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Order Granting Plaintiff's Motion for Summary Judgement/
Denying Defendant's Motion for Summary Judgment

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Case No. 14-CV-0130

Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

RAY WARREN EXLEY, an individual,

Plaintiff,

vs.

LOIS M. O'BRIEN, an individual, DOES 1-XXX; and ABC CORPORATIONS 1-100 inclusive,

Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/ DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court for determination of cross-motions for summary judgment. The cross-motions have been fully briefed. The Court has considered all briefs, pleadings and exhibits. Good cause appearing, the Court enters the following findings of fact and conclusions of law:

The parties dispute ownership of real property located in Douglas County, Nevada. The parties are described herein as Plaintiff, Ray Warren Exley ("Dr. Exley"), and Defendant, Lois M. O'Brien ("Dr. O'Brien"). Through their respective cross-motions for summary judgment, the parties agree that there are no genuine issues of material fact and the matter ought to be determined pursuant to NRCP 56.

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STANDARD OF REVIEW

Summary judgment is appropriate when, after viewing the evidence in a light most favorable to the non-moving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. NRCP 56; *Butler v. Bogdanovich*, 101 Nev. 449, 451 (1985). The purpose of summary judgment is to avoid the necessity and expense of trial when such would serve no real purpose such as when there is no real dispute over the facts. *See, Flowers v. Carville*, 292 F.Supp.2d 1225, 1228 (D. Nev. 2003).

A genuine factual dispute occurs when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005). *See also, Cuzze v. University and Cmty Coll. Sys.*, 123 Nev. 598, 602-03 (2007)(party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact).

A party moving for summary judgment may support the motion with evidence negating an essential element of the opposing party's claim or by pointing out an absence of evidence supporting the opposing party's claim. *Torrealba v. Kesmetis*, 124 Nev. 95, 100 (2008). In a opposing a motion for summary judgment, a party must transcend the pleadings and by affidavit or other admissible evidence, introduce specific facts demonstrating the existence of a genuine issue of material fact. *Id; See also, Cuzze*, 123 Nev. at 602-03 (2007)(if the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the [summary judgment

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standard] by ... pointing out ... that there is an absence of evidence to support the nonmoving party's case)(internal quotations omitted).

The Court must give the party opposing summary judgment the benefit of all favorable inferences. *O'Dell v. Martin*, 101 Nev. 142, 144 (1985); *Berge v. Fredericks*, 95 Nev. 183, 186 (1979). While the Court must construe the pleadings and evidence in a light most favorable to the non-moving party, that party must show more than some metaphysical doubt as to the operative, material facts. *Wood*, 121 Nev. at 732.

UNDISPUTED MATERIAL FACTS

Through the cross-motions for summary judgment, the parties agree that there is no genuine issue of material fact regarding ownership of the property. *Cheqer, Inc., v. Painters and Decorators*, 98 Nev. 609, 612-13, 655 P.2d 996 (1982). The dispute regards differing interpretations of existing law. Irrespective of the parties' factual concessions, the Court has reviewed the record confirms the non-existence of any genuine issues of material fact.

Dr. Exley and Dr. O'Brien are not Nevada residents. The parties were married on or about April 1977. The marriage was short-lived and the parties divorced on or about May 1977. The parties continued to live together but did not pool their finances.

In 1983, the parties purchased a vacation rental located at 429 Panorama Drive, Stateline, Nevada. Title to the property was taken as "Ray Warren Exley, M.D., an unmarried man, and Dr. O'Brien, an unmarried woman, as Joint Tenants." Consideration

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for the purchase was a combination of cash, paid for entirely by Dr. Exley; a straight note, taken in Dr. Exley's name alone; and assumption of the existing loan, taken in Dr. Exley's name alone. On or about March 3, 1988, Dr. Exley paid off the balances on the two notes ($153,716.80) with his own separate funds. Dr. Exley contributed 100% of the purchase price of the Tahoe property, including insurance, from his separate funds.

Dr. Exley and Dr. O'Brien remarried in 1992. Title to the Tahoe property was never changed or modified to reflect the marriage or otherwise reflect a community property interest.

Dr. Exley filed for divorce in California in 2007. The divorce has been finalized and the parties are not currently married. The California divorce court was aware of the Tahoe property but did not distribute the Tahoe property. On October 17, 2016, the parties filed a *Joint Submission of Supplemental Documents Requested by the Court*, in reference to the California divorce proceedings. Therein, the parties stipulated that the California court made two rulings having relevance to this Court's determination: (1) there was no agreement by the parties to share property; and (2) the Tahoe property is not community property. Other than as providing support for the stipulation, the documents attached to the *Joint Submission* are not relied upon the Court in reaching its determination.

Dr. O'Brien has provided evidence supporting that she made payments between 2006 and 2015 for various expenses for the Tahoe property. The payments were for expenses such as property taxes, home owners' insurance premiums, cleaning services and telephone service. At the pre-trial conference, counsel

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intimated that the exact amount of Dr. O'Brien's payments remains in dispute.

THE LAW

While agreeing on the facts, the parties greatly differ as to the law governing the determination of the parties' ownership interests in the Tahoe property.

Generally, Dr. Exley is of the view that title is not dispositive and that the parties' respective contributions to the purchase price are highly relevant. Unequal contributions raise a presumption that the parties intended their ownership shares to be in proportion to the amount contributed. Dr. Exley relies upon *Sack v. Tomlin*, 110 Nev. 204, 210, 871 P.2d 298 (1994) and *Langevin v. York*, 111 Nev. 1481, 1485, 907 P.2d 981 (1995).

Generally, Dr. O'Brien is of the view that contributions are completely irrelevant. The title of joint tenancy raises the presumption that Dr. Exley intended to gift one-half ownership to Dr. O'Brien. The presumption is only overcome by clear and convincing evidence of a different intent. Dr. O'Brien relies heavily upon *Gorden v. Gorden*, 93 Nev. 494, 497 569 P.2d 397 (1977).

As it regards the determination of the relative ownership interests of joint tenants in real property, there are three distinct bodies of law to be applied to three distinct factual scenarios.

The first category regards those circumstances wherein a married couple takes title to property as joint tenants. In such circumstances, NRS 125.150 is directly applicable. In the context of divorce proceedings, the court "shall dispose of any

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property held in joint tenancy" consistent with the process of distributing community property. NRS 125.150(2). Further:

> If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that property that can be traced to the acquisition or improvement of the property held in joint tenancy. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider: (a) The intention of the parties in placing the property in joint tenancy; (b) The length of the marriage; and © Any other factor the court deems relevant in making a just and equitable disposition of that property.

Id. (emphasis added).

Also directly applicable, and heavily relied upon by Dr. O'Brien, is the case of *Gorden v. Gorden*, 93 Nev. 494, 497 569 P.2d 397 (1977). "When separate funds of a spouse are used to acquire property in the names of the husband and the wife as joint tenants, it is presumed that a gift of one-half of the value of the joint tenancy property was intended. The presumption is overcome only by clear and convincing evidence." *Id.* at 497.[1]

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[1] *Gorden* was decided in 1977. In 1993, the Nevada Legislature amended NRS 125.150 so as to add the provisions regarding joint tenancies held by married couples. 1993 Statutes of Nevada 2550; 1993 AB 435; and corresponding legislative history amending NRS 125.150. The legislative history strongly reflects a legislative intent to deflate the gift presumption. The initial version of the legislation would have completely removed the gift presumption enunciated in *Gorden*. The adopted legislation took a compromise position. Nonetheless, *Gorden* has since been re-affirmed. *Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999); *Blanchard v. Montgomery*, 2016 Nev.App. LEXIS 258, 2016 WL 3584702.

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The second category regards those circumstances wherein unmarried adults have agreed to hold property as if married. In such circumstances, the respective ownership interests of the joint tenants are determined by use of one law by analogy. The seminal Nevada case is *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992) wherein the Nevada Supreme Court stated, "Thus we hold that unmarried cohabiting adults may agree to hold property that they acquire as though it were community property." *Id.* at 938; See also, *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).

The third body of law regards those situations wherein unmarried adults have taken real property as joint tenants in the absence of an agreement to hold property as if married. Joint tenants are presumed to have equal ownership shares. *Sack v. Tomlin*, 110 Nev. 204, 210, 871 P.2d 298 (1994); *Langevin v. York*, 111 Nev. 1481, 1485, 907 P.2d 981 (1995). Where the tenants have contributed unequally to the purchase price, however, that presumption is overcome in favor of a presumption that the parties "intended to share in proportion to the amount contributed to the purchase price." *Langevin*, 111 Nev. at 1485, *quoting Sack* 110 Nev. at 210.

The presumptions are more fully stated as such:

> We find the rule to be that where a conveyance to purchasers of a tenancy in common is silent these purchasers are presumed to take equal shares. However, the presumption is a rebuttable one and does not prevent proof from being introduced that the respective holdings and the interests of the parties are unequal. In a showing of unequal contribution, in the absence of further proof the prior presumption is overcome and another presumption arises; that is, that the parties intended to share in proportion to the amount contributed by each to the purchase price.

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Sack, 110 Nev. at 213, quoting *Williams v. Monzingo*, 235 Iowa 434, 16 N.W.2d 619, 622-23 (Iowa 1944)(emphasis added). The same presumptions apply to joint tenancies. *Langevin*, 111 Nev. at 1485.[2]

As it regards the third category of cases, NRS 125.150, *Gorden*, and *Michoff* are not applicable. Dr. O'Brien, who relies heavily on *Gorden*, recognizes the obvious distinction between *Gorden* and category three cases, i.e., the marital status of the parties when entering into the joint tenancy. Nonetheless, Dr. O'Brien argues that *Gorden* applies equally to unmarried individuals. Dr. O'Brien cites the California case of *Milian v. De Leon*, 181 Cal.App.3d 1185, 1195, 226 Cal.Rptr. 831, 837 (1986). Dr. O'Brien does not cite any Nevada authority.

Plainly, *Gorden* and *Langevin* provide for two very different sets of legal presumptions that are incapable of being simultaneously employed to a singular property. The conflicting law of the two cases is reconciled only by their distinguishable factual underpinnings. *Gorden* applies "When separate funds of a spouse are used to acquire property in the names of the husband and the wife as joint tenants..." *Gorden v. Gorden*, 93 Nev. 494, 497 569 P.2d 397 (1977). This is category one. *Gorden* also applies, by analogy, where the circumstances are such that an

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[2] Regarding *Langevin*, Dr. O'Brien charges the Nevada Supreme Court with "going against Nevada precedent," i.e, *Gorden*, and "erroneously" applying *Sack* to joint tenancies. Dr. O'Brien's *Motion for Summary Judgment*, p. 6. Dr. O'Brien relies on California case law in existence at the time of *Langevin* and considered by the Nevada Supreme Court. *Langevin* and *Sack* remain valid, controlling precedent best representing Nevada law. This is true even if, as Dr. O'Brien claims, the Nevada Supreme Court misapprehended California law.

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unmarried couple has agreed to hold their property as community property. *Michoff*. This is category two. *Langevin*, on the other hand, applies to category three, represented by those circumstances wherein unmarried parties take title to property as joint tenants in the absence of an agreement to treat the property as community property. Proving this point, the Nevada Supreme Court did not mention *Gorden* (1977) in either *Langevin* (1995) or *Sack* (1994).

THE LAW AS APPLIED TO THE UNDISPUTED FACTS

Before analyzing which category of law applies to this case, it is noteworthy that Dr. O'Brien insists that title is determinative of ownership interests and that contributions are completely irrelevant. On the contrary, regardless of the category employed, title is not conclusive as to ownership. *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984). Regarding category one and two cases, the plain language of NRS 125.150 makes contributions relevant. Even under *Gorden*, contributions would presumably be relevant to rebutting the gift presumption. Contributions are highly relevant to category three determinations given the presumptions outlined in *Langevin*.

As to the Tahoe property, category one is inapplicable. The parties were not married when they purchased the Tahoe property and continued in that status beyond payoff of the entire purchase price. The parties are not married now. The parties agree with this assessment as did the California divorce court which determined that the Tahoe property is not community property.

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As for the second category, community property by analogy, Dr. Exley denies its application by convincingly distinguishing *Michoff*.

Tellingly, Dr. O'Brien does not affirmatively argue for application of *Michoff* and did not even mention the case or the legal theory in her *Motion for Summary Judgment*. Rather, Dr. O'Brien refers to *Michoff*'s community property by analogy theory only in footnote 10, p. 7, of her *Opposition to Plaintiff's Motion for Summary Judgment* and footnote 4, p. 7 of her *Reply in Support of Motion for Summary Judgment*. Even then, Dr. O'Brien states that "the doctrine of community property by analogy could in fact apply..." on the basis of "an implicit agreement to share in property." *Id.* Yet, Dr. O'Brien declared under penalty of perjury:

> 5. Respondent and I lived together. We never discussed and never agreed that we would "live together as though we were married."
>
> 6. We never had any agreement with regard to our property, responsibilities and obligations. We never had any oral or written agreement that all property acquired during our cohabitation would belong to both of us equally.
>
> 7. From approximately 1982 to the present time, Dr. Exley was bedridden and claimed to be unable to work. We worked in different cities, and did not have a sexual relationship except may be once per year. The art work was purchased by me with separate money and I have all of the receipts for the purchases in my name. At the time of the purchases of the art work I was living in San Francisco and Dr. Exley was residing in Los Angeles. I worked in a Catholic hospital and there were times when I introduced Dr. Exley as my husband in order to preserve my job. The residence in Beverly Hills was purchased by my with my separate property and in my name exclusively as a single woman. We purchased the Tahoe house as an unmarried couple as tenants in common in 1982. The Beverly Hills house was

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> purchased in 1981 as a lease option and purchased by me in 1982. I owned a home in Palo Alto, California and when I sold the house in Palo Alto the proceeds of that house was used for the down payment on the Beverly Hills residence. The Palo Alto house was my separate property.

Declaration of Lois O'Brien, Plaintiff's *Motion for Summary Judgment*, Exhibit 8. Further, the California divorce court determined that there was no agreement between doctors Exley and O'Brien to share their property.

Dr. O'Brien makes no effort to compare the facts of this case with *Michoff*. A comparison shows that the two cases have few factual similarities. The relevant facts of *Michoff* were as follows: Lois and Max Michoff cohabited and were romantically involved but were never legally married. Lois, however, legally changed her last name to Michoff. The parties started a business called L&M Rentals (named for Lois and Max), naming Lois as the sole owner. Max contributed a large portion of the funds to start the business but wanted Lois to be the sole named owner so as to prevent a claim against the business by he former wife. Lois and Max agreed, however, that they were co-equal owners. Lois devoted her time and efforts to running the business. When the business needed a contractor's license, Lois applied for the license. Lois was again listed as the owner. Max was listed as the "qualified employee." Profits were either invested into the business or retained as savings. The business later incorporated under the name Wester States Construction, Inc. Lois and Max agreed to be co-equal owners, each owning 50 percent. They opened checking and payroll accounts accessible to Lois and Max. Lois personally guaranteed the bonds. Max held Lois out as his

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wife. When entering a partnership agreement with another individual, Max had Lois sign a consent of spouse. Max and Lois filed joint tax returns as husband and wife. When the company filed for a sub-chapter S election, Lois and Max designated the holdings of the company as community property. *Western States Constr.*, 108 Nev. at 931-35.

Given these facts, the Nevada Supreme Court found substantial evidence "that Lois and Max impliedly agreed to hold their property as though they were married. *Michoff*, 108 Nev. at 938-939.

Even when viewed in a light most favorable to Dr. O'Brien, the evidence provided in this case would not support a finding at trial that the parties had an express or implied contract to treat their property as community property. "There is no evidence of a contract between the cohabitants which was the basis for *Michoff*. There is no evidence of pooling of assets or holding themselves out as husband and wife or treating their assets as community property or building a business together." *Gilman v. Gilman*, 114 Nev. 416, 427, 956 P.2d 761 (1998). The elements of cohabitation and romantic involvement are incidental and are not "the real basis for the *Michoff* holding..." *Id.* Accordingly, the Court finds that the doctrine of community property by analogy, category two, is not applicable to the facts of this case.

The Court finds that this case fits squarely within the third category. That is, Dr. Exley and Dr. O'Brien, an unmarried couple, took the Tahoe property as joint tenants in the absence of any agreement, express or implied, to treat the purchase as

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community property. They also unequally contributed to the purchase price. These facts create a presumption that the parties intended to take ownership of the property in relation to their respective contributions. *Langevin v. York*, 111 Nev. 1481; *Sack v. Tomlin*, 110 Nev. 204.

Of course, the presumption may be rebutted by evidence supporting that the parties intended to share the property equally irrespective of their unequal contributions. *Langevin v. York*, 111 Nev. 1481; *Sack v. Tomlin*, 110 Nev. 204. To that end, Dr. O'Brien opines that the facts of this case are distinguishable from those in *Langevin*. Specifically, Dr. O'Brien argues that when the Tahoe property was purchased the parties were living together under the pretense of marriage unlike the parties in *Langevin*. This argument is diametrically opposed to Dr. O'Brien's sworn statements such as: "Respondent and I lived together. We never discussed and never agreed that we would 'live together as though we were married.' And, "We worked in different cities, and did not have a sexual relationship except may be once per year." Declaration of Lois O'Brien, Plaintiff's *Motion for Summary Judgment*, Exhibit 8.

Dr. O'Brien also maintains that the parties treated the property as "theirs" and consistently held it out as such to third parties. Dr. O'Brien points to statements made by Dr. Exley wherein he used such words as "we" and "our" when referring to the Tahoe property. Those words alone, however, do not evince an agreement that ownership in the Tahoe property was to be equal irrespective of the grossly unequal contributions.

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The Court finds that *Langevin* is not materially distinguishable from the present case. In *Langevin*, Norman and Laurie lived together but were not married. Norman and Laurie purchased property for investment purposes, taking title as joint tenants. Norman paid for the property. The specific arrangements regarding the property were unclear, but it was "clear that there was no agreement or understanding that the parties would share disproportionately to the amount contributed toward the purchase price of the property." *Langevin*, 111 Nev. at 1485, and footnote 4. Further, "there is no indication that the acquired property was to be treated as community property as if Norman and Laurie were married, but rather the deed to all four parcels explicitly identify the parties as 'unmarried.'" Id. at 1485.

The Court finds that Dr. O'Brien has not pointed the Court to any evidence that, when viewed most favorable to Dr. O'Brien, would at trial sufficiently rebut the presumption that the parties' intended their ownership interests in the Tahoe Property to be in proportion to their contributions. Rather, the presumption is fully bolstered by the undisputed facts. These include: The parties were not married at the time of purchase or at anytime prior to complete payoff of the purchase price; the parties took title as "an unmarried man" and "an unmarried woman"; the Tahoe property was neither parties' primary residence; Dr. Exley paid most, if not all, of the purchase price with his separate property; The notes on the Tahoe Property were taken in Dr. Exley's name alone; The parties did not pool their assets; When the parties subsequently remarried, they did not

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change title to the Tahoe property; the parties are not currently married; and there was no agreement, express or implied, to equal ownership despite unequal contribution.

The Court finds that the parties' ownership interests in the Tahoe property are, as a matter of law, to be determined in proportion to their respective contributions to the purchase price of the property. *Langevin v. York*, 111 Nev. 1481, 1485, 907 P.2d 981 (1995)("In the present case, Norman paid the entire purchase price for parcels A and B without any contribution from Laurie. Therefore, he should be awarded the two parcels outright.").

The Court turns to NRS 125.150, by analogy, for assistance in defining "contribution." Specifically,

> As used in this subsection, 'contribution' includes, without limitation, a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property."

NRS 125.150(2).

Applying this definition to the undisputed facts, Dr. Exley contributed 100% of the purchase price for the Tahoe property and is entitled to a declaration of 100% ownership. What remains for trial is whether Dr. O'Brien is entitled to reimbursement for expenses she paid relative to the Tahoe Property and, if so, the amount of reimbursement.

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IT IS HEREBY ORDERED that Dr. Exley's Motion for Summary Judgment is **GRANTED**. Dr. Exley is declared to have complete, one hundred percent (100%), ownership of the Tahoe property. Reserved for trial is the determination of whether Dr. O'Brien is entitled to reimbursement for expenses paid relative to the Tahoe Property and, if so, the amount of reimbursement. NRCP 56(d). Also reserved is any determination regarding allowance of attorney's fees and costs. Any party requesting attorney's fees or cost shall, after trial and in accord with rules of procedure and law, file a motion and any supporting evidence.

IT IS FURTHER ORDERED that Dr. O'Brien's Motion for Summary Judgment is **DENIED**.

Dated this 21st day of October, 2016.

THOMAS W. GREGORY
DISTRICT JUDGE

Copies served by mail/email this 21st day of October, 2016, to:

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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 Dec. 12, 2016

BOBBIE R. WILLIAMS Clerk of Court
of the State of Nevada, in and for the County of Douglas,

By Sgardner Deputy