ORIGINAL

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Appellant in Proper Person

IN THE SUPREME COURT OF THE STATE OF NEVADA

R. SCOTLUND VAILE,

Appellant,

vs.

CISILIE A. PORSBOLL fka, CISILIE A. VAILE,

Respondent.

Supreme Court Case No: 52593
District Court Case No: 98 D230385

FILED
SEP 15 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

RESPONSE TO RESPONDENT'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION

I. INTRODUCTION

Respondent's answer to Appellant's current petition offers little by way of legal argument for why the petition should not be granted. Rather, Respondent echoes her recurrent theme that since she believes that Appellant Vaile is an all-around bad guy, his rights under the law should be curtailed and the rules of the Court should not be applied in his case. This Court deserves a more meaningful reply. The purpose of this response is to clarify supposed facts presented by Respondent and to address the policy issues raised in an effort to allow this Honorable Court to determine how to apply Nevada law uniformly.

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II. PROCEDURAL HISTORY

Appellant Vaile's simplified listing of the procedural history in this case as contained in the petition itself includes all filing dates relevant to the petition. Respondent appears intent on obfuscating the simplicity of the timeline presented by Appellant by 1) reciting a complex version of the historical record that includes filings and orders not remotely relevant to the issues before the Court,[1] including filings not a part of this case;[2] 2) by misrepresenting that certain notices of appeal[3] applied to orders other than for those which they recite;[4] 3) omitting the explanation that Appellant's last notice of appeal was filed so long after the order was entered because Respondent's counsel failed to file a notice of the order until almost eight months after the order was entered;[5] and 4) pretending that the lower court entered only a single "final" order which could have been appealable when in actuality, two final orders were entered: the lower court's October 9, 2008 order titled *Findings of Fact, Conclusions of Law,* ***Final*** *Decision and Order,* and

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[1] Respondent's apparent objective in including filings that are not relevant to the issues in the instant petition is to enable her counsel to deride Mr. Vaile or his attorney in the context of those filings, or even to argue the merits of litigation taking place in another state. See *Answer*, 3 fn 6. In the interests of judicial economy, Mr. Vaile will save his response to Respondent's accusations and wresting of the facts surrounding those filings for when and if those issues are presented and relevant for this Court.

[2] For example, Respondent references a Petition for a Writ of Certiorari to the US Supreme Court in a case not in the Nevada state courts at all. See *Answer,* 5.

[3] Reading Respondent's history without understanding that orders took several days to travel to Appellant, during which period he may have been making filings which appeared to contradict the en route orders.

[4] For example, Respondent claims at *Answer,* 8 fn 17, that Mr. Vaile's most recent appeal (presumably referring to the notice of appeal dated April 10, 2009) was filed premature in that it was filed seven days before the final decision (presumably the April 17, 2009 order). Respondent's counsel certainly knows by reading the April 10 notice of appeal that it did not include an appeal of the April 17 order. One might wonder how one could claim that it even could have if it had not been issued yet. Respondent's claim was a clear misrepresentation.

[5] It seems contradictory that Respondent would claim that Appellant is not entitled to relief because of an allegation that he was two days late in a filing here, and many days late there, while omitting the fact that she was almost eight months late in the notice – which *prevented* Mr. Vaile from filing the notice of appeal during that time frame.

the court's April 17, 2009 order titled *Findings of Fact, Conclusions of Law, **Final** Decision and Order Re: Child Support Penalties Under NRS 125B.095.* The tactics of Respondent's counsel in attempting to confuse the facts, albeit habitual, are nonetheless disingenuous, obvious and unethical.

Respondent's counsel also claims to have "only attached documents it considers necessary to the Court's consideration of the issue specified."[6] Appellant hopes that this ruse and its purpose is transparent to this Court. Deciphering the muddled history presented by Respondent reveals that the ***only*** date included or omitted by Appellant in his relevant procedural history to which Respondent objects was with regard to Respondent's motion which reopened this case.[7] Mr. Vaile apparently recited the date of the signature on the motion itself, instead of the filing date. This filing has no bearing whatsoever on the issues before this Court in this petition. Respondent's recitation of facts is not helpful in resolving the issues raised in the petition. Appellant's procedural history included in the petition is accurate and contains all relevant dates.

III. FACTS

Respondent's answer also asserts a number of facts which briefly require correction:

1. Respondent begins her brief by claiming that Mr. Vaile is trying to re-litigate this Court's 2002 decision finding that he kidnapped his children.[8] This is absurd on several levels. Firstly, Appellant's stated purpose together with every legal argument presented by Appellant advocates the lower court should ***follow*** this Court's 2002 decision, despite the fact that it was not

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[6] *Answer,* 2.

[7] Titled *"Motion to Reduce Arrears in Child Support to Judgment, to Establish a Sum Certain Due Each Month in Child Support, and for Attorney's Fees and Costs,"* signed November 9, 2007.

[8] *Answer,* 1.

entirely favorable to Mr. Vaile.[9]

Secondly, this Court never found that Mr. Vaile had *kidnapped* his children. Obviously this appellate Court was not the finder of facts in the case. Even if it had been it never made that finding (or holding). Only the dissent even used the words "kidnapping"[10] or "abduction." In most states, quoting the dissent of a case as the *finding* of the Court is immediately sanctionable. Respondent's statement in this regard was an inflammatory and intentional misrepresentation.

2. In an effort to make Mr. Vaile out as litigious[11] (a bad guy), Respondent's counsel claims that "the Ninth Circuit Court of Appeals has outright forbidden him from filing any more papers on these issues."[12] In actuality, the Ninth Circuit held when it issued its final decision that, "No further filings will be accepted in this closed case." If this was an "outright" prohibition, it applied equally to both parties. Respondent's claim in this regard is again, simply false.
3. Respondent claims in the recitation of facts that no matters remain pending before the district court. In actuality, the parties had a hearing before the lower court on April 29, 2009 in response to another continuing request by Respondent's counsel for additional attorney's fees. At the time of the filing of Respondent's answer, that matter was pending before the lower court, which issued an order denying Respondent's request on June 25, 2009.

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[9] The fact that Mr. Vaile would argue in favor of a decision that was unfavorable to him shows respect for the court system and the rule of law, not an abuse of it.

[10] Under no state law were Mr. Vaile's action in following the order of a family court to pick-up and return one's children to the country of their origin, in accordance with the agreement between the parties, and sanctioned by the lower court after the return, considered kidnapping, even when that order is later overturned by a higher court. However, Respondent Porsboll's actions in retaining children in a foreign jurisdiction after purporting to take them on a temporary visit, in contravention of the parties agreement, and in defiance of an order by the lower court, is considered kidnapping in every US jurisdiction.

[11] Taking precautions to ensure that this Court will have an opportunity to hear Mr. Vaile's appeal is not vexatious, especially when his arguments are precisely what this Court previously held.

[12] *Answer,* 1.

Respondent's statement claiming that there are no pending issues is, again, false.

Despite a string of misrepresentations and name-calling, Respondent's answer does establish that both parties agree to the most relevant facts – that Appellant Vaile filed the notices of appeal he claimed to file in his petition. The only fact which Respondent appears to question[13] is whether Appellant filed the November 1, 2009 *Amended Notice of Appeal* he claims to have e-filed, served on opposing counsel, and attached to his petition. Respondent presents no inkling of evidence to disprove the claim, and supports no reason to disbelieve Mr. Vaile's proof. In fact, Respondent acknowledges receiving service of this filing.[14] However, in the event that the signature with which Appellant signed his petition, or the record of the e-filing attached to the petition as Exhibit E, is not sufficient to support his claim, Mr. Vaile has attached hereto as Exhibit A, an affidavit reiterating the truth of these facts. In the event that there is any reason to question the claims of the petition, the e-filing record, or the affidavit, Appellant requests limited discovery to depose the e-filing clerk identified in the e-filing record to verify its validity.

In addition to the fact that Appellant filed a notice of appeal on November 3, 2009, the second of the two key facts necessary to grant the petition is that Appellant Vaile timely filed a motion[15] under Rule 59 in response to the March 20, 2009 order. Respondent does not dispute this fact, and included the motion in her answer as Exhibit J.

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[13] *Answer,* 6 fn 12.

[14] *Id.*

[15] *Motion for Reconsideration and to Amend Order or Alternatively, for a New Hearing and Request to Enter Objections and Motion to Stay Enforcement of the March 3, 2009 Order,* filed March 31, 2009.

IV. ARGUMENT

A. APPELLANT'S PETITION FOR EN BANC RECONSIDERATION WAS TIMELY UNDER NRAP 40A BECAUSE IT WAS SENT BY THE DUE DATE

Respondent observes that NRAP 40A(b) allows an appellant to petition for *en banc* reconsideration within a 10-day period following written entry of the decision. Respondent omits the relevant language from 40A(h) which establishes the mailbox rule with regard to a petition under this rule:

> (h) **Untimely Petitions; Unrequested Answer or Reply**. A petition for reconsideration is timely if ***mailed or sent*** by commercial carrier to the clerk within the time fixed for filing. The clerk shall not receive or file an untimely petition, but shall return the petition unfiled. The clerk shall return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.
> (emphasis added).

Since Mr. Vaile lives in California, outside the jurisdiction of the Court, the time within which he will receive an order from the Court is longer than for Nevada litigants.[16] As such, he mailed or sent his response via commercial carrier within the 10 day period allowed. If this had not been the case, this Court's clerk would not have filed the petition as instructed in Rule 40A(h). Appellant's petition was indeed timely filed.

B. EN BANC REHEARING SHOULD BE ORDERED TO ENSURE UNIFORMITY IN THIS COURT'S PREVIOUS JURISDICTIONAL DECISIONS IN THIS CASE

Respondent claims inexplicably that the panel's decision is not contrary to any prior published opinions.[17] Respondent appears to overlook that the panel

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[16] Even if Mr. Vaile had (he did not) mailed the petition outside the time period specified, the fact that he lives outside the jurisdiction where mailings will take longer to arrive, would counsel some latitude. Without Rule 40A(h), the mailing of the order from the Court, production of the petition, and mailing back to the Court, would all have to happen in the time period.

[17] *Answer*, 9.

decision directly conflicts with the jurisdictional holdings in this Court's *published 2002 opinion* ***in this very case.***[18] As such, rehearing is necessary to ensure uniformity.

Additionally, Respondent claims that no new evidence has been presented which supports rehearing. However, the facts (supported by evidence) that 1) Mr. Vaile did indeed file an appropriate notice of appeal on November 3, 2009;[19] 2) that the e-filing clerk received the notice through the e-filing system as shown by the e-filing record attached to the petition, and 3) the affidavit attached hereto as Exhibit A, are clearly new and relevant evidence that support rehearing.

Rehearing is necessary in order for this Court to ensure the uniformity and authority of its orders and to effect compliance from the lower court.

C. REHEARING IS NECESSARY IN ORDER TO ENSURE UNIFORM APPLICATION OF THE NEVADA APPELLATE RULES

By presenting no argument to rebut Appellant's assertion that NRAP 4(a)(4) extended the time to file a notice of appeal to 30 days from the entry of an order disposing of the last motion made under Rule 59, she appears to have waived this issue. In fact, Respondent admitted that even after the August 15, 2008 order, the issues raised by Appellant in his March 31, 2008 motion under Rule 59 were only "partially resolved."[20] Since the next order chronologically issued by the lower court was on October 9, 2009, that would have been the first opportunity, under Respondent's own theory, that the court could have resolved all issues brought up by "the last such remaining motion" indicated in NRAP 4(a)(5). Appellant's

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[18] Respondent's quote from an off-topic point, out of context, with some dicta attached cannot override the clear holdings on the matter of jurisdiction made by this Court in its 2002 decision. Since Mr. Vaile fully discredited this misquote in the response to the motion to consolidate these cases on appeal, the arguments are not repeated here.

[19] Supported by the evidence of Appellant's submission of the notice, Respondent's admission that her counsel received the notice, and the affidavit attached hereto.

[20] *Answer*, 5.

notice of appeal of the March 20 order under NRAP 4 would not have been due until 30 days after notice of entry of the October 9, 2009 order. As such, even by Respondent's reckoning, the panel's decision that Appellant's notice of appeal of the March 20, 2008 order was untimely, was mistaken. In order to ensure uniform application of NRAP 4, rehearing is necessary.

D. Other Substantial Precedential, Constitutional, and Public Policy Issues Justify the Petition

In a further show of waiver, Respondent's Answer to the petition provides no argument at all to dispute Appellant's assertion that substantial precedential and public policy issues also exist in 1) denying an appellant relief because of a lower court clerk's error; 2) rejecting the appeal of all orders if one order is unappealable; and 3) asserting jurisdiction when it properly lies elsewhere. These issues, in addition to those argued above, are of clear importance for the judicial system of the State.

V. Conclusion

For the foregoing reasons, Appellant respectfully requests that the Court rehear the dismissal of this appeal *en banc* because of the very substantial public policy issues involved, and to ensure uniformity with the previous judgments of this Court.

Respectfully submitted this 2nd day of July, 2009.

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Exhibit A

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AFFIDAVIT IN SUPPORT OF PETITION FOR EN BANC RECONSIDERATION

I, R. Scotlund Vaile being first duly sworn, depose and say that I am the Appellant in Supreme Court Case Number 52593, and Plaintiff in District Court Case Number 98 D230385. I have first-hand knowledge of the facts presented below.

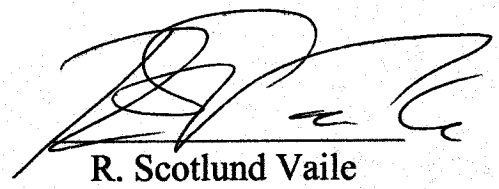
I state that:

1. I produced and caused to be filed on March 31, 2008, a *Motion for Reconsideration and to Amend Order or Alternatively, for a New Hearing and Request to Enter Objections, and Motion to Stay Enforcement of the March 3, 2008 Order,* wherein I stated that the Motion was made under NRCP Rule 59. It is my belief that all issues raised in this motion were not

decided by the lower court until the lower court issued its October 9, 2008 order.

2. I produced an *Amended Notice of Appeal* on November 1, 2008 and e-filed this document into the Clark County District Court Wiznet E-file & Serve electronic filing system on November 3, 2008. I served this document on Respondent's counsel on the same day.
3. On or about March 14, 2009, I downloaded from the Wiznet electronic filing system the e-filing record (queue) for my account. I removed superfluous or private columns from the record, but I did not add or alter any content. I presented the information as Exhibit E attached to my *Petition for En Banc Reconsideration* dated March 15, 2009. The Exhibit is an accurate record of the filing and the action taken by the clerk in response to the filing.
4. All filings made by me to this Court with respect to all pending appeals, and all statements contained in these filings, are to the best of my knowledge, true and correct.
5. FURTHER AFFIANT SAYETH NOT:

With the understanding that a false statement in this affidavit will subject me to penalties for perjury, I swear that the statements presented herein are true.



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State of California, County of Sonoma
Subscribed and sworn to (or affirmed) before me on this 1ST day of JULY, 2009, by R. SCOTLUND VAILE proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Michele Wetch
Signature