraud. There is a difference between having a daughter by a judge and committing fraud against the court. The distinction between the relationship and the failure to disclose it, is substantial.

30. Judge Schaeffer completely misunderstands this point, asserting that "There is no

difference between the TPO case and the promissory note case on the the issue of the relationship of the former Judge [Dory] to one of the Plaintiffs inasmuch as the only apparent claim in both cases is that the sexual dalliance created a bias in favor of Plaintiff Virginia Gallegos from Judge Dory." (Order and Opinion, pg.4, lines 13-16) In fact, the bias was obvious in both cases, whether or not there was a relationship between Gallegos and Dory. The differences, however, were significant: In this TPO case, Gallegos did not disclose the relationship, while in the debt case, she did. Furthermore, Appellants did not contest the debt, and chose to waive Judge Dory's disqualification; on the other hand, while they strongly opposed the TPO, they were denied a fair trial because the proceedings were conducted before a judge who was, by law, disqualified.

31. The District Court's ruling in the appeal of the postjudgment order in the debt case was more or less correct regarding this non-issue, although it did not explicitly mention the waiver. Judge Dory did, in fact, disqualify himself – as he should have – but after discussion outside of the presence of any court personnel, as NCJC allows, the parties agreed to continue despite the relationship between Virginia Gallegos and Judge Dory. That Appellants filed their Motion to Change Trial in the first place indicates that they were quite aware of their options, and their decision to waive the disqualification and to retract their motion was knowing and deliberate.

32. Judge Schaeffer concludes from the discussion in the appeal that the Sixth District Court found no problem allowing allowing Judge Dory to remain as judge in the debt case, so it likewise should have been no problem for him to remain in the TPO case. This conclusion omits a significant difference between the two cases: there was no waiver in the TPO case; indeed, there was no disclosure, precluding the possibility of a waiver. From there, Judge Schaeffer leaps even further to an incorrect conclusion that Judge Wagner's decision creates a kind of retroactive *res judicata* in the TPO case. In fact, under the rules and established law and opinion, the Sixth District was prohibited from doing any such thing, for two reasons:

issue preclusion requires that the issues be exactly the same (and they weren't the same), and Judge Wagner would have exceeded his authority to make any pronouncements on matters not properly before him. Under the Rules, Judge Wagner was required to remain silent regarding this TPO case, even if he had an opinion one way or the other.

33. The idea of "retroactive disclosure" is absurd: Appellants were unable to make use of the 2010 disclosure in 2009, when it was needed. Judge Schaeffer's reasoning is akin to arguing that disclosing this year's income on this year's tax return, excuses a failure to disclose last year's income on last year's tax return. The argument doesn't hold water.

34. In his convoluted reasoning, which conflates the debt case with the TPO case, Judge Schaeffer writes, "[...] this fraud was not extrinsic; that is, it did not arise after and outside the case. Rather, it was before the case and timely raised during the case but then waived as an issue when Defendants allowed Judge Dory to continue without objection when Judge Dory asked the he be allowed to continue." (Order and Opinion, pg. 5, lines 24..27) This Appeal is made in the TPO case, which was decided the year before the disclosure and revelation in the debt case. Judge Schaeffer is confused about which case is which. He has the sequence of the two cases backwards. Continuing, he asserts that the cases were "litigated more or less simultaneously and concern many of the same facts and the same parties". (Order and Opinion, pg. 9, lines 8..9) In fact, the TPO case was started and finished in 2009 – there was no appeal – and the claim in the debt case wasn't filed until 2010. The issues were completely different: TPOs aren't the same as loans. There was no overlap whatsoever.

35. Judge Schaeffer rightly concludes that there couldn't have been extrinsic fraud in the debt case because everyone knew about the relationship. Of course: the disclosure was made in the debt case, Appellants have never claimed fraud in the debt case, and Appellants had no inclination to contest that judgment, anyway. Appellants take no issue with that point, but it's irrelevant to this TPO case. Then, somehow, Judge Schaeffer reaches the conclusion that, consequently, there was no extrinsic fraud in this TPO case. Huh? If Applicant had made

her disclosure a year earlier, that might be true, but she didn't make the disclosure a year earlier, and Judge Schaeffer's statement isn't true.

36. Judge Schaeffer further wrote: "There is simply no reason to allow this issue to be raised any further: it has been over-litigated as it is." (Order and Opinion, pg. 10, lines 7..8) In fact, it has never been raised before, let alone litigated. There has never before been a Rule 60(b) motion or claim of extrinsic fraud in either this TPO case or in the debt case. In fact, neither of Appellants has ever before made a Rule 60(b) motion or claim of extrinsic fraud in either of their lives. How does that constitute "over litigation"?

37. This conflation of the two cases corrupts Judge Schaeffer's reasoning in numerous other places, too ridiculously many to enumerate exhaustively. For one example, however, he writes "[...] none of the issues Defendants raise in their 60(b) Motion appear the affect the substantial justice of the monetary judgment herein." (O & O, pg. 13, lines 18..19) This is no monetary judgment in this TPO case, the monetary judgment is in the other case. He continues to compound one error into multiple errors.

38. If Judge Schaeffer hadn't conflated the two cases, creating a kind of Frankenstein monster combined from the two, and if he hadn't mis-apprehended the basis of the motion, his Order and Opinion would mostly disappear. Excision of irrelevant matter would eliminate the majority of what would remain.

39. There is no time limitation to filing a Rule 60(b) motion for extrinsic fraud upon the court. Admittedly, the Order and Opinion does not disagree with this statement, that any time limitation applies to a Rule 60(b) motion for vacatur by reason of extrinsic fraud upon the court. However, he muddies the waters by claiming that the time to file this particular Motion to Vacate Judgment was somehow passed.

40. The Motion to Vacate provides citations affirming the absence of a time limitation. The authorities are consistent, all the way up to the Supreme Court of the United

States. Indeed, in one of the cases cited in the Motion to Vacate, a delay of nine years was allowed. (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 64 S. Ct. 997, 322 U.S. 238 (U.S. 05/15/1944)) The overwhelming imperative to maintain the integrity of the judicial process is cited as a reason for the absence of a limitation.

41. Judge Schaeffer attacks the absence of limitation by hint and innuendo without solid argument, when he quotes *NC-DSH, Inc. v. Garner* on pg.9, lines 11..16. However, the quote he provides mentions equitable estoppel (which doesn't apply here), a Rule 60(b)(4) motion (the Motion to Vacate was made under Rule 60(b)(3), not the same rule used in *Matter of Theda Harrison Living Trust*) and a statute of limitations (which doesn't apply here) in cases which are substantially different from this TPO case. He offers no solid, even remotely on-point examples.

42. At several points in his wandering discussion, Judge Schaeffer maintains that the time for filing the Motion to Vacate Judgment has passed, because the time for filing an appeal has passed. However, the Motion to Vacate Judgment isn't an appeal, the Rules indicate the proper remedy for extrinsic fraud is a Rule 60(b) motion or a separate action – not an appeal --, and Appellants' reading of over a hundred cases involving extrinsic fraud failed to uncover any case which dealt with extrinsic fraud using an appeal. All of this appeal nonsense in his Order and Opinion is simply wrong and misplaced.

43. Nevertheless, Appellants wish to explain their delay in filing the Motion to Vacate, even though there is no adverse consequence to them for having waited. The essential reason is that, due to bias and misconduct by Judge Dory and by Judge Schaeffer, Appellants felt that such a motion was futile. Both judges have exhibited extreme bias, disregard for the law, disregard for the rules of court, and disregard for the ethical rules which apply to judges and (in the case of Judge Schaeffer) disregard for the Nevada Code of Professional Conduct. Under such circumstances, there was no reason to perform a futile act. Equity does not demand an idle gesture, and the rule behind the Motion to Vacate was founded in equity.

44. However, as the Order and Opinion mentioned, Appellants made an offer of settlement to Gallegoses, and they agreed in principle during a hearing last year. Appellants' attorney was to have drawn up the paperwork, but he went AWOL, so Appellants created the documents themselves. (Appendix B.2015.09.09) Among the terms, to which Gallegoses agreed, was a requirement that the TPO somehow be made to "go away". Judge Schaeffer was to have investigated expungement or sealing of the record, but he, too, dropped the ball, and never investigated. Appellants subsequently determined that expungement was unavailable in Nevada, sealing was unavailable under the circumstances and wasn't necessarily permanent, anyway, and determined that the Motion to Vacate Judgment was the best way to do this. In off-the-record communication with Gallegoses, Gallegoses said they didn't care how it was to be done and they had no objection to the Motion. Hence, in view of the facts that Judge Schaeffer encouraged a settlement and that the Gallegoses were not opposed to using a Rule 60(b) motion, Appellants seized the opportunity to make their Motion to Vacate.

45. Because Appellants' justification for the delay is not dispositive one way or the other (given that there is no time limit), the illustration of the underlying cause need not be documented. It would be proper to bring the material to this court's notice (being part of the record in the five different cases which Judge Schaeffer has used in his O & O). However, it would require the addition of another ream of paper (or its electronic equivalent) to this Brief and Appendix. To thus burden this appellate court would be unfair and probably an unwelcome demand on its time. However, it seems important to provide the reasons for the timing of events which, to read the rambling Order and Opinion, would otherwise be utterly confusing and perplexing. Judge Schaeffer argues that Appellants are negligent in not filing earlier, and have thereby lost their moral, if not legal rights, to protest. Consequently, we must provide a plausible explanation.

46. However, accusations of misconduct against a judge are not to be made lightly, so we now explain them. Again, the Motion to Vacate Judgment does not hinge on the validity of

accusations against a judge or against judges: the Motion is based on extrinsic fraud by Applicant, it is not based on any misconduct by the Judge. Furthermore, the ensuing section is not meant to argue that any delay in making the Motion is either excused or within limits, since there is no time limit for filing a Rule 60(b) motion when it is based on extrinsic fraud. However, explaining the delay will tie together a few loose ends of the narrative, so some other statements of fact might make more sense. Judge Schaeffer's telling of events is out of sequence: he jumps back and forth in time. Without a better explanation, his version is misleading. We want to make it clear what happened, because the facts, in sequence and in context, make good sense.

47. Judges Dory and Schaeffer have both acted as advocates for Gallegoses. In both cases, both judges have acted as advocates for Gallegoses. For example, in the debt case, there were at least three post-judgment collection hearings under NRS 21.270 for debtor examination. The rules require that the judgment creditor move for each such hearing, showing (except for the first hearing) cause why the hearing should take place. Both judges have ignored the rules, scheduling such hearings without motions, without warnings, and without any showing of cause.

48. In at least one debt case hearing (2014.05.27), even the clerk didn't know the reason for the hearing when asked by Respondents/Appellants. Apparently, only the Judge and the Plaintiffs knew the reason it was called.

49. Law and the rules require that parties question their opponents (although a judge is permitted to ask questions to clarify testimony thus elicited). (Appendix B.2013.05.27) Both judges have taken over this function from Gallegoses, in violation of law and the rules, asking most of the questions themselves, in the debt case. They have gone beyond that: they repeatedly give legal advice to Gallegoses, even in open court, suggesting tactics and weighing in on the likelihood of success of this or that possible strategy.

50. (Judge Schaeffer even fails to properly manage his clerks, one of whom told us that we did not need to file certain documents to perfect this appeal. Failure to file those documents would have been grounds to dismiss this appeal. Not only was she giving legal advice, she was giving bad legal advice. How many litigants have been harmed by her actions? Furthermore, the stories of the two clerks – clerk and deputy clerk – have contradicted each other, and they have contradicted themselves, in connection with documents which probably were passed from Ruben Gallegos to Judge Schaeffer, an inappropriate *ex parte* communication. Ruben admitted it. Somebody in that office has lied.)

51. In the TPO case, it appeared that Judge Dory really didn't care what Adverse Parties had to say: his mind was made up before anyone entered the courtroom. But he guided Sissie Gallegos through the process with leading questions so that she would give the right answers.

52. These and other issues were raised by Respondents in the debt case, in their Motion for Adherence to Rules of Law and Procedure, 2014.05.27. Judge Schaeffer denied the motion with no discussion, on the grounds that there was insufficient time to consider it. He didn't even wait for Plaintiffs to oppose or agree: for all we know, they might have thought it a good idea. Over a year later, he was still calling hearings without motions, without showing of cause, and without specifying the reason for the hearing. One would expect that a year would have been enough time to consider that motion, but Judge Schaeffer continues to act as Plaintiffs' advocate, making the motions himself and deciding them without discussion.

53. Even Hy Forgeron, who – according to Ruben Gallegos in the record, advised Ruben Gallegos in the debt case – was told by Judge Dory that Dory thought that the Gallegoses needed an attorney and that Dory had recommended Forgeron or Herrera to Gallegos. (Response to Motion to Disqualify Attorney, 2013.03.17, pg. 3, lines 21..24; Appendix B.2013.03.18) Thus, Forgeron, who claims to be unable to recall much of anything, reveals an *ex parte* conversation between Judge Dory and Ruben Gallegos, about which

Respondents were never notified as required by the NCJC. In granting the TPO, Judge Dory said he had an *ex parte* conversation with Sissie Gallegos, but failed also to convey the substance that conversation to Adverse Parties, again in violation of the NCJC. Subsequently, he admitted to a second *ex parte* conversation regarding a modification of the TPO, and again violated the NCJC by failing to memorialize it; it's not clear that the second conversation ever should have taken place: there is no apparent justification for that *ex parte* communication.

54. Under these circumstances, it appeared highly improbable to Adverse Parties (Appellants) that a Rule 60(b) motion would have much chance of success.

55. Both judges have shown prejudice and bias, and ignored Appellants' arguments. A review of the record shows that Judge Dory almost always ignored Appellants arguments in both cases. The record is silent on disposition of Appellants' motions: he mostly just ignored them, sometimes after just a few questions. In the TPO case, Adverse Parties (Appellants) prepared their Motion to Dissolve Temporary Order (Appendix A.2009.08.25.A), with supporting attached exhibits, but Judge Dory almost completely ignored it in the hearing and made no mention of it otherwise in the record. He denied it, but gave no reasons.

56. Similarly, Judge Schaeffer ignored Appellants' aforementioned Motion for Adherence to Rules of Law and Procedure, nor did he wait for Plaintiffs to weigh in on the issues (unless they had already done so, *ex parte*).

57. Judge Schaeffer also ignored Appellants' Motion to Disqualify Attorney (Appendix B.2013.02.24). He didn't wait for Hy Forgeron's response to the latter, he went ahead and scheduled another hearing to include Hy Forgeron as if it were a foregone conclusion that the motion would be denied. The motion was meritorious: it cited from the record to show that Forgeron had consulted with the judge (an ethical breach by itself) and also had given advice on the matter to Gallegos (a conflict of interest). Contrary to Judge

Schaeffer's assertion (Order and Opinion, pg. 9, lines 19..20) that Forgeron did not contest the Motion to Disqualify Attorney, he filed his Response to Motion to Disqualify Attorney on 2013.03.18 (Appendix B.2013.03.18), which included a lot of "I don't recall"s, and implications that both Judge Dory and Ruben Gallegos were liars (Dory spoke from the bench, Ruben as a sworn-to-tell-the-truth party), and wasn't even a proper response by the Rules because he didn't attach a affidavits or citations to support almost all of his averments. Rather than wait for a ruling, however, after all of this, Forgeron abandoned his clients the day of the hearing, without any warning to them – yet another ethical lapse on Forgeron's part.

58. Judge Schaeffer somehow disregards this as a defense or as a response. Judge Schaeffer says in his O & O, on line 20, that if there had been a response, he likely would have denied the motion, anyway, allowing Forgeron to act as Gallegoses' attorney. Although the point was moot, Appellants filed a reply later to answer Forgeron's assertions for the record. (Appendix B.2013.06.07) So Judge Schaeffer was saying that he was inclined to deny the motion before seeing a response (because he refused to recognize the response as a response) and before seeing a reply. <u>This is almost a textbook example of prejudice: deciding an issue before seeing the evidence or hearing the arguments.</u>

59. Judge Schaeffer expresses concern over Plaintiffs' loss of their attorney (O & O, pg. 10, lines 27 *et seq.*), but seems to have no concern over Respondents' loss of their attorney.

60. Judge Schaeffer claims that this TPO matter "is now long past and no longer has any direct effect on the Plaintiff's [Applicant's] interests". (O & O, pg. 10, lines 19..20) What about Adverse Parties' interests? He does not concern himself with them.

61. With both judges prejudiced and biased against Appellants, is it any wonder that Appellants regarded filing a Rule 60(b) motion to be a futile gesture?

62. Judge Schaeffer, when he chooses, has little regard for the law or the rules. A third reason that Appellants didn't file their Rule 60(b) motion is that Judge Schaeffer has

little or no regard for the law when it so suits him, and – given his bias and prejudice – without the possibility of a settlement he was unlikely to have dealt with such a motion properly. In retrospect, perhaps Appellants even later gave him too much credit. His Order and Opinion speaks for itself.

63. Some examples in the following paragraphs of this section:

64. Judge Schaeffer exceeds his authority by ignoring the rules of court: he grants relief without motions or discussion (by calling hearings, dispensing with the adversary process); he accepts improperly formed briefs from an attorney (Hy Forgeron attached no affidavit or other evidence to his Response); he denies the right to be heard (for example, by refusing to consider motions for no good reason); he accepts opinions of facts without any evidence or opportunity for reply (by taking at least some of Forgeron's statements as facts, when Forgeron is not even under oath nor writing in an affidavit, in an issue which – because it became moot – was never fully litigated); by going outside the record and the courtroom to investigate matters (violating NCJC 2.9(C); see more below); by showing hostility to Appellants (slandering and libelling Appellants without basis; more below).

65. Judge Schaeffer has ignored the rule that required long ago that the debt case be transferred to District Court, because issues were raised which were beyond the jurisdiction of the Austin Court. The he further ignored his obligation under DCR 22 to dismiss the debt case entirely, when Gallegoses, as Plaintiffs, failed to effect the transfer.

66. When testimony of Plaintiffs, statements by Judge Dory, and un-sworn hearsay by Hy Forgeron (the latter, which Judge Schaeffer takes as Gospel) conflict – indicating that *someone* probably is committing perjury – Judge Schaeffer isn't bothered, and doesn't bother to inquire further. Judge Schaeffer reduces a Category C Felony to a "sexual dalliance", and doesn't concern himself with Ruben Gallegos's admitted, on-the-record, threats to shoot Appellants' horse. He is not bothered when Sissie Gallegos destroys Appellants' property. He fails to notice stalking of Appellants by Ruben Gallegos.

67. Judge Schaeffer advocates sealing the record, rather than solving the underlying problem. (O & O, pg. 16, line 25 *et seq.*) This is disturbing for several reasons. First, no justification exists for sealing the records (SRCR 3.4): any motion to do so ought to be granted or denied on its merits, and not because the parties thus stipulate. In fact, sealing would likely be contrary to public policy. Moreover, Judge Schaeffer suggests that the sealing be made contingent upon the performance of the terms of a proposed contract; to do so would make the court, itself, a party to the contract, a serious violation of judicial impartiality. Finally, Schaeffer is, as he as done before, giving legal advice to Gallegoses in making this recommendation, regardless of how he tries to couch his opinion on the subject.

68. Of course, he completely ignores the point, too, that in 2009, Sissie Gallegos committed extrinsic fraud against the Austin Court.

69. Violations of ex parte rule NCJC 2.9(C). Many of the statements made by Judge Schaeffer in his Order and Opinion seem to be based on facts and falsehoods which don't appear anywhere in the record. True or not, these represent violations of NCJC 2.9(C), which says, "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." The commentary says that this rule extends to "all mediums, including electronic". (Comment [7]) Yet his Order and Opinion are replete with statements indicating that he has violated this rule: "The Court takes judicial notice of the several cases..." (pg. 11, lines 1..2: not a "case" in the sense of one cited; hearsay? this was never litigated!) "Apparently, Defendants discovered that and sought such a writ..." (pg. 16, lines 7..12: finding "evidence" on Plaintiffs' web site!) "...nor have they apparently realized..." (pg. 9, lines 24..25: this information would only be available *ex parte*)

70. In the O & O, pg. 19, line 18 *et seq.*, Judge Schaeffer writes, "[...] Plaintiffs have lost their lawyer in the meantime [...] and [...] therefore seem at a loss as to how to proceed.

That is, they have not apparently initiated a foreclosure or similar action to force the sale of Eleven Eleven Ranch nor does it appear that any garnishment or other collections litigation has taken place, nor have they replaced their lawyer, nor have they apparently realized that they should have replied to the instant 60(b) Motion. At any rate, the Court takes judicial notice of the fact that no outside collections actions have been filed [...]" Either Judge Schaeffer is jumping to conclusions without a basis, or he has been communicating directly or indirectly with Gallegoses, or he's a psychic. Maybe the Gallegoses hired a competent attorney, who told them that as Wagner reminded them the property doesn't belong to Marking and Fleming, maybe after three so-called "debtor inquests" they have learned that Appellants have no non-exempt property or income, maybe the same attorney told them that for a half dozen reasons Eleven Eleven Ranch was off the hook long ago, they sued the wrong party, there are no separate actions (because collection is a post-judgment activity in the same case), and not to bother anyway because there is no point, why waste their money? Judge Schaeffer's ignorance of the law and the facts of the debt case, and his "knowledge" of what Plaintiffs have done, and what they have not done, are both frightening to behold. The only way Judge Schaeffer would "know" these things is by *ex parte* communication and by private research (which falls under the *ex parte* prohibitions). (Or, maybe he is only speculating, drawing conclusions with no basis in the evidence.)

71. (Judge Schaeffer misleads in that, according to the record, Ruben Gallegos has consulted at least three different attorneys. He is certainly not attorney-deprived.)

72. We cannot provide citations or other evidence to support the *absence* of these things in the entire record and in the limited universe of things of which judicial notice might properly be taken. To do so would require a truckload of things to prove the absence of foundation for the above assertions. As the old philosophers' example goes, you'd have to examine all of the crows in the world to prove that there aren't any white ones. We are fairly certain that this information isn't in any legitimate place for him to notice it. It seems far more

likely that he "heard someone say" that we had helped others with cases, that he found documents on the web (and not by reading transcripts or opinions), or was in improper *ex parte* discussions with Plaintiffs/Applicant. To our knowledge, Appellants' web site is not mentioned in any litigated case, anywhere, and things which are not true either haven't been litigated or confirmed, or we would almost certainly know about it. Yet Judge Schaeffer feels compelled to do "research" by going to one of our web sites to bolster his case.

73. We have here a judge who surfs the Internet and talks to his friends to find material to support his pre-conceived notions. This judge doesn't use WestLaw for legal "research", he uses Google.

74. It matters not for purposes of the rule whether these statements are true or not: Judge Schaeffer violated the NCJC in doing the "research" for his O & O.

75. Improper use of judicial notice. Judge Schaeffer has improperly taken judicial notice, and he has taken judicial notice of matters which are ineligible for judicial notice. To the extent that he has done this, his argument relying on such notice is invalidated.

76. "[...] we may take judicial notice of facts generally known or capable of verification from a reliable source, whether we are requested to or not. NRS 47.150(1). Further, we may take judicial notice of facts that are '[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.' See NRS 47.130(2)(b)." (*Mack v. Estate of Mack*, 206 P.3d 98, 125 Nev. Adv. Op. No. 9 (Nev. 03/26/2009))

77. This motion is made in the TPO case, and the debt case is a different case. When a court takes notice of a different case (such as the TPO case), it is also considered to be judicial notice. "As a general rule, we will not take judicial notice of records in another and different case, even though the cases are connected. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing *Giannopulos v. Chachas*, 50 Nev. 269, 270, 257 P. 618, 618

(1927)). However, this rule is flexible in its application and, under some circumstances, we will invoke judicial notice to take cognizance of the record in another case. Id. To determine if a particular circumstance falls within the exception, we examine the closeness of the relationship between the two cases. Id." (*Mack v. Estate of Mack*) From the foregoing case, it's still judicial notice, even when the two cases were heard in the same court.

78. In addition to referring to facts (and falsehoods) outside the record of this case and outside the record of any other case, Judge Schaeffer has liberally referred to the record in the debt case, in the writ case filed to ask for an appeal in the Sixth District Court, to the Nevada Supreme Court appeal of the latter, and to others. In all cases, these referrals to matters outside the record of the TPO case were instances of judicial notice, as defined by the Nevada Supreme Court's opinion in *Mack v. Estate of Mack* and its opinions in other cases.

79. NRS 47.130 to 47.170 define the rules regarding judicial notice.

80. "Judicial notice may be taken at any stage of the proceeding prior to submission to the court or jury." (NRS 47.170) Since there has been no activity since 2009 in this TPO case until the Motion to Vacate Judgment was filed, and since the debt case was not filed until 2010, no judicial notice of debt case matter, or any other matter, has properly occurred in the TPO case, because no judicial notice occurred "prior to submission to the court" of the Motion to Vacate Judgment.

81. There is a reason for NRS 47.170: "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed." (NRS 47.160) In order for this rule to be meaningful, the court must notify the parties when judicial notice is being taken; otherwise, they do not have an opportunity to contest the taking of judicial notice, and, obviously, the notice must occur prior to submission of the matter to the court. This rule also has the effect of adding the noticed item to the record.

82. In other words, if a judge takes discretionary judicial notice, then he must notify

the parties, at the time, before submission for decision. In the case of mandatory judicial notice, when a party requests that the judge take notice, the notification occurs automatically. For instance, the instant Motion to Vacate Judgment referred to the TPO case, but the Applicant had a chance to object in the normal course of handling the Motion.

83. In the TPO case, there was no notification, therefore all judicial notice or reference to matters outside the TPO case taken by Judge Schaeffer was improperly taken judicial notice. If Judge Schaeffer had felt it was important to consider such matters, he could have called a hearing before taking the Motion to Vacate Judgment under consideration, before making a decision, but he did not. What we have now is an Order and Opinion with the smell of legal eisegesis: he came to a decision, then did "research" -- including taking judicial notice – to justify the decision already made. There was no discussion among the parties, including Applicant Sissie Gallegos, and no chance to object to the existence or scope of the judicial notice taken.

84. In addition to the foregoing failure, Judge Schaeffer's use of judicial notice is improper in another respect: many of the "facts" that he notices fail both tests of NRS 47.130: the "facts" are not "generally known" within the territorial jurisdiction of the court, and they are not subject to easy verification. "Generally known" means that the fact must be "common knowledge", it doesn't count that Judge Schaeffer knows it; "[...] personal knowledge is not judicial knowledge, and a judge may personally know a fact of which he cannot take judicial knowledge. 1 Ray, Law of Evidence, Judicial Notice 152 (1980) at 194-97." (*Eagle Trucking Co. v. Texas Bitulithic Co.*, 612 S.W.2d 503, 24 Tex. Sup. J. 180 (Tex. 1981))

85. If it isn't commonly known, the fact must be "Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." (NRS 47.130) How is Judge Schaeffer to verify as undisputed an assertion that Marking has helped others with cases, or that Ruben has not hired another attorney? (The attorney may not be able to answer the question, and Ruben may

not be willing, with the attorney-client relationship to be held in confidence, so the availability of "accurate and ready determination" is not a foregone conclusion.)

86. As such, the very minimal facts actually litigated, and the final orders of this TPO case, are the only ones properly available to Judge Schaeffer. Almost all of his O & O ought to be stricken from the record; what remains will not support his decision.

87. The "sexual dalliance" canard. Before Judge Schaeffer came along, the word sex – either in its root form, or as the adjective "sexual" -- never appeared in the record of this case, nor could it be found in the debt case. Nor had the record seen "dalliance" or "sexual relationship" until Judge Schaeffer began to talk about it. Judge Schaeffer has invented this as an issue. We never before used the word "sex", but Schaeffer has used it over a dozen times in his O & O alone, and he always uses it in the context of Judge Dory and Sissie Gallegos.

88. We re-iterate at this point: the instant Motion to Vacate Judgment isn't about Judge Dory's relationship with Sissie Gallegos, or about any aspect of that relationship. We don't care about that. It's about Gallegos's failure to disclose that they had a daughter in common. That's it, that's all. They have a daughter, which implies some kind of relationship, we can't help that. We complain of her failure to disclose in this TPO case, that consanguinity, that's all.

89. The matter of Judge Dory's relationship with Sissie Gallegos was mentioned by Appellants on two occasions before this motion was filed: It was brought up in a motion to disqualify Judge Dory, (Appendix B.2010.06.01) and it was mentioned in another motion as an example of Judge Dory's disregard of the law. (Appendix B.2013.01.23) In the first instance, Respondents wrote, in the debt case, "The Hon. Joe Dory is disqualified from acting in this case due to consanguinity with a party and also due to appearance of impropriety." (Motion to Change Trial, 2010.06.01) It's hard to put it any more politely than that. (That motion was subsequently retracted without retracting the allegation, and the disqualification

waived, as described *supra*.) Later, again in the debt case, they argued that the rules required that the debt case should be dismissed or transferred to district court. Part of the argument was based on Judge Dory's disregard for the law and the rules, and noted (among many other things) that Judge Dory had committed a Category C felony "when he impregnated Plaintiff Gallegos with their daughter, Mary Hammon" (because Sissie was around 14 years old at the time, and he was considerably senior) (pg.8, lines 187..188). Yes, the integrity of Judge Dory was being questioned, but lack of integrity is grounds for disqualifying a judge, and that was an essential part of the argument.

90. Again, you can have a relationship with integrity or not, but the second motion wasn't about the relationship, it was about integrity. We have NEVER complained about the relationship itself, only about its implications – as declared by the Nevada Legislature – for the two cases.

91. How else are Respondents/Adverse Parties supposed to have raised these issues? It's difficult to mention "consanguinity" without implying sex, unless you're in a conversation about, say, *in vitro* fertilization. And it's difficult to note that someone is guilty of a felony without saying what he did.

92. These two, necessary mentions of the relationship between Judge Dory and Sissie Gallegos have sparked outrage in Judge Schaeffer, and two separate threats to cite Appellants for contempt of court. The second of those threats is to be found near the end of his O & O, page 17, lines 19..24. (On the other hande, he never threatened Gallegoses on account of perjury.)

93. Contempt of court is governed by NRS 22.010, which defines contempts as follows:

NRS 22.010 Acts or omissions constituting contempts. The following acts or omissions shall be deemed contempts:

1. Disorderly, contemptuous or insolent behavior toward the judge while the judge is holding court, or engaged in judicial duties at chambers, or toward masters or arbitrators while sitting on a reference or arbitration, or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the court, or in its immediate vicinity, tending to interrupt the due course of the trial or other judicial proceeding.

3. Disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers.

4. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court or judge at chambers.

6. Disobedience of the order or direction of the court made pending the trial of an action, in speaking to or in the presence of a juror concerning an action in which the juror has been impaneled to determine, or in any manner approaching or interfering with such juror with the intent to influence the verdict.

7. Abusing the process or proceedings of the court or falsely pretending to act under the authority of an order or process of the court.

94. None of these cover Judge Schaeffer's threat. He might be tempted to use NRS 22.010.3, but he has no authority whatsoever to prohibit anyone before him from litigating an issue according to the rules, so any order he makes to prohibit mention of the topic, when done for a lawful purpose, is not lawful.

95. The rules do allow that any "scandalous" matter may be stricken from a pleading, but this isn't scandalous, and the request to strike must be made by motion from a party who is asked to respond to that pleading. (NRCP 12(f)) There has been no such motion, and, even if there were, that gives Judge Schaeffer no authority to cite for contempt. By very old rule, "Nothing is considered scandalous which is positively relevant to the cause, however harsh and gross the charge may be. The degree of relevancy is not deemed material. *Coop. Eq. Pl.* 19; 2 *Ves.* 24; 6 *Ves.* 514, 11 *Ves.* 626; 15 *Ves.* 477; *Story Eq. Plo. Sec.* 269 *Vide* Impertinent." (*Bouvier's Law Dictionary, 6th Edition*; emphasis added)

96. Accordingly, Judge Schaeffer's threats of a contempt ruling are unlawful and exceed his authority. Moreover, they attempt to deny due process to the parties, by prohibiting them from raising material issues. As such, they have discouraged Appellants from making

the Rule 60(b) motion before this.

97. Libel and slander of Appellants. Judge Schaeffer has been hostile towards, and biased against, Appellants, as evidenced by his employment of libel and slander against us. We use these terms advisedly, since he has, by violating the rules and by exceeding his authority, arguably put himself beyond the protections of privilege and immunity.

98. "[...] the Court takes judicial notice of the several cases that Mr. Marking has helped others with as well as his own cases" (O & O, pg. 11, lines 1..2) This implies that Marking has been engaged in the unauthorized practice of law. We have scratched our heads over where Schaeffer got this idea. It's certainly not in any cases (we would know about those), it's never been litigated (we'd know that, too), and any such rumour or conjecture would be merely that, and he'd have no authority to take judicial notice of it. Therefore, he has no authority to make such a statement. Without proof, it's libellous.

99. Perhaps he got it from Hy Forgeron, who wrote, "Leave it to Mr. Marking. I believe him to be the 'ghost attorney' for the Plaintiff in at least two Sixth Judicial District Court civil cases as well as another case in which he is the pro per Plaintiff." (Response to Motion to Disqualify Attorney, pg. 6, lines 19..22) We'd freely admit to acting as our own "ghost attorney" in multiple pro per cases, except that it's hard to be a ghost attorney for yourself, when you file all your pleadings out in the open. There's a shortage of good licensed attorneys around, given that the prevalence of gentlemen such as Forgeron and Schaeffer makes it hard to find qualified representation and advice. But for others? Again, this implies the unauthorized practice of law. *What are those two cases, Mr. Forgeron?* Are they the same ones of which you take judicial notice, Judge Schaeffer? If not, *to which cases do you refer, Judge Schaeffer?*

100. So, Schaeffer repeats the libel started – or maybe continued -- by Forgeron.

101. "[...] there has been no indication of a perceived or actual continuing threat of

violence or harassment to the Plaintiffs or either of them coming from the Defendants of either of them." (O & O, pg. 10, lines 24..25). "Continuing" implies that there at some time was a threat of violence or harassment, and the record shows that there was no such threat, nor any violence, nor any harassment by Appellants. There were no findings of fact to support that conclusion, simply because there were no facts to support that conclusion. (A finding of "harassment" without citing specific facts isn't a proper finding.) Judge Dory issued the order merely because Sissie said she was "afraid", a claim that's hard to refute. Schaeffer libels Appellants by his use of the word, "continuing". Schaeffer views Appellants as violent and harassing, but the record shows that the violence and harassment were perpetrated by Gallegoses (threatening to shoot a horse, destroying property, stalking, stealing a watering tank, stealing a gate, abuse of office, assault (without battery), fraud, and so on). Judge Schaeffer tries to turn the table and make Appellants the bad guys, when Sissie's only purpose in applying for the TPO was to keep Appellants out of the Roping Club. (See, or rather, hear, Ruben's statements on the Austin Roping Club meeting recording)

102. This overt hostility towards Appellants was a major factor in discouraging them from making their Rule 60(b) motion earlier.

Conclusions

The Motion to Vacate Judgment was based on Applicant Sissie Gallegos's failure to disclose her consanguinity to Judge Dory at the beginning of the proceedings in this case, denying Adverse Parties Marking and Fleming their right to disqualify Judge Dory, as the relationship between Judge Dory and Gallegos, by statute and court rules, made Judge Dory

unqualified to sit on this case, and rendered the proceedings and his orders in this matter unlawful and a violation of due process.

Judge Schaeffer, in his Order and Opinion, wrongly took the Motion to be based on the relationship itself, and not on the extrinsic fraud which came from the failure to disclose. Judge Schaeffer compounded the error by concluding that the issue had been previously litigated, and conflated this TPO case with another case. Furthermore, he erred by concluding that disclosure was, somehow, effective retroactively. Given that he misunderstood the basis of the Motion, his legal and factual arguments were, as a consequence, completely off base. Effectively, he argued against some different motion which has never been made.

Additionally, Judge Schaeffer, in part but not entirely because of his fundamental misunderstanding of the Motion, ruled – often incorrectly – on a number of irrelevant issues and non-issues, many of which weren't even in dispute. He also misconstrued and misunderstood the record in this case and in related cases.

Judge Schaeffer has, in the making of his Order and Opinion, exceeded his authority by failing to consider the facts, by manifestly disregarding the law, and by breaching multiple provisions of the court rules, statutes, and tenets of fundamental logic.

APPELLANTS RESPECTFULLY SEEK FROM THIS COURT an order (1) reversing the Austin Court's denial of Appellants' Motion to Vacate Judgment, (2) ordering stricken from the record all incorrect and irrelevant matter in the Austin Court's Order and Opinion, and (3) requiring that further proceedings, if any, be conducted in accordance with the rules.

Appellants' Certificate

Appellants hereby certify that

We have written and read this brief; and

To the best of our knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page of the appendix where the matter relied on is to be found.

Dated this Tuesday, 24 November 2015.

_____

Michael Marking, Appellant

_____

Elizabeth Fleming, Appellant

both at Post Office Box 190, Austin,
Nevada 89310-0190

Note Regarding Appellants' Appendix

Appellants' Appendix follows this brief, and is provided on a CD-ROM to avoid producing a large stack of paper. The contents of Appellant's Appendix are listed in the Table of Contents, which begins in this Brief on Page 2. Items included in the Appendix are designated by letters (designating from which case the documents arose), plus the date of the document. They retain their original page numbers within each item.

Within each directory or folder on the CD-ROM is an index file, *index.html*, which links to the other files. This is the same way that web sites are put together, and any of the most popular web browsers should be able to read the files in the appendix.

Primary documents on the CD-ROM are PDF files, complying with Nevada's electronic filing rules.

Appellants request that this Court take judicial notice of the documents in the Appendix. All of the documents are from this court, from the Austin court, and from the Nevada Supreme Court, so taking of judicial notice is mandatory.

Certificate of Service

I hereby certify under penalties of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage prepaid, at Battle Mountain, Nevada, addressed as follows:

Virginia (Sissie) Gallegos; Post Office Box 221; Austin, Nevada 89310

Dated Tuesday, 24 November 2015.

_____

Michael Marking

Affirmation

(Pursuant to NRS 239B.030)

I hereby affirm that the preceding document filed in the above-described manner does not contain the social security number of any person.

Dated Tuesday, 24 November 2015.

_____

Michael Marking

(Appellants' electronic document name: *gvmf_appellants_opening_brief_20151116d)*