

DOC # 0759597
03/04/2010 09:26 AM Deputy: DW
OFFICIAL RECORD
Requested By:
BADER & RYAN LTD

Case # 09-CV-0285

Douglas County - NV
Karen Ellison - Recorder
Page: 1 Of 14 Fee: 27.00
BK-0310 PG- 1022 RPT: 0.00



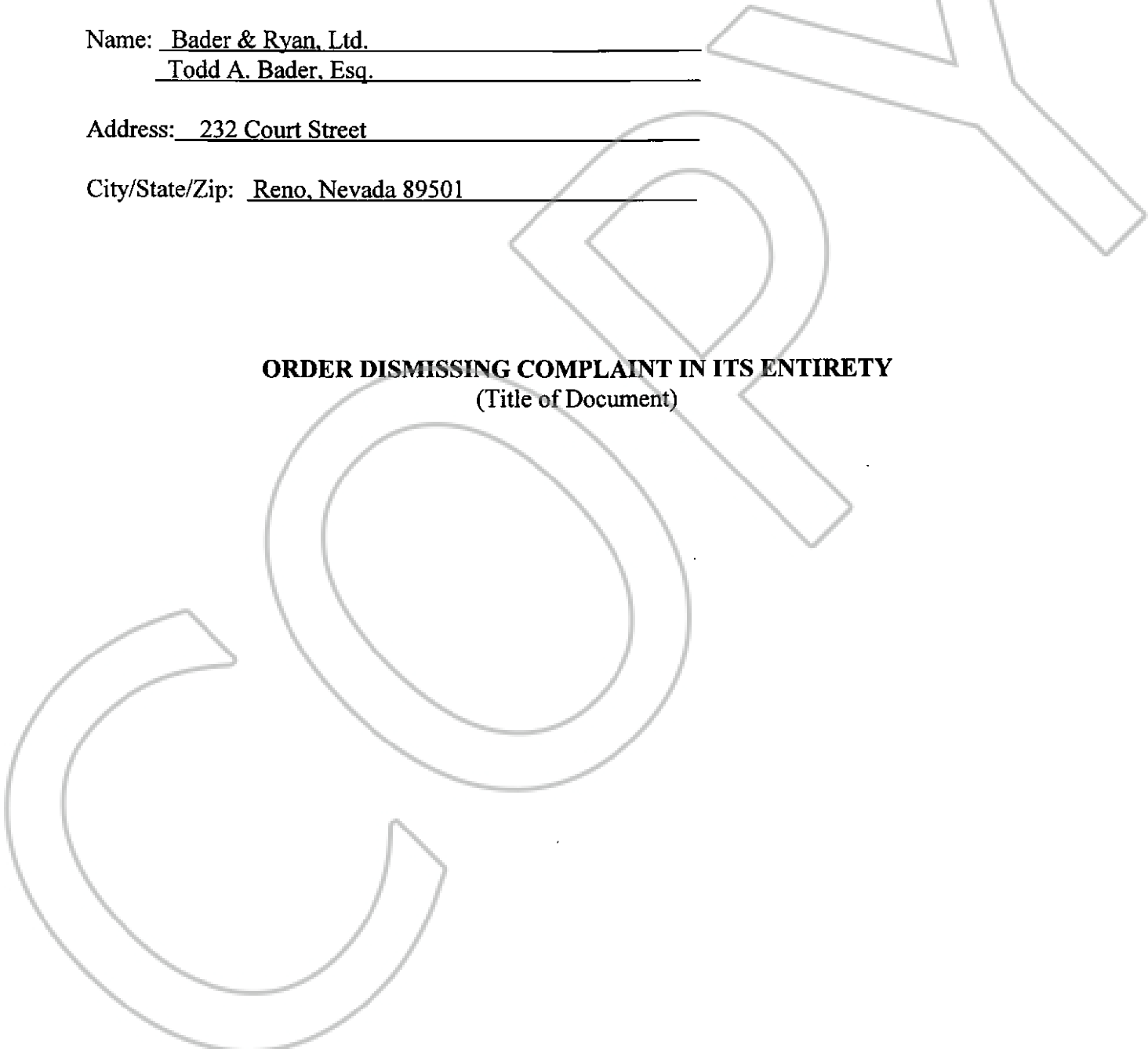
Recording Requested by:

Name: Bader & Ryan, Ltd.
Todd A. Bader, Esq.

Address: 232 Court Street

City/State/Zip: Reno, Nevada 89501

ORDER DISMISSING COMPLAINT IN ITS ENTIRETY
(Title of Document)



RECEIVED

Case No. 09-CV-0285

NOV 17 2009

2009 NOV 17 AM 8:54

Dept. No. II

DOUGLAS COUNTY
DISTRICT COURT CLERK

M. BIAGGINI

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

SCHULZ PARTNERS, LLC,

Plaintiff,

vs.

ZEPHYR COVE PROPERTY OWNERS
ASSOCIATION, INC., a Nevada
corporation,

Defendant.

ORDER DISMISSING
COMPLAINT IN ITS ENTIRETY

THIS MATTER comes before the court upon Plaintiff Schulz Partners LLC's ("Schulz") *Motion for Preliminary Injunction*, filed September 10, 2009, and Defendant Zephyr Cove Property Owners Association, Inc.'s ("Association") *Motion to Dismiss*, filed September 21, 2009. Both motions have been fully briefed. This court has read and reviewed all the documents, pleadings and exhibits offered in support of and in opposition to the motions. Further, this court takes judicial notice of *Schulz et al. v. Zephyr Cove Property Owners Association, Inc.*, Ninth Judicial District case no. 15446, which was originally filed December 31, 1984 ("the first case").

BK- 0310
PG- 1023
Page: 2 Of 14 03/04/2010
0759597

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

It is undisputed that Schulz owns Lot 3 of Zephyr Cove. Schulz moves for an injunction forcing the Association to remove two signs from the edges of a beach area abutting Lot 3 of Zephyr Cove. Schulz alleges that these signs slander their title because Schulz owns the beach area. The Association disagrees, however, and seeks to dismiss this entire case based upon the 1987 written decision of Judge Norman C. Robison in the first case. Everyone agrees that Schulz is the successor-in-interest to the plaintiffs in the first case.

Each party asserts that the other is barred from making certain arguments under claim and issue preclusion. This court must first examine these arguments to determine whether the motion to dismiss has merit, to determine whether the court should even address Schulz's motion for preliminary injunction.

I. Procedural History of the First Case

In the first case, the plaintiffs sought to quiet title from the Association as to the sandy beach area abutting Lot 3 down to the elevation of 6,223 feet which was Lake Tahoe datum. *Complaint to Quiet Title* (Dec. 31, 1984) (Case No. 15446). On January 27, 1987, the plaintiffs in the first case received a clerk's default against Zephyr Cove Properties, Inc., the developer. *Default* (Jan. 27, 1987) (Case No. 15446) (attached as Exhibit J to the complaint in 09-CV-0285). No default judgment was ever entered against the developer.

After a two day trial, the Honorable Norman C. Robison made the following findings of fact:

1 1. That Plaintiffs [Schulz et al] are the fee owners
2 of that certain real property described as Lot 3 in
3 Block F as shown on the Amended Map of Zephyr Cove
4 Property in Section 10, Township 13 North, Range 18
5 East, M.D.B.&M., which was filed in the office of the
6 recorder of Douglas County, Nevada on August 5, 1929.

7 3. That by virtue of Quitclaim Deed dated November 20,
8 1982, recorded on November 29, 1982, in Book 1182, Page
9 1266 as Document No. 73526 of the official records of
10 Douglas County, Defendant [the Association] is the
11 grantee of Zephyr Cove Property, Inc., [the developer]
12 as to that certain real property described as:

13 "The beach area at Zephyr Cove in front of
14 Lots 1-A through Lot 11, and to the low
15 water mark as delineated on that certain map
16 entitled, 'Amended Map of Zephyr Cove
17 Property in Section 10, Township 13 North,
18 Range 18 East' filed for record on August 5,
19 1929 in the office of the County Recorder of
20 Douglas County, State of Nevada."

21 Said Quitclaim Deed was admitted Exhibit "A" to these
22 proceedings.

23 4. That by covenants running with the land recorded by
24 [the developer in the 1982 quitclaim deed] the
25 aforementioned beach area was to remain continuously
26 open for use by the property owners and/or residents of
27 [the Association].

28 *Findings of Fact and Conclusions of Law at 2-3 (May 29,*
1987) (Case No. 15446) (attached as Exhibit 1 to the motion to
dismiss in 09-CV-0285). Judge Robison went on to conclude:

1. That the conveyances to Plaintiffs [Schulz et al.]
granted them no interest in fee to any real property
other than the property within the platted boundaries
of Lot 3 in Block F as shown on the Amended Map of
Zephyr Cove Property in Section 10, Township 13 North,
Range 18 East, M.D.B.&M. Which was filed in the office
of the recorder of Douglas County, Nevada on August 5,
1929.

2. That that certain Grant, Bargain and Sale Deed
dated June 4, 1979, recorded October 27, 1980, in Book
1080, Page 2061, as Document No. 50079 (Exhibit "13" to
these proceedings), granted no interest in the fine

1 sandy beach as to Plaintiffs or their predecessors-in-
2 interest.

3 3. That Plaintiffs enjoy the same right to use the
4 fine sandy beach area below the seawall as all other
5 owners in the Zephyr Cove Subdivision. . .

6 5. That [the Association] is the grantee of [the
7 developer] under that certain Quitclaim Deed dated
8 November 26, 1982, which transferred the beach area at
9 Zephyr Cove in front of Lots 1-A through Lot 11 and to
10 the low-water mark, as delineated on that certain map
11 entitled "Amended map of Zephyr Cove Property in
12 Section 10, Township 13 North, Range 18 East", filed
13 for record on August 5, 1929, in the office of the
14 County Recorder of Douglas County, State of Nevada.

15 6. That Plaintiffs [Schulz et al.] have a prescriptive
16 right to use that portion of land adjacent to Lot 3 in
17 Block F lying between the platted boundaries of Lot 3
18 in Block F and the seawall.

19 9. That all owners of property within the area covered
20 by the Amended Map of Zephyr Cove Property in Section
21 10, Township 13 North, Range 18 East, M.D.B.&M, which
22 was filed in the office of the recorder of Douglas
23 County, Nevada, on August 5, 1929, have an irrevocable
24 license to use the fine sandy beach below the seawall.

25 *Id.* at 4-6. Final judgment was entered against the plaintiffs in
26 the first case on May 29, 1987. See Exhibit Q to complaint in
27 09-CV-0285.

28 The first case was appealed by the plaintiffs and their
29 appeal was dismissed in its entirety; Judge Robison's decision
30 was affirmed. *Schulz v. Zephyr Cove Property Owners Association,*
31 *Inc.* (March 30, 1988) (Nevada Supreme Court docket no.
32 .18344) (attached as Exhibit G to the complaint in 09-CV-0285).

33 II. Procedural History of this Case

34 In this current action, Schulz alleges four causes of
35 action: (1) to extinguish the Association's claim to the beach
36

1 area adjacent to Lot 3; (2) declaratory relief determining the
2 scope of Schulz's property rights; (3) an injunction excluding
3 the Association from the beach adjacent to Lot 3 to the elevation
4 of 6,223 feet; and (4) slander of title for the Association's
5 posting of signs excluding plaintiffs from the beach area
6 adjacent to Lot 3. *Complaint* at ¶ 20, 22, 24, 26 (August 20,
7 2009). Plaintiffs' claims are based on the conclusion that the
8 Association does not have any ownership interest in the beach at
9 Lot 3. *Id.* at ¶ 14. Plaintiffs' claims are based on the
10 conclusion that they own the beach at Lot 3 to the elevation of
11 6,223 feet. *Id.* at ¶ 13. Each of these claims rests on the
12 legal basis that plaintiffs are the owners of the sandy beach
13 area adjacent to Lot 3.

14
15 **III. Standard of Law - Motion to Dismiss**

16 When considering a motion to dismiss made under NRC
17 12(b)(5), a district court must construe the complaint liberally
18 and draw every fair inference in favor of the plaintiff.
19 *Merluzzie v. Larson*, 96 Nev 409, 411-12 (1980), overruled on
20 other grounds, 106 Nev. 568 (1990). A complaint should not be
21 dismissed unless it appears to a certainty that the plaintiff
22 could prove no set of facts that would entitle him or her to
23 relief. *Zalk-Josephs Co. v. Wells Cargo*, 81 Nev. 163, 169
24 (1965).

25 ----

26 ----

1 IV. Plaintiffs are Barred from Bringing this Action under
2 Claim Preclusion

3 The Nevada Supreme Court recently modified the doctrine of
4 res judicata - instead, the concept has been broken into "claim
5 preclusion" and "issue preclusion." *Five Star Capital Corp. v.*
6 *Ruby*, 124 Nev. Adv. Op. 88, ___, 194 P.3d 709, 714 (Oct. 30,
7 2008).

8 Claim preclusion applies to prevent one (or both) parties
9 from bringing a claim that was previously, or could have been,
10 brought in a prior civil law suit. *Id.* For claim preclusion to
11 apply there must be: (1) the same parties, or privity between the
12 parties; (2) a valid, final judgment; and (3) the second law suit
13 is based on the same claims that were actually or could have been
14 brought during the first case. 194 P. 3d at 717.

15 First, this case involves the same parties or their
16 successors-in-interest as the first case. Obviously, the
17 Association was the defendant in the first case and is again the
18 defendant in this matter. Plaintiff Schulz Partners, LLC, is the
19 successor-in-interest to the plaintiffs in the first case, as
20 shown by plaintiff's own chain of title. *Motion for Preliminary*
21 *Injunction* at Exhibit T.

22 Second, there was a valid, final judgment in the first case.
23 Judge Robison issued a final judgment after a two-day trial in
24 1987, which was later affirmed by the Nevada Supreme Court.
25

26 Third, this current lawsuit is based on the same claims that
27 were actually brought in the first case. Each of the Schultz's
28

1 claims in this action is predicated on the same question as the
2 first case: whether Schulz owned the beach area adjacent to Lot
3 3 down to the water line at Lake Tahoe.

4 The decision in the first case was explicitly clear: the
5 Association owned the beach area adjacent to Lot 3 pursuant to
6 the 1982 quitclaim deed. *Findings of Fact and Conclusions of Law*
7 at finding no. 2, and conclusion no. 5 (May 29, 1987) (Case No.
8 15446). Plaintiffs Schulz never had any interest in that beach
9 area. *Id.* at conclusion nos. 2 and 3. Plaintiffs Schulz has the
10 same right to use that beach as others in the development, which
11 is that they have an irrevocable license to use the sandy beach
12 from the seawall down to the water level. *Id.* at conclusion no.
13 3 and 9. Further, Plaintiffs Schulz have the prescriptive right
14 to use the beach between the boundaries of Lot 3 and the seawall.
15 *Id.* at conclusion no. 6.

17 Plaintiffs cannot reargue these findings, or the underlying
18 facts affecting them, in this current case. Plaintiffs make a
19 convoluted argument that the January 1986 default against the
20 developer in some way gave plaintiffs title to the beach area.
21 This argument, however, fails to recognize that a clerk's default
22 is not an enforceable judgment. NRCP 55. Furthermore, the
23 written decision of Judge Robison superseded any effect of the
24 default, making it clear that Plaintiff Schulz never had any
25 interest in the beach area. *Findings of Fact and Conclusions of*
26 *Law* at conclusion nos. 2 and 3 (May 29, 1987) (Case No. 15446).

27 ----
28

1 Accordingly, plaintiffs are prohibited by claim preclusion
2 from re-litigating their non-ownership of the beach area adjacent
3 to Lot 3.

4 **V. Plaintiffs are Barred from Bringing this Action under**
5 **Issue Preclusion**

6 Issue preclusion applies to prevent a party from re-raising
7 an issue that was "actually and necessarily litigated" and on
8 which there was a final decision on the merits in the first
9 lawsuit. 194 P.3d at 713. Issue preclusion may apply, even if
10 claims preclusion does not. *Id.*

11 For issue preclusion to apply there must be: (1) the issue
12 decided in the first case must be identical to the issue to be
13 decided in the second case; (2) the first ruling must have been
14 on the merits and become final; (3) the party against whom issue
15 preclusion is asserted must have been a party to the first case;
16 and (4) the issue was actually and necessarily litigated.

17 First, the issue decided in the first case by Judge Robison
18 is identical to the issue to be decided in this case: do the
19 Schulz's own the beach adjacent to Lot 3.

20 Second, Judge Robison found on the merits, after a trial,
21 that plaintiff's predecessor did not have any ownership interest
22 in the beach adjacent to Lot 3. That decision became final after
23 the Nevada Supreme Court affirmed it in its entirety by
24 dismissing Schulz's appeal.

25 Third, the plaintiff in this case is the direct successor-
26 in-interest to the parties in the first case. Indeed,
27
28

1 plaintiff's partners, Donald and Kathleen Schulz, were named
2 plaintiffs in the first action.

3 Fourth, the issue of ownership of the beach area adjacent to
4 Lot 3 was actually and necessarily litigated in the first case.
5 Indeed, Judge Robison's written decision deals solely with the
6 issue of ownership and access or use of the beach areas - even
7 though plaintiffs made other claims in their amended complaint
8 (which appear to have been resolved by settlement).

9 In this matter, issue preclusion prevents the parties from
10 re-litigating the issue of who owns and who may access or use the
11 beach area adjacent to Lot 3. Judge Robison was clear: any owner
12 within the Zephyr Cove development, including the Schulz's, may
13 access the beach adjacent to Lot 3 between the water level and
14 the sea wall. *Findings of Fact and Conclusions of Law* at
15 conclusion nos. 3 and 9 (May 29, 1987) (Case No. 15446). Although
16 plaintiffs have a right to use the beach between the seawall and
17 the boundary to Lot 3, the Association continues to be the fee
18 simple owner of that property. *Id.* at conclusions 2, 5, and 6.

19
20 **VI. Adverse Possession Has Not Been Pleaded**

21 Accordingly, as of the court's decision in 1987, the
22 Association owned the beach adjacent to Lot 3 in fee simple, but
23 Schulz had access to use the beach like any other property owner
24 within the subdivision. The Association believes that this
25 resolves this matter and that it should be dismissed in its
26 entirety, but Schulz argues that there is still an outstanding
27 claim for adverse possession based on paragraph 12 to the *First*
28

1 Amended Complaint which states:

2 Seawalls were built by the Plaintiff's predecessors
3 and the owners of the other buildable lakefront lots,
4 without objection from the developer, to stabilize the
5 bank at the approximate high water elevation. One of
6 Plaintiff's predecessors constructed a fence on top of
7 the seawall to prevent intrusion. The seawall and
8 fence has been maintained by Plaintiff and its
9 predecessors continuously for more than fifty years.
10 The area between the metes and bounds description of
11 the northwestern lot line of Lot 3 and the seawall has
12 been acquired by adverse possession, or in the
13 alternative, the boundary has been established by the
14 doctrine of settled boundaries. The [Association]
15 asserts an unsupportable adverse claim to the area
16 behind the Plaintiff's sea wall.

17 Because of the application of claim and issue preclusion,
18 plaintiff is barred from attempting to assert an adverse
19 possession claim prior to the court's decision in the first case
20 in 1987. Accordingly, the plaintiffs must assert adverse
21 possession since the date of the decision in the last order.

22 To assert a claim for adverse possession, plaintiffs must
23 plead by a verified complaint: (1) actual, exclusive and adverse
24 possession for 15 years; and (2) that he paid taxes on that
25 property for 5 years. NRS 40.090(1). Nevada is a notice
26 pleading state, but the pleading must assert sufficient facts
27 necessary to establish all the elements of a claim so that the
28 opposing party has adequate notice of the nature of the claim and
relief sought. NRCP 8; Hay v. Hay, 100 Nev. 196 (1984).

Paragraph 12 of the First Amended Complaint is too vague to
put any reasonable person on notice that plaintiffs are seeking
title through adverse possession. Not only is the complaint not
verified, but there are no allegations tending to show that

1 plaintiff has exclusively possessed the area between the Lot 3
2 and the seawall in light of the court's previous grant of a
3 prescriptive easement, or that plaintiff has paid taxes with
4 regard to this property for the last 5 years.

5 Accordingly, the complaint on file is insufficient to make
6 out a claim of adverse possession.

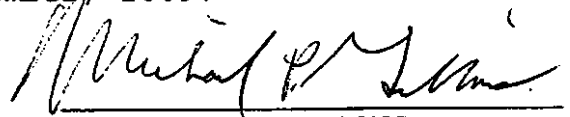
7 VII. Conclusion

8 Accordingly, defendant's *Motion to Dismiss* is GRANTED IN ITS
9 ENTIRETY. Plaintiff's *Motion for Preliminary Injunction* is
10 DENIED as moot. The court notes, under *Honeycutt*, that it would
11 likely have denied the plaintiff's motion anyway on the grounds
12 that they were not likely to succeed on the merits, and that any
13 harm to the plaintiff was de minimis. The complaint is DISMISSED
14 WITH PREJUDICE (except for a claim for adverse possession if an
15 amended complaint is filed).
16

17 Defendant moves for attorney's fees and costs pursuant to
18 NRCP 11. There may be merit to the request. The defendant is
19 authorized to file a separate motion for fees and costs citing
20 all relevant legal doctrines, and include a memorandum of costs
21 and an affidavit of fees.

22 IT IS SO ORDERED.

23 Dated this 16 day of November, 2009.

24
25 

26 MICHAEL P. GIBBONS
27 DISTRICT JUDGE
28

Copies served this 17th day of November, 2009, to: Harry W. Swainston, Esq., 4040 Hobart Road, Carson City, NV 89703; Todd A. Bader, Esq., 232 Court Street, Reno, NV 89501-2220.

Musuh K. Mann

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

COPIES

COPY

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original in file and of record in my office.

DATE 2/26/10

TED THUAN Clerk of the 9th Judicial District Court of the State of Nevada, in and for the County of Douglas,

By Debra Deputy