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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

In re LISA RIZZOLO; THE LISA M. RIZZOLO SEPARATE PROPERTY TRUST and THE LMR TRUST, *Petitioners*,  
vs.  
UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA, KIRK and AMY HENRY; FREDRICK RIZZOLO aka RICK RIZZOLO; THE RICK AND LISA RIZZOLO FAMILY TRUST; THE RICK J. RIZZOLO SEPARATE PROPERTY TRUST; THE RLR TRUST; and KIMTRAN RIZZOLO, *Respondents*.

CASE NO.

Petition for Writ of Mandamus to District Court Case No. 2:08-CV-00635-PMP-GWF

**PETITION FOR WRIT OF MANDAMUS**

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I.

**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This is a civil action in which the district court had original jurisdiction under the provisions of 28 U.S.C. § 1332(a). This court has authority to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651. The All Writs Act gives the court the power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* In this case, the issue in dispute is before the United States District Court for the District of Nevada. Thus, this court has jurisdiction to issue a writ of mandamus pursuant to 28 U.S.C. § 1651.

II.

**STATEMENT OF ISSUES PRESENTED  
AND RELIEF SOUGHT**

1. Whether this Court should exercise its power of supervisory mandamus.

2. Whether the statement in *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) that “if community property can be given away by the husband (citation omitted) and is subject to his debts upon his death (citation omitted), we see no reason why it is not subject to his debts, whether arising out of tort or contract during his lifetime and the wife need not be made a party when the husband is defending against the community property, since in legal effect she is a party to every action involving the community property” is still good law in Nevada in light of the fact that the underlying statutory predicate for said statement as it existed in 1970 is no longer in effect.

3. Whether under Nevada’s Uniform Fraudulent Transfer Act, NRS<sup>1</sup> 112.140, *et seq.* (“NUFTA”), a non-debtor spouse’s share of community property

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<sup>1</sup>“NRS” refers to Nevada Revised Statutes.

1 awarded in a Nevada divorce decree is not “subject to process by a creditor  
2 holding a claim against only one tenant” and would not fall within the definition  
3 of an “asset” under NRS 112.150(2)(c).

4 4. Whether a creditor of one spouse can collaterally attack the award of  
5 property in a Nevada divorce decree as a fraudulent transfer under Nevada’s  
6 Uniform Fraudulent Transfer Act, NRS 112.140, *et seq.*, in light of the  
7 countervailing statutory authority contained in NRS 125.185.

8 5. Whether under Nevada’s Uniform Fraudulent Transfer Act, NRS  
9 112.140, *et seq.*, a creditor may only avoid a transfer in a Nevada divorce decree to  
10 the extent that the value of the community property awarded to the non-debtor  
11 spouse exceeded in value of the property awarded to the debtor spouse.

12 6. Whether the foregoing should be certified as questions to the  
13 Supreme Court of the State of Nevada.

14 Defendant Lisa Rizzolo respectfully requests that this Court issue a writ of  
15 mandamus compelling the District Court to vacate its order denying Defendant  
16 Lisa Rizzolo’s motion for summary judgment. Further, questions numbered 2, 3, 4  
17 and 5, above, be certified to the Nevada Supreme Court in accord with Rule 5 of  
18 the Nevada Rules of Appellate Procedure. Once the Nevada Supreme Court has  
19 answered the same, that this Court remand for further proceedings to the District  
20 Court regarding Defendant Lisa Rizzolo’s motion for summary judgment pursuant  
21 to the Nevada Supreme Court’s answers to the above certified questions.

### 22 III.

## 23 STATEMENT OF THE CASE

### 24 A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS 25 BELOW

26 This petition arises from the District Court’s erroneous April 19, 2012,  
27  
28

1 Order<sup>2</sup> denying Defendant Lisa Rizzolo’s motion for summary judgment. The  
2 underlying action was initiated by Plaintiffs, Kirk and Amy Henry (“Plaintiffs” or  
3 “Henrys”), in the United States District Court, District of Nevada, on or about May  
4 15, 2008.

5 \_\_\_\_\_ In their Complaint (#1), Plaintiffs alleged state law causes of action for  
6 conspiracy to the fraud, common law fraud and further, a violation of Nevada’s  
7 Uniform Fraudulent Transfer Act (“NUFTA”) against Defendants, Frederick  
8 “Rick” Rizzolo (“Rick Rizzolo”), Lisa Rizzolo (“Lisa Rizzolo”) and The Rick and  
9 Lisa Rizzolo Family Trust. The causes of action in the Complaint essentially  
10 related to efforts to collect the proceeds of a settlement related to a personal injury  
11 action that allegedly occurred against the Plaintiff, Kirk Henry on or about  
12 September 20, 2001. Mr. Henry filed suit on or about October 2, 2001 in Nevada  
13 state court. Lisa Rizzolo was not a party to that action, nor the settlement thereof.  
14 Defendant, Lisa Rizzolo, filed her Answer (#24) on or about September 12, 2008.

15 Plaintiffs on June 16, 2009 filed a Motion for Leave to File Amended  
16 Complaint (#130). Thereafter, on July 8, 2009, the Court entered an Order (#132)  
17 granting Plaintiffs Motion for Leave to File Amended Complaint (#130). In the  
18 First Amended Complaint (#135), Plaintiffs asserted claims against Defendants,  
19 Rick Rizzolo, Lisa Rizzolo, The Rick and Lisa Rizzolo Family Trust and added,  
20 The Rick Rizzolo Separate Property Trust and The Lisa Rizzolo Separate Family  
21 Trust.

22 Plaintiffs on July 31, 2009 filed a Motion for Leave to File Second  
23 Amended Complaint (#156). Thereafter, on September 15, 2009, the Court  
24 granted Plaintiffs Motion for Leave to File Second Amended Complaint (#195). In

25 \_\_\_\_\_  
26 <sup>2</sup>See April 19, 2012 Order (#582) denying Defendant Lisa Rizzolo’s Motion  
27 for Summary Judgment. (Vol. 3 ER0667 - ER0672) Please note, “ER” refers to  
28 the Exhibits in Support of the Petition for Writ of Mandamus.



1 the Second Amended Complaint (#200) Plaintiffs asserted claims against  
2 Defendants, Rick Rizzolo, Lisa Rizzolo, The Rick and Lisa Rizzolo Family Trust,  
3 The Rick Rizzolo Separate Property Trust, The Lisa Rizzolo Separate Property  
4 Trust and added, The RLR Trust and The LMR Trust for state law causes of action  
5 for conspiracy to defraud, common law fraud, and a violation of NUFTA.

6 Defendants, Lisa Rizzolo, The Lisa Rizzolo Separate Property Trust and  
7 The LMR Trust filed their Answer and Counterclaim (#244) to the Second  
8 Amended Complaint on December 9, 2009.

9 On September 7, 2010, Plaintiffs filed a motion to voluntarily dismiss their  
10 first and second causes of action (#455) which was granted on July 20, 2011  
11 (#533). As such, Plaintiffs' state law causes of action for conspiracy to defraud  
12 and common law fraud were dismissed.

13 Plaintiffs then filed a Motion for Leave to File a Third Amended Complaint  
14 and Reopen Discovery (#518) on June 6, 2011. Said motion was granted on July  
15 28, 2011 (#537) and Plaintiffs added Kimtran Rizzolo as a new Defendant on  
16 August 1, 2011. In their Third Amended Complaint, Plaintiffs allege a state law  
17 cause of action for violation of NUFTA (#539). Defendants Lisa Rizzolo, The  
18 Lisa M. Rizzolo Separate Property Trust and The LMR Trust's Answer to Third  
19 Amended Complaint and Crossclaim was then filed on August 15, 2011 (#543).

20 Defendants Lisa Rizzolo, The Lisa M. Rizzolo Separate Property Trust and  
21 The LMR Trust's Motion for Summary Judgment was filed on November 7, 2011  
22 (#553). Plaintiffs filed their Opposition thereto on December 1, 2011 (#560) and a  
23 Reply (#564) was subsequently filed on December 19, 2011. The Court denied  
24 said motion on April 19, 2012 (#582).

25 **B. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED**  
26 **FOR REVIEW**

27 On or about October 2, 2001, Plaintiffs Kirk and Amy Henry (the "Henrys")  
28 filed a personal injury suit against Rick Rizzolo and The Power Company, Inc.

1 (“Power Company”) in Nevada district court in the case styled “*Kirk Henry and*  
2 *Amy Henry v. The Power Company, Inc. and Rick Rizzolo*,” Case No. A440740  
3 (the “State Court Case”). In the State Court Case, Plaintiff Kirk Henry (“Mr.  
4 Henry”) alleged that he was assaulted and severely injured by agents of the Crazy  
5 Horse Too Gentlemen’s Club (“Crazy Horse Too”) on or about September 20,  
6 2001. Crazy Horse Too was owned and operated by the Power Company which  
7 Plaintiffs alleged was Rick Rizzolo’s alter ego. Lisa Rizzolo was not a party to  
8 said lawsuit. As such, Lisa Rizzolo is not obligated to pay the Henrys in the State  
9 Court Case.

10 On or about May 24, 2005, Lisa Rizzolo and her former husband, Rick  
11 Rizzolo, filed a Joint Petition for Summary Decree of Divorce in Nevada district  
12 court (family division) in the case styled “*In the Matter of Marriage of Lisa*  
13 *Rizzolo and Frederick Rizzolo*,” Case No. 05-D-337616 (the “State Divorce  
14 Case”).<sup>3</sup> On or about June 7, 2005, the Decree of Divorce was entered in the State  
15 Divorce Case.<sup>4</sup> The Rizzolo's conducted their divorce in open court and in view of  
16 the public and did not request to seal the case as would have been allowed under  
17 NRS 125.110. Plaintiffs, prior to entering into the settlement with Rick Rizzolo,  
18 were aware of the Rizzolo's divorce and the division of assets provided for in said  
19 divorce.<sup>5</sup> The divorce decree was in accordance with considerations allowed by  
20 Nevada state law regarding the division of marital property. As such, the decree  
21 of divorce determined the interest of the parties in the marital assets. In  
22 accordance with the decree of divorce, Rick Rizzolo was awarded the Crazy Horse

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24 <sup>3</sup> See Motion for Summary Judgment (#553), Exhibit “B”, Joint Petition for  
25 Summary Decree of Divorce. (Vol. 1 ER0040 - ER0049)

26 <sup>4</sup> See Motion for Summary Judgment (#553), Exhibit “C”, Decree of  
27 Divorce. (Vol. 1 ER0050 - ER0053)

28 <sup>5</sup> See Motion for Summary Judgment (#553), Exhibit “D”, Plaintiff Kirk  
Henry's Answers to Defendant Lisa Rizzolo's First Set of Request for Admissions.  
(Vol. 1 ER0054 - ER0063)

1 Too.

2 The Crazy Horse Too which was awarded to Rick Rizzolo pursuant to the  
3 decree of divorce, had a value in excess of \$30 Million at the time the decree of  
4 divorce was entered.<sup>6</sup> Essentially, Lisa Rizzolo received the marital residence in  
5 Las Vegas, Nevada, a house in Newport Beach, California and a condo in  
6 Chicago, Illinois, as well as the Oppenheimer accounts in the amount of \$7.2  
7 Million.<sup>7</sup> At the time of the divorce, the Crazy Horse Too was worth substantially  
8 more than the property received by Lisa Rizzolo in the divorce.

9 On or about June 2, 2006, Rick Rizzolo and the Power Company executed  
10 Plea Memorandums in the federal criminal case styled "*United States of America*  
11 *v. Power Company, Inc., doing business as The Crazy Horse Too, and Frederick*  
12 *Rizzolo,*" Case No. 2:06-CR-0186-PMP (PAL) ("the Federal Criminal Case").<sup>8</sup>  
13 The Plea Memorandums provided that the Power Company was only to pay the  
14 Henrys \$10 Million in restitution. At the sentencing hearing, the Court ordered  
15 both Rick Rizzolo and the Power Company to pay the restitution, plus interest on  
16 any unpaid portion of the restitution after the first year. Pursuant to the Plea  
17 Memorandums, the Court ordered the defendants to sell the Crazy Horse Too and  
18 provided that the defendants would have a year to accomplish the same. The  
19 Court further ordered, *inter alia*, the defendants were to pay the restitution owed to  
20 the Henrys upon the sale of the Crazy Horse Too. Rick Rizzolo failed to sell the  
21 Crazy Horse Too within the one-year period that was provided for in the Plea  
22 Memorandums.

23 The Government then moved for substitute forfeiture of the Crazy Horse  
24

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25 <sup>6</sup> See Motion for Summary Judgment (#553), Exhibit "E", Expert Opinion(s)  
26 of Rick Miranda and Shelly Lowe. (Vol. 1 ER0064 - ER0271)

27 <sup>7</sup> See Motion for Summary Judgment (#553), Exhibit "B", Joint Petition for  
28 Summary Decree of Divorce, Section V. (Vol. 1 ER0040 - ER0049)

<sup>8</sup> See Motion for Summary Judgment (#553), Exhibit "G", Plea  
Memorandums. (Vol. 2 ER0276 - ER0316)

1 Too and then, after the forfeiture, attempted to sell the club to multiple purchasers  
2 but to no avail. On or about February 28, 2011, the Court ordered that Canico  
3 Capital Group, LLC (“Canico”) will foreclose on the forfeited property.<sup>9</sup> The  
4 Court further ordered that the foreclosure sale by Canico is a sale for all purposes  
5 including the plea agreements.<sup>10</sup> On July 1, 2011, the Crazy Horse Too was sold  
6 to Canico at the non-judicial foreclosure sale.

7 On or about July 26, 2006, Plaintiffs entered into a Release of All Claims  
8 and Agreement to Indemnify for and in Consideration of the Issuance of a Draft  
9 (the “Settlement Agreement”),<sup>11</sup> with Rick Rizzolo and the Power Company  
10 pursuant to which the Henrys will release all claims in exchange for the payment  
11 of \$10 Million in the State Court Case. The Settlement Agreement provided for an  
12 initial payment of \$1 Million and that the \$9 Million balance would be paid from

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13  
14 <sup>9</sup> See Motion for Summary Judgment (#553), Exhibit “H”, Order of Sale.  
15 (Vol. 2 ER0317 - ER0321)

16 <sup>10</sup>In the Federal Criminal Case, the Henrys have agreed to abandon their  
17 interest in the sale of the Crazy Horse Too to the Government, allowing the  
18 Government to forfeit the property, in consideration that the Henrys would be the  
19 first to receive any proceeds of the sale. On September 7 2007, the Petition and  
20 Settlement Agreement, Stipulation for Entry of Order of Forfeiture, and Order  
21 (#70) was entered in the Federal Criminal case. On May 7, 2008, the Government  
22 filed and distributed in the Federal Criminal Case a proposed First Amended Order  
23 of Forfeiture (#180), reducing the Henrys from first position (#70) to fifth  
24 position, to which the Henrys objected (#185, #191), citing the transfer of assets in  
25 the State Divorce Case. On June 24, 2008, the proposed First Amended Order of  
26 Forfeiture was entered in the Federal Criminal Case (#222), as an order  
27 acknowledging the Henrys’ abandonment of their interest in the Crazy Horse Too.  
28 On October 15, 2008, a Second Amended Order of Forfeiture (#242) was entered  
in the Federal Criminal Case acknowledging the abandonment of the Henrys’  
interest in the Crazy Horse Too and their fifth position as payment from the  
proceeds of the sale of the Crazy Horse Too.

<sup>11</sup> See Motion for Summary Judgment (#553), Exhibit “I”, Settlement  
Agreement. (Vol. 2 ER0322 - ER0328)

1 the sale of the Crazy Horse Too. Following execution of the settlement  
2 agreement, the initial \$1 Million was paid to the Henrys. During the course of the  
3 negotiations regarding the language of the Settlement Agreement, Rick Rizzolo's  
4 counsel in the State Court Case advised Plaintiffs' counsel that Rick Rizzolo did  
5 not have sufficient funds to pay the \$9 Million in the event the Crazy Horse Too  
6 did not sell. Aware of the same, Plaintiffs still entered into the settlement  
7 agreement with Rick Rizzolo and the Power Company in the State Court Case. It  
8 is of import to note, the Henrys have never alleged that they were fraudulently  
9 induced into the settlement agreement nor have they sought rescission of the same.  
10 In fact, on or about September 2, 2011, a Judgment was entered against Rick  
11 Rizzolo in the State Court Case.<sup>12</sup> Specifically, the Judgment provided that Rick  
12 Rizzolo was in breach of the Settlement Agreement and Plaintiffs were entitled to  
13 a judgment in their favor against Rick Rizzolo in the amount of \$9 Million.

14 In September 2006, the City of Las Vegas revoked the liquor and/or  
15 business license of the Crazy Horse Too. At the time of the revocation, an escrow  
16 had been opened for the sale of the Crazy Horse Too in the amount of \$45  
17 Million.<sup>13</sup> The planned sale of the Crazy Horse Too reportedly failed because of  
18 the revocation of its liquor license which diminished its value.<sup>14</sup>

19  
20 **IV.**  
**ARGUMENT**

21 Five "guidelines aid this Court's determination of whether mandamus relief  
22 is appropriate in a given case: (1) whether the petitioner has no other means, such  
23

24  
25 <sup>12</sup> See Motion for Summary Judgment (#553), Exhibit "J", Judgment. (Vol. 2  
26 ER0329 - ER0339)

27 <sup>13</sup> See Motion for Summary Judgment (#553), Exhibit "K", Reporter's  
28 Transcripts of Hearing in Re Motion for Preliminary Injunction pp. 113-115  
(testimony of Stuart Cadwell). (Vol. 2 ER0340 - ER0344)

<sup>14</sup> See *Id.*

1 as an appeal, to obtain the desired relief; (2) whether the petitioner will be  
2 damaged or prejudiced in any way not correctable on appeal; (3) whether the  
3 district court order is clearly erroneous as a matter of law; (4) whether the district  
4 court's order is an oft repeated error or manifests an persistent disregard of the  
5 federal rules; and (5) whether the district court's order raises new and important  
6 problems or issues of first impression." *See Bauman v. United States Dist. Ct.*,  
7 557 F.2d 650 (9<sup>th</sup> Cir. 1977)). "Satisfaction of all five . . . is not required,"  
8 *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1491 (9<sup>th</sup> Cir. 1989); indeed, "it  
9 is unlikely that all of the guidelines will be met in any one case, and the decision  
10 often requires balancing of conflicting factors," *Star Editorial, Inc. v. United*  
11 *States Dist. Ct.*, 7 F.3d 856, 859 (9<sup>th</sup> Cir. 1993). Moreover, where the Court is  
12 exercising its supervisory or advisory mandamus authority, rigid adherence to  
13 these guidelines is not required. *See In re Cement Antitrust Litig.*, 688 F.2d 1297  
14 (9<sup>th</sup> Cir. 1982).

15 **A. Petitioner Has No Other Adequate Means of Seeking Relief**

16 The first *Bauman* factor is easily satisfied as the April 19 Order is an order  
17 denying a motion for summary judgment which is not an appealable order, but  
18 instead is interlocutory in nature. *See Price v. Kramer*, 200 F.3d 1237 (9<sup>th</sup> Cir.  
19 2000); *Jeffers v. Gomes*, 240 F.3d 845 (9<sup>th</sup> Cir. 2001); *Chevron USA, Inc. V.*  
20 *Caetano*, 224 F.3d 1030 (9<sup>th</sup> Cir. 2000); *Robinson v. Prunty*, 249 F.3d 862 (9<sup>th</sup> Cir.  
21 2001); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897 (9<sup>th</sup>  
22 Cir. 2004); *cert. denied*, 125 S. Ct. 2936 (2005).

23 Notwithstanding, Defendant Lisa Rizzolo is requesting that this Court issue  
24 certified questions to the Nevada Supreme Court which are dispositive of the  
25 motion for summary judgment and ultimately, the final determination of the  
26 subject litigation. Such relief is not available on direct appeal.

27 **B. Threat of Irreparable Injury**

28 The second *Bauman* factor is also satisfied. In their divorce, Defendant Lisa  
Rizzolo's former husband, Rick Rizzolo, was awarded the community business

1 assets including the Crazy Horse Too. Essentially, Defendant Lisa Rizzolo  
2 received the non-business community assets, *i.e.*, the marital residence in Las  
3 Vegas, Nevada, a house in Newport Beach, California and a condo in Chicago,  
4 Illinois, as well as the Oppenheimer accounts. Since the divorce, Defendant Lisa  
5 Rizzolo has sold the condo in Chicago, Illinois but has retained her residence in  
6 Las Vegas, Nevada and the house in Newport Beach, California.

7 Defendant Lisa Rizzolo will be irreparably injured if the April 19 Order is  
8 not corrected. Specifically, the April 19 Order allows the Henrys, if they prevail at  
9 trial, to satisfy Rick Rizzolo's \$9 Million separate contractual debt from  
10 community property awarded to Defendant Lisa Rizzolo. Undoubtedly, Plaintiffs  
11 will seek to attach and/or garnish Defendant Lisa Rizzolo's assets, including her  
12 real property, to satisfy the same. In Nevada, the loss of real property generally  
13 results in irreparable harm because real property is unique. *See, e.g., Dixon v.*  
14 *Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987); *Leonard v. Stoebling*,  
15 102 Nev. 543, 728 P.2d 1358 (1986); *Dickstein v. Williams*, 93 Nev. 605, 571 P.2d  
16 1169 (1977); *Gladstone v. Gregory*, 95 Nev. 474, 596 P.2d 491 (1979). As such,  
17 Defendant Lisa Rizzolo will be irreparably injured due to the loss of her real  
18 property to pay for her former husband, Rick Rizzolo's separate contractual debt  
19 to Plaintiffs.

20 **C. The District Court's Order is Clearly Erroneous as a Matter of Law**

21 There is no question that a "creditor"<sup>15</sup> seeking to avoid a transfer under  
22 NUFTA must demonstrate that any properties allegedly transferred were "assets"  
23 of the debtor. NUFTA provides creditors with remedies against debtors who  
24 transfer assets with "intent to hinder, delay, or defraud any creditor of the debtor."  
25 *See* NRS 112.180(1)(a). NUFTA limits its definition of "asset" to property of a

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26  
27 <sup>15</sup>A creditor is defined under NUFTA as "a person who has a claim," which  
28 is in turn defined as "a right to payment, whether or not the right is reduced to  
judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,  
disputed, undisputed, legal, equitable, secured or unsecured." *See* NRS  
112.150(3)-(4).

1 debtor but does not include “[a]n interest in property held in tenancy by the  
2 entireties or *as community property to the extent that it is not subject to process*  
3 *by a creditor holding a claim against only one tenant.*” (Emphasis added.) See  
4 NRS 112.150(2)(c). Under NUFTA, community property is not available to  
5 satisfy the debts of only one spouse.<sup>16</sup> In other words, a fraudulent transfer of an  
6 interest held as community property would be avoidable only by joint creditors of  
7 both spouses. *Id.* Such is not the case here. There is no question that Plaintiffs  
8 are not creditors of Defendant Lisa Rizzolo. As such, Lisa Rizzolo’s community  
9 property should not be available to satisfy Rick Rizzolo’s separate contractual debt  
10 to the Plaintiffs.<sup>17</sup> *Id.*

11 **1. Lisa Rizzolo’s Community Property is Not an Asset Under NUFTA**  
12 **and Therefore, is Not Subject to Avoidance.**

13 There is no question that Defendant Lisa Rizzolo and her former husband,  
14 Rick Rizzolo were divorced on or about June 7, 2005.<sup>18</sup> Over a year later, on or  
15 about July 26, 2006, Rick Rizzolo entered into a settlement agreement with the  
16  
17

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18 <sup>16</sup>See Reply to Plaintiffs’ Opposition to Motion for Summary Judgment  
19 (#564), Exhibit “A”, a portion of NUFTA’s Legislative History. (Vol. 3 ER0600 -  
20 ER0622)

21 <sup>17</sup>During the marriage, parties in Nevada have a “present, existing and equal  
22 interest,” in their community property and the alignment of such property does not  
23 change upon divorce. See NRS 123.220-250. Creditors gain no greater right to  
24 look to the community property of one spouse for the separate debt of the other  
25 upon divorce. See, e.g., *Mfrs. & Traders Trust Co. v. Lauer’s Furniture*  
26 *Acquisition, Inc.*, 226 A.D.2d 1056 (N.Y. App.Div. 1996) (creditor’s remedy in a  
27 fraudulent conveyance action is limited to reaching the property which would have  
28 been available to satisfy the judgment had there been no conveyance).

<sup>18</sup>See Reply to Plaintiffs’ Opposition to Motion for Summary Judgment  
(#564), Exhibit “B”, a portion of the Deposition of Lisa Rizzolo. (Vol. 3 ER0623 -  
ER0638)



1 Plaintiffs.<sup>19</sup> Thereafter, on or about September 2, 2011, a judgment was entered  
2 against Rick Rizzolo. Said judgment provided that Rick Rizzolo was in breach of  
3 the settlement agreement and Plaintiffs were entitled to a judgment in their favor  
4 against Rick Rizzolo in the amount of \$9 Million.<sup>20</sup>

5 Specifically, the judgment<sup>21</sup> provides, in pertinent part:

6 On July 26, 2006, Plaintiffs entered into a Settlement  
7 Agreement with Defendant Rick Rizzolo in the amount of \$10  
8 million. *See* Exhibit “1,” Settlement Agreement. Defendant Rick  
9 Rizzolo paid \$1 million upon execution of the Settlement  
Agreement. Defendant Rick Rizzolo was obligated to pay the  
remaining \$9 million upon the closing of the sale of the Crazy  
Horse Too.

10 The Crazy Horse Too was sold by foreclosure sale on July  
11 1, 2011, and did not net the proceeds required to satisfy the  
12 \$9,000,000 judgment against Defendants. As such, Defendant  
13 Rick Rizzolo is obligated to make the remaining payment of the  
14 settlement to Plaintiffs. Since the initial \$1 million payment  
15 referenced above, Defendant Rick Rizzolo has failed to make any  
further payments to Plaintiffs under the Settlement Agreement.  
In light of the foregoing, Defendant Rick Rizzolo is now in  
breach of the Settlement Agreement and Plaintiffs are entitled to  
a judgment in their favor for all remaining amounts due under the  
Settlement Agreement.

16 IT IS THEREFORE ORDERED that Judgment is hereby  
17 entered and that Plaintiff has and recovers of Defendant Rick  
18 Rizzolo, the sum of NINE MILLION DOLLARS AND ZERO  
CENTS (\$9,000,000).

19 There is no question that the Henrys entered into a settlement agreement  
20 with Rick Rizzolo in July, 2006 (over a year after Rick Rizzolo and Defendant  
21 Lisa Rizzolo divorced). Further, the decree of divorce was a public document and  
22 Plaintiffs, prior to entering into the settlement agreement, have admitted they were  
23  
24

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25  
26 <sup>19</sup>See Reply to Plaintiffs’ Opposition to Motion for Summary Judgment  
27 (#564), Exhibit “E”, Settlement Agreement. (Vol. 3 ER0653 - ER0659)

28 <sup>20</sup> See Reply to Plaintiffs’ Opposition to Motion for Summary Judgment  
29 (#564), Exhibit “F”, Judgment. (Vol. 3 ER0660 - ER0663)

<sup>21</sup> See Exhibit “J”, Judgment. (Vol. 2 ER0329 - ER0339)

1 aware of the division of assets provided for in said decree.<sup>22</sup>

2 Additionally, Defendant Lisa Rizzolo was not party to the State Court Case,  
3 or its stipulated resolution. In fact, Defendant Lisa Rizzolo did not execute the  
4 settlement agreement.<sup>23</sup> Absent the foregoing, Defendant Lisa Rizzolo's share of  
5 the community property was, and is, her property, during marriage and after  
6 divorce, and free from Rick Rizzolo's separate contractual debt.

7 Under NUFTA, a "creditor" is defined as "a person who has a claim," which  
8 in turn is defined as "a right to payment, whether or not the right is reduced to  
9 judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,  
10 disputed, undisputed, legal, equitable, secured or unsecured." *See* NRS  
11 112.150(3)-(4). Applying the foregoing, Plaintiffs are judgment creditors under  
12 NUFTA based on Rick Rizzolo's breach of the settlement agreement. As such,  
13 Plaintiffs cannot reach Defendant Lisa Rizzolo's community property to satisfy  
14 Rick Rizzolo's separate contractual debt incurred by him after the marriage. *See,*  
15 *e.g., Schilling v. Embry*, 575 P.2d 1262, 1265 (Az. 1977) (a creditor cannot reach  
16 marital community property to satisfy a separate obligation incurred by either  
17 spouse after marriage).

18 Notwithstanding, the District Court in its April 19 Order concluded that  
19 Kirk Henry was injured in September 2001 and the Rizzolos divorced in June  
20 2005 and that as such, the conduct giving rise to Plaintiffs' claim against Rick  
21 Rizzolo occurred during the marriage and was a community debt. The District  
22 Court's April 19 Order is clearly erroneous as a matter of law. Plaintiffs are not  
23 unliquidated tort creditors but rather, judgment creditors under NUFTA based on a  
24 breach of the settlement agreement which occurred after the marriage. Close  
25 scrutiny of the settlement agreement reveals that there was no admission of  
26 liability by Rick Rizzolo. Further, Rick Rizzolo did not assault Plaintiff, Kirk

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28 <sup>22</sup> See Exhibit "D," a portion of Plaintiff Kirk Henry's Answers to Defendant  
Lisa Rizzolo's First Set of Request for Admissions. (Vol. 1 ER0054 - ER0063)

<sup>23</sup> See NRS 123.230.

1 Henry. Clearly, Rick Rizzolo did not personally commit an intentional tort.  
2 Plaintiffs' only basis for inclusion of Rick Rizzolo in the State Court Case was  
3 that agents of the Power Company allegedly assaulted Plaintiff Kirk Henry and  
4 that the Power Company was owned and operated by Rick Rizzolo and was his  
5 "alter ego." Under the facts and circumstances of the case *sub judice*, Defendant  
6 Lisa Rizzolo's share of the community property should not be liable for the  
7 separate contractual debt of Rick Rizzolo incurred by him after the divorce.

8 **2. The *Randono* Decision Relied Upon By the District Court in its**  
9 **April 19 Order Appears to No Longer Be Good Law in Nevada.**

10 In the case *sub judice*, the District Court in its April 19 Order denying  
11 Defendant Lisa Rizzolo's motion for summary judgment, erroneously surmised  
12 that "a tort committed during the marriage by one spouse is considered a  
13 community debt and the entirety of the community property is subject to a  
14 judgment against the tortfeasor spouse, even if the other spouse was not a named  
15 party to the suit," citing *Randono v. Turk*, 466 P.2d 218, 223-24 (Nev. 1970) as  
16 authority for said proposition.<sup>24</sup> Applying the foregoing, the District Court  
17 erroneously concluded that "Lisa Rizzolo's share of the community property is  
18 'subject to process by a creditor holding a claim against only one tenant' as set  
19 forth in NUFPA § 112.150(2)(c), and therefore falls within the definition of an  
20 'asset' that can be fraudulently transferred." Close scrutiny of the *Randono*  
21 decision reveals that in all probability it is no longer good law in Nevada.

22 In *Randono v. Turk*, *supra*, 86 Nev. at 130, the Nevada Supreme Court  
23 observed that:

24 . . . NRS 123.230 provides that the husband is to have 'the entire  
25 management and control of the community property, with the like  
26 absolute power of disposition thereof, except as provided in this  
27 chapter, as of his own separate estate.' The exceptions are found  
28 in NRS 123.040, which directs that a wife's earnings are not  
liable for the husband's debts; and NRS 123.210, which exempts  
the wife's separate property from liability for the husband's debts.

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28 <sup>24</sup>As a secondary citation, the District Court cited *F.T.C. v. Neiswonger*, 580  
F.2d 769 (8<sup>th</sup> Cir. 2009). As discussed below, the *Neiswonger* court adopted the  
*Randono* decision on face value without any analysis of the same.

1 On the other hand, NRS 123.260, covering disposition of the  
2 community property on the death of the marital partners,  
3 provides: 'Community property passing from the control of the  
4 husband, either by reason of his death or by virtue of testamentary  
5 disposition by the wife, is subject to his debts . . . '

6 If community property can be given away by the husband (*Nixon*  
7 *v. Brown*, 46 Nev. 439, 214 P. 524 (1923)) and is subject to his  
8 debts upon his death (NRS 123.260), we see no reason why it is  
9 not subject to his debts, whether arising out of tort or contract,  
10 during his lifetime. This court has previously held in *Jones v.*  
11 *Edwards*, 49 Nev. 299, 307-308, 245 P. 292 (1926), that the wife  
12 need not be made a party when the husband is defending an action  
13 against the community property, since in legal effect she is a party  
14 to every action involving the community property. *See also*  
15 *Carlson v. McCall*, 70 Nev. 437, 271 P.2d 1002 (1954).

16 The statutory predicate for the *Randono* decision was NRS 123.230 and  
17 NRS 123.260. At the time of the *Randono* decision, NRS 123.230 gave the  
18 husband the exclusive right to control and dispose of community property, with no  
19 limitation on the ability of the husband to make a gift of community property to a  
20 third party without consent. In 1970, NRS 123.230 provided:

21 The husband shall have the entire management and control of the  
22 community property, with the like absolute power of disposition  
23 thereof, except as provided in this chapter, as of his own separate  
24 estate; provided:

- 25 1. That no deed of conveyance or mortgage of any real  
26 property held as community property shall be valid for any  
27 purpose whatever unless both the husband and wife execute and  
28 acknowledge the same, except as provided in subsection 3.
2. That the wife shall have the entire management and  
control of the earnings and accumulations of herself and her  
minor children living with her, with the like power of disposition  
thereof, when the earnings and accumulations are used for the  
case and maintenance of the family.
3. The husband or wife may, by written power of  
attorney, give to other the complete power to sell, convey or  
encumber any real property held as community property.

In 1975<sup>25</sup>, NRS 123.230 was amended to joint management and control by  
the spouses. Specifically, NRS 123.230 now provides:

A spouse may, by written power of attorney, give to the other the  
complete power to sell, convey or encumber any property held as  
community property or either spouse, acting alone, may manage

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<sup>25</sup>The language of the rules was slightly tweaked in 1977, and again in 1997  
and 1999, but essentially, the 1975 changes produced the community property  
management and control scheme still used in Nevada.

1 and control community property, whether acquired before or after  
2 July 1, 1975, with the same power of disposition as the acting  
spouse has over his separate property, except that:

3 1. Neither spouse may devise or bequeath more than one-half  
of the community property.

4 2. Neither spouse may sell, convey or encumber the  
5 community property without the express or implied consent of the  
other.

6 3. Neither spouse may sell, convey or encumber the  
7 community real property unless both join in the execution of the  
8 deed or other instrument by which the real property is sold,  
conveyed or encumbered, and the deed or other instrument must  
be acknowledged by both.

9 4. Neither spouse may purchase or contract to purchase  
10 community real property unless both join in the transaction of  
purchase or in the execution of the contract to purchase.

11 5. Neither spouse may create a security interest, other than a  
12 purchase money security interest as defined in NRS 104.9107, in,  
13 or sell, community household goods, furnishings or appliances  
unless both join in executing the security agreement or contract  
for sale, if any.

14 6. Neither spouse may acquire, purchase, sell, convey or  
15 encumber the assets, including real property and goodwill, of a  
16 business where both spouses participate in its management  
17 without the consent of the other. If only one spouse participates  
18 in management, he may, in the ordinary course of business,  
acquire, purchase, sell, convey or encumber the assets, including  
real property and goodwill, of the business without the consent of  
the nonparticipating spouse.

19 As evident from the foregoing, the 1975 amendment to NRS 123.230  
20 repealed by implication the former version of said statute relied upon by the  
21 Nevada Supreme Court in the *Randono* decision. Further, NRS 123.260<sup>26</sup> was not

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22  
23 <sup>26</sup>In 1970, NRS 123.260 provided:

24 1. Community property passing from the control of the husband,  
25 either by reason of his death or by virtue of testamentary  
26 disposition by the wife, is subject to his debts and to  
27 administration and disposal under the provisions of Title 12 of  
28 NRS; but in the event of such testamentary disposition by the  
wife, the husband, pending administration, shall retain the same  
power to sell, manage and deal with the community property as  
he had in her lifetime; and his possession and control of the  
community property shall not be transferred to the personal

1 amended but rather, has been repealed. Since the underlying statutory predicates,  
2 *i.e.*, NRS 123.230 and NRS 123.260 as they existed in 1970, are no longer in  
3 effect, the *Randono* case is of little or no precedential value. Clearly, the District  
4 Court in rendering its April 19 Order read too much into *Randono*'s dicta and  
5 erroneously relied upon the *Randono* case without any analysis.

### 6 **3. Liability of an Innocent Spouse for the Tort of the Other**

7 Generally a spouse is liable for the tort of the other only if the spouse  
8 authorizes the tortious act and it furthers the community purpose. *See In re*  
9 *Acequia, Inc.*, 34 F.3d 800 (9<sup>th</sup> Cir. 1994); *Gagan v. Sharar*, 376 F.3d 987 (9<sup>th</sup> Cir.  
10 2004); *DePinto v. Provident Sec. Life Ins. Co.*, 374 F.2d 50 (9<sup>th</sup> Cir. 1967);  
11 *Babcock v. Tam*, 156 F.3d 116 (9<sup>th</sup> Cir. 1946). Close scrutiny of the April 19  
12 Order reveals it is barren of any consideration of the foregoing factors. Absent  
13 such, the April 19 Order is clearly erroneous in its determination that the tort was a  
14 community debt.

15 In addition, there is authority that community property received by an  
16 "innocent spouse" pursuant to a divorce is purged of liability for some community  
17 debts. Thus, in *Miller v. City National Bank*, 594 SW2d 823, 826 Tex. Civ. App.  
18 (1980), the court acknowledged the general rule that a debt incurred by a husband  
19 during marriage is presumed to be a community debt for which all community  
20 property is liable. There, suit for collection of that debt arose after divorce and  
21 after property had been divided and vested in the former spouses as their  
22 respective separate property. In addition, the wife did not agree to the debt and did

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23  
24 representative of the wife except to the extent necessary to carry  
25 her will into effect.

26 2. After 40 days from the death of the wife, the surviving  
27 husband shall have full power to sell, lease, mortgage or  
28 otherwise deal with and dispose of the community real property,  
unless a notice is recorded in the county in which the property is  
situated to the effect that an interest in the property, specifying it,  
is claimed by another under the wife's will.

1 not even know about it. Under those circumstances, the wife's share of  
2 community property was not liable for the debt.

3 In the case *sub judice*, Defendant Lisa Rizzolo is considered an "innocent  
4 spouse." In the State Court Case, Plaintiff, Kirk Henry alleged that he was  
5 assaulted and severely injured by agents of the Crazy Horse Too on or about  
6 September 20, 2001. Plaintiffs further allege that the Crazy Horse Too was owned  
7 and operated by the Power Company which was Rick Rizzolo's "alter ego." As  
8 such, Plaintiffs only filed suit against Rick Rizzolo and Power Company in the  
9 State Court Case on or about October 2, 2001. Defendant Lisa Rizzolo was not  
10 subject to process and not a party to said lawsuit. Further, Defendant Lisa Rizzolo  
11 did not execute the settlement agreement. Accordingly, Defendant Lisa Rizzolo is  
12 not obligated to pay the Plaintiffs as a result of the State Court Case. *See Jahner*  
13 *v. Jacob*, 515 N.W. 2d 183 (N.D. 1994); *see also Hullett v. Cousin*, 63 P.3d 1029,  
14 1034 (Ariz. 2003).

15 Further, an act constituting an intentional tort of the husband does not create  
16 a claim or debt against the wife. The mere fact of marriage is not enough. *See*  
17 *Bernardelli v. Bernardelli*, 12 BR 123 (D.Nev. 1981); *Jewett v. Patt*, 95 Nev. 246,  
18 591 P.2d 1151 (1979). Accordingly, Defendant Lisa Rizzolo could not be  
19 personally liable for Rick Rizzolo's intentional tort, if any, committed during the  
20 marriage merely by virtue of being married. *Id.* As such, Defendant Lisa  
21 Rizzolo's half of the community property was, and is, her property, during  
22 marriage and after divorce, free from Rick Rizzolo's separate debt to the Plaintiffs.

23 In *Jewett v. Patt*, *supra*, 95 Nev. at 247, the Nevada Supreme Court stated  
24 that a spouse is not personally liable for his or her spouse's intentional torts  
25 committed during marriage merely by virtue of being married. In *Jewett*, the  
26 Nevada Supreme Court stated:

27 The district court ruled that Stevie Patt could not be liable for the  
28 professional malpractice, if any, of her husband Seymour. The  
claimed predicate for her liability was simply the fact of her  
marriage to Seymour. This is not enough. Whether community  
property is subject to a judgment against Seymour, if one is  
obtained, is another matter. *Randono v. Turk*, 86 Nev. 123, 466

1 P.2d 218 (1970). The district court did not err in dismissing the  
2 action against Stevie with prejudice.

3 Further, in *Bernardelli v. Bernardelli*, *supra*, 12 B.R. at 124, the Bankruptcy  
4 Court stated:

5 An act constituting an intentional tort of the husband does not  
6 create a claim or debt against the wife. The mere fact of marriage  
7 is not enough. *Jewett v. Patt*, 591 P.2d 1151, 95 Nev. 246 (1979).  
8 The legal issue of whether community property in Nevada is  
9 liable for a judgment debt on account of an intentional tort of the  
10 husband is discussed in *Randono v. Turk*, 466 P.2d 218, 86 Nev.  
11 123 (1970). Although that case was decided before the 1977  
12 revision of some of Nevada's community property laws, the  
13 *Jewitt* court in holding a wife is not a proper party to an action  
14 against the husband for his intentional tort, states:

15 "Whether community property is subject to a  
16 judgment against Seymour (husband), if one is  
17 obtained, is another matter." (*Jewitt*, *supra*, 95 Nev.  
18 at 248, 591 P.2d 1151, citing *Randono v. Turk*,  
19 *supra*.)

20 The question of whether community property in Nevada is liable  
21 for the judgment debt created by the tort of a spouse is one for a  
22 Nevada court not this court.

23 As in *Bernardelli*, the determination whether community property in  
24 Nevada is liable for the judgment debt created by the tort of one spouse is one best  
25 left for the Nevada Supreme Court. As stated above in more detail, Defendant  
26 Lisa Rizzolo respectfully requests that the Court issue a certified question to the  
27 Nevada Supreme Court as to whether the *Randono* decision is still good law in  
28 Nevada.

29 **4. The April 19 Order Misapplied Ninth Circuit Law to Reach its**  
**Erroneous Conclusion.**

30 The District Court in the April 19 Order erroneously surmised that "to the  
31 extent the divorce settlement inequitably divided the community assets and Rick  
32 Rizzolo fraudulently transferred a portion of his share of the community property  
33 to Lisa Rizzolo through the divorce, Rick Rizzolo's share of the community  
34 property that was fraudulently transferred to Lisa Rizzolo is also subject to the  
35 judgment." In its April 19 Order, the District Court did not cite any legal authority  
36 for this proposition.

37 The Ninth Circuit in *Britt v. Damson*, 334 F.2d 896, 903 (9<sup>th</sup> Cir. 1964),



1 under the predecessor fraudulent conveyance statute in the Bankruptcy Act,  
2 considered a case where the community owned a construction business operated  
3 by the husband. The court awarded the business of the bankrupt husband and all  
4 community obligations to the husband. The wife was awarded the non-business  
5 community property. The court ruled that a court-awarded property settlement is  
6 only avoidable to the extent that the value of the community property awarded to  
7 the non-operating spouse exceeds in value the property awarded to the operating  
8 spouse.

9 With respect to the latter, the Ninth Circuit opined:

10 To the extent that the value of the community property  
11 awarded to Mrs. Damson was offset by the value of the  
12 community property awarded to Mr. Damson, the 'transfer' to  
13 Mrs. Damson was, as a matter of law, supported by 'fair  
14 consideration,' as that term is defined in section 67, subd. d(1)(e).  
15 To this extent the award to each amounted to no more than an  
16 equal partition of property in which, as indicated above, they each  
17 had a vested, equal undivided interest.

14 \* \* \*

15 From what has been said it will be evident that, at most, the  
16 trustee can enforce rights only to the extent, if any, that the value  
17 of the award to Mrs. Damson exceeded one half of the total value  
18 of the community property.

18 Assuming *arguendo*, a Nevada divorce decree can be collaterally attacked  
19 by a creditor, then the award of community property under the divorce decree is  
20 only avoidable to the extent that the value of the community property awarded to  
21 Defendant Lisa Rizzolo exceeded the value of the property awarded to Rick  
22 Rizzolo. *Id.* However, the District Court's April 19 Order appears to be more  
23 expansive than the holding in the *Britt v. Damson* case and seems to expose  
24 Defendant Lisa Rizzolo's share of the community property to avoidance. Such is  
25 in contravention of the *Britt v. Damson* decision. To the extent that the April 19  
26 Order exceeds the dictates of *Britt v. Damson*, it is clearly erroneous as a matter of  
27 law.

28 Notwithstanding, the District Court in its April 19 Order presumed that in  
Nevada a creditor of one spouse could collaterally attack a divorce decree and set

1 aside the property award on the basis it was a fraudulent transfer. Specifically, the  
2 April 19 Order provides, in pertinent part, that “[m]arried couples may not avoid  
3 community debts by (1) making fraudulent transfers through a divorce, (2) settling  
4 the community claim against the spouse who fraudulently transferred community  
5 assets, and (3) breaching the settlement agreement, leaving the spouse who  
6 fraudulently transferred community assets without sufficient means to satisfy the  
7 liability owed to the third party creditor.” The District Court then concluded that  
8 “[w]here a reasonable jury could find that spouses engaged in such conduct, a  
9 fraudulent transfer claim against the community property will lie.” In support  
10 thereof, the District Court cited *In re Beverly*, 374 B.R. 221, 233-34 (9<sup>th</sup> Cir. BAP  
11 2007) and *Mejia v. Reed*, 74 P.3d 166, 173 (Cal. 2003). There appears to be no  
12 Nevada caselaw that a creditor of only one spouse can collaterally attack as a  
13 fraudulent transfer under NUFITA the award of community property in a Nevada  
14 divorce decree.

15 In fact, in Nevada a third party cannot collaterally attack a decree of  
16 divorce. *See* NRS 125.185. Specifically, NRS 125.185 provides “[n]o divorce  
17 from the bonds of matrimony heretofore or hereafter granted by a court of  
18 competent jurisdiction of the State of Nevada, which divorce is valid and binding  
19 upon each of the parties thereto, may be contested or attacked by third persons not  
20 parties thereto.” *See Gutowsky v. Gutowsky*, 38 Misc. 2d 827, 238 N.Y.S.2d 877  
21 (S.Ct. 1963); *Madden v. Cosden*, 314 A.2d 128 (Md.Ct.App. 1974). Since the  
22 *Beverly* and *Mejia* cases dealt strictly with marital settlement agreements and not  
23 decrees of divorce, said cases are not controlling. In fact, the *Beverly* and *Mejia*  
24 cases have been distinguished by *In re Bledsoe* 569 F.2d 1106, 1110 (9<sup>th</sup> Cir.  
25 2009).

26 In *In re Bledsoe, supra*, 569 F.2d at 1110, the trustee of the debtor-wife’s  
27 bankruptcy estate brought an adversary proceeding to set aside transfer of assets to  
28 debtor’s ex-husband pursuant to a judgment entered in a state court dissolution  
proceeding. In rejecting the trustee’s position, the Ninth Circuit noted in *Bledsoe*:

1 For example, *Britt v. Damson*, 334 F.2d 896 (9<sup>th</sup> Cir. 1964),  
2 contradicts Trustee's position. There, we rejected claims  
3 premised on Washington law and brought under the predecessor  
4 statute to § 544, because "[w]e [we]re not aware of any  
5 Washington decision in which it was held that creditors of a  
6 marital community which has been terminated by divorce may set  
7 aside a property award on the basis that it was a fraudulent  
8 transfer." *Id.* At 901.

9 Other cases involved a marital settlement agreement, rather than  
10 a dissolution judgment entered at the conclusion of a regularly  
11 conducted state-court proceeding. See *Beverly v. Wolkowitz (In*  
12 *re Beverly)*, 374 B.R. 221 (B.A.P. 9<sup>th</sup> Cir. 2007)(applying  
13 California law to a marital settlement agreement), *adopted*, 551  
14 F.3d 1092 (9<sup>th</sup> Cir. 2008)(order); *Mejia v. Reed*, 31 Cal.4th 657,  
15 3 Cal.Rptr.3d 390, 74 P.3d 166, 174 (2003)(same); *Corzin v.*  
16 *Fordu (In re Fordu)*, 201 F.3d 693, 707-09 (6<sup>th</sup> Cir.  
17 1999)(applying Ohio law to a marital separation agreement);  
18 *Roosevelt v. Ray (In re Roosevelt)*, 176 B.R. 200 (9<sup>th</sup> BAP Cir.  
19 1994)(applying California law to a marital settlement agreement).  
20 Because transfers under a settlement agreement may raise  
21 different issues in this context, we need not and do not decide  
22 whether *Greeninger* would apply to a marital settlement  
23 agreement. See *In re Lynch-Kirby*, 220 Or.App. 188, 185 P.3d  
24 494, 496 (2008)(applying the rule that a marital settlement  
25 agreement is treated as a contract, whose terms are governed by  
26 the parties' intent, not the court's).

27 569 F.3d at 1110 n. 2.

28 As such, the Nevada Supreme Court could determine that NRS 125.185 is  
controlling and takes precedence over NUFTA concluding that a creditor cannot  
collaterally attack a Nevada divorce decree as a fraudulent transfer. Since this  
issue is dispositive of important issues in the subject litigation, Defendant Lisa  
Rizzolo respectfully requests that this Court certify a question to the Nevada  
Supreme Court of whether a creditor of one spouse can collaterally attack the  
award of community property in a Nevada divorce decree as a fraudulent transfer  
under NUFTA in light of the countervailing statutory authority contained in NRS  
125.185.

**D. The District Court's Order is an Oft Repeated Error.**

The fourth *Bauman* factor is also present in the case *sub judice*. The  
District Court's April 19 Order citing the *Randono* decision is an often repeated  
error. For example, the Eighth Circuit cases of *F.T.C. v. Neiswonger*, 580 F.2d  
769 (8<sup>th</sup> Cir. 2009) and *Jones v. Swanson*, 341 F.2d 723 n. 6 (8<sup>th</sup> Cir. 2003) cited

1 *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218, 224 (1970). Clearly, the District  
2 Court's April 19 Order is an oft repeated error wherein the federal district and  
3 appellate courts will continue to cite *Randono* for authority, even though there is a  
4 serious doubt that said case is still good law in Nevada.

5 **E. The District Court's Order Raises New and Important Problems or**  
6 **Issues of First Impression.**

7 There should be no quarrel that "[w]hen interpreting state law, federal  
8 courts are bound by decisions of the state's highest court." See *Ariz. Elec. Power*  
9 *Coop., Inc. v. Berkeley, supra*, 59 F.3d at 991; *In re Bledsoe, supra*, 569 F.3d  
10 1109. The District Court's April 19 Order raises new and important issues of first  
11 impression in Nevada. There appears to be no Nevada decisions addressing the  
12 issues raised in certified questions numbered 3, 4 and 5 set forth in this petition.  
13 As such, said certified questions would be new and important issues of first  
14 impression in Nevada.

15 **V.**

16 **CONCLUSION**

17 Defendant Lisa Rizzolo has adamantly maintained that the divorce was not  
18 collusive. The divorce decree was approved by the court in accordance with  
19 Nevada state law regarding the division of marital property. As such, the decree  
20 of divorce determined the interest of the parties in the property.

21 Moreover, Defendant Lisa Rizzolo's half of the community property was,  
22 and is, her property, during marriage and after divorce, and free from Rick  
23 Rizzolo's separate debts. Defendant Lisa Rizzolo was not a party to either the  
24 State Court Case or its resolution. Therefore, a third party is not permitted under  
25 Nevada law to question either the parties' decision to divorce, or collaterally  
26 attack the divorce.<sup>27</sup>

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27 <sup>27</sup>Nevada is a no-fault, community property state. As such, the motivation of  
28 the parties in desiring to be married or divorced are irrelevant to the legitimacy of  
the status chosen. It can be personal, tax, insurance, economic, for asset  
protection, or for no reason whatsoever, and no person has any basis for

1 Further, an “asset” under NUFITA specifically excludes “[a]n interest in  
2 property held in tenancy by the entirety or as community property to the extent it  
3 is not subject to process by a creditor holding a claim against only one tenant.”  
4 Accordingly, Plaintiffs’ claim was solely against Rick Rizzolo, and Defendant  
5 Lisa Rizzolo’s half of the community property was not an asset subject to  
6 avoidance during the marriage, and remains so after the divorce.

7 Thus, it is imperative that the certified questions presented in this petition  
8 be answered by the Nevada Supreme Court. There appears to be no Nevada  
9 decisions which address important determinative issues presented in the case *sub*  
10 *judice* and thus, would be issues of first impression in Nevada. It is crucial that  
11 this Court exercise its mandamus powers to compel the District Court to vacate its  
12 April 19 Order. Even though interlocutory orders are not the law of the case,  
13 Defendant Lisa Rizzolo believes that if this matter were to proceed to trial without  
14 the guidance of the Nevada Supreme Court, the April 19 Order would be  
15 improperly applied as the same. Accordingly, there is a dire necessity that the  
16 April 19 Order be corrected.

17 Defendant Lisa Rizzolo respectfully requests that this Court exercise its  
18 power of supervisory mandamus compelling the District Court to vacate its April  
19 Order denying Defendant Lisa Rizzolo’s motion for summary judgment.  
20 Further, that this Court certify the following questions to the Nevada Supreme  
21 Court:

22 **Whether the statement in *Randono v. Turk*, 86 Nev. 123, 466**  
23 **P.2d 218 (1970) that “if community property can be given**  
24 **away by the husband (citation omitted) and is subject to his**  
25 **debts upon his death (citation omitted), we see no reason why**  
26 **it is not subject to his debts, whether arising out of tort or**  
27 **contract during his lifetime and the wife need not be made a**  
28 **party when the husband is defending against the community**

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27 attempting to “look behind” the choices made. Specifically, NRS 125.185  
28 provides: “No divorce from the bonds of matrimony heretofore or hereafter  
granted by a court of competent jurisdiction of the State of Nevada, which divorce  
is valid and binding upon each of the parties thereto, may be contested or attacked  
by third persons not parties thereto.”

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**property, since in legal effect she is a party to every action involving the community property” is still good law in Nevada in light of the fact that the underlying statutory predicate for said statement as it existed in 1970 is no longer in effect.**

**Whether under Nevada’s Uniform Fraudulent Transfer Act, NRS 112.140, *et seq.* (“NUFTA”), a non-debtor spouse’s share of community property awarded in a Nevada divorce decree is not “subject to process by a creditor holding a claim against only one tenant” and would not fall within the definition of an “asset” under NRS 112.150(2)(c).**

**Whether a creditor of one spouse can collaterally attack the award of property in a Nevada divorce decree as a fraudulent transfer under Nevada’s Uniform Fraudulent Transfer Act, NRS 112.140, *et seq.* in light of the countervailing statutory authority contained in NRS 125.185.**

**Whether under Nevada’s Uniform Fraudulent Transfer Act, NRS 112.140, *et seq.*, a creditor may only avoid a transfer in a Nevada divorce decree to the extent that the value of the community property awarded to the non-debtor spouse exceeded in value of the property awarded to the debtor spouse.**

Once the Nevada Supreme Court has answered the same, that this Court remand for further proceedings Defendant Lisa Rizzolo’s summary judgment motion for decision by the District Court in compliance with the Nevada Supreme Court’s answers to the above certified questions.

DATED this 18<sup>th</sup> day of May, 2012.

BAILUS COOK & KELESIS, LTD.

s/ Mark B. Bailus  
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**STATEMENT OF RELATED CASES**

Petitioner is not aware of any related cases pending in this Court.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed.R.App.P. 21(d), the undersigned counsel hereby certifies that the attached Petition for Writ of Mandamus is proportionately spaced, has a typeface of 14 points or more and is no more than 30 pages.

DATED this 18<sup>th</sup> day of May, 2012.

BAILUS COOK & KELESIS, LTD.

s/ Mark B. Bailus  

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**CERTIFICATE OF SERVICE**

1  
2 I hereby certify that on May 18, 2012, I electronically filed the foregoing  
3 with the Clerk of the Court for the United States Court of Appeals for the Ninth  
4 Circuit by using the appellate CM/ECF system. Participants in the case who are  
5 registered CM/ECF users will be served by the appellate CM/ECF system. I  
6 further certify that some of the participants in the case are not registered CM/ECF  
7 users. I have mailed the foregoing document by First-Class Mail, postage prepaid,  
8 or have dispatched it to a third party commercial carrier for delivery within 3  
9 calendar days to the following non-CM/ECF participants:

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