IN THE SUPREME COURT OF THE STATE OF NEVADA

RHONDA HELENE MONA AND MICHAEL J. MONA, JR.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JOE HARDY, DISTRICT JUDGE,

Respondents,

and

FAR WEST INDUSTRIES,

Real Party in Interest.

Case No.: _____

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Petitioner Rhonda Helene Mona ("Rhonda") is an individual.

2. Petitioner Michael J. Mona, Jr. ("Michael") is an individual.

3. Rhonda has been represented in divorce proceedings in the District Court by Kainen Law Group, LLC, and she is represented in this Court by Lemons, Grundy & Eisenberg.

4. Michael has been represented in the District Court by Marquis Aurbach Coffing and John W. Muije & Associates, and he is represented in this Court by Marquis Aurbach Coffing.

DATED: July 17, 2015

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ROUTING STATEMENT

According to NRAP 17(a)(1), this case is presumptively retained by the Supreme Court because it is a proceeding invoking the Supreme Court's original jurisdiction. The issues presented in this writ petition do not fall into the exception outlined in NRAP 17(b)(8) because the issues do not involve a challenge to pretrial discovery orders or orders resolving motions in limine.

DATED: July 17, 2015

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Petitioners, Rhonda Helene Mona ("Rhonda") and Michael J. Mona, Jr. ("Mike") (collectively "the Monas"), hereby petition this Court for a writ of mandamus or prohibition to vacate the District Court's July 15, 2015 post-judgment sanctions order that subjects Rhonda's separate bank accounts to execution and orders the release of all funds in the accounts if this Court does not intervene by July 20, 2015, which is the last day of the temporary stay entered by the District Court. 2 Petitioners' Appendix ("App.") 348-58.

I

INTRODUCTION

This writ petition presents important issues in the context of execution proceedings following the domestication of a foreign judgment in Nevada. Real party in interest, Far West Industries ("Far West") obtained a judgment in California against Mike and other defendants, not including Rhonda, for allegations relating to fraud. 1 App. 173-93. After the foreign judgment was domesticated in Nevada, Far West did not make any effort to "add" Rhonda to the judgment. Rhonda was deposed in her capacity as the trustee of the Mona Family Trust, wherein Far West learned of some of Rhonda's personal assets. 1 App. 163-72. After this deposition, Far West filed an ex parte motion on order shortening time to subject Rhonda's personal assets to the judgment against Mike. 1 App. 127-43. Without notice, the District Court froze several of Rhonda's personal bank accounts pending a show cause hearing. 2 App. 194-96.

In the show cause hearing, the District Court refused to allow an evidentiary hearing. Yet, the District Court's order sanctions the Monas and considers Far West's arguments of fraudulent transfer (which were never alleged in a complaint) as "established." 2 App. 357. The District Court's order also deems as "established" Far West's ability to execute upon Rhonda's personal bank accounts, even though Far West has not issued execution documents against Rhonda or given her the chance to claim exemptions. *Id.* Despite a post-marital property settlement agreement between the Monas defining Rhonda's separate property, the District Court simply discarded the agreement and considered it as a fraudulent transfer during this same show cause hearing. *Id.*; 2 App. 238-50. The Monas now seek relief from this Court to vacate the District Court's sanctions order. 2 App. 348-58. The show cause hearing was held on Thursday, July 9, 2015. 2 App. 302-47. The written order from the show cause hearing was filed on Wednesday, July 15, 2015 (2 App. 348-58) and allows a temporary stay of the order through Monday, July 20, 2015. 2 App. 358.

The Monas have also concurrently filed an emergency motion to stay the entire District Court proceedings because Far West is continuing to take measures to attach Rhonda's separate property and seek relief that is beyond the District Court's jurisdiction.

II

ISSUES PRESENTED AND OVERVIEW OF RELIEF REQUESTED

(1) Lack of personal jurisdiction over Rhonda. Rhonda was not a party to the foreign judgment (1 App. 1-7) originally obtained in California by Far West, nor was Rhonda ever made a party to the post-judgment proceedings in the District Court. As a fundamental right of due process, Far West was required to personally serve Rhonda before acquiring jurisdiction over her. *See, e.g., Browning v. Dixon*, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (explaining that service of process is required to satisfy due process). The same holds true for discovery proceedings involving non-parties, which requires personal service of a subpoena according to NRCP 45. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("Nevada Rules of Civil Procedure 45(c) requires that a subpoena be personally served."). Due to the lack of personal service upon Rhonda, this Court should vacate the District Court's sanctions order. 2 App. 348-58.

(2) A separate action was needed against Rhonda. As a matter of law, Far West was not permitted to add new parties, such as Rhonda, in post-judgment proceedings, even if she had been personally served. In *Callie v. Bowling*, 123 Nev. 181, 186, 160 P.3d 878, 881 (2007), this Court explained that new parties cannot be added to a judgment in post-judgment proceedings based upon an alter ego theory because the new party is completely deprived of formal notice, discovery, fact finding, and an opportunity to be heard before the claim is resolved. The Court's holding in *Callie* specifically overruled the

former practice of simply adding new parties to a judgment in post-judgment proceedings by amendment. *See McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 317 P.2d 957 (1957). Contrary to *Callie*, the District Court relied upon *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) for the notion that a judgment against Mike could be levied against Rhonda's separate property without due process. Since *Randono* violates Rhonda's due process rights, it should be overruled on the same basis that *Callie* overruled *McCleary Cattle*. Further, the District Court relied, in part, upon NRS 21.330 to sanction Rhonda as a non-party. Yet, this statute expressly requires a judgment creditor, such as Far West, to "institute an action" against a non-party, such as Rhonda, instead of attaching her separate property and entering sanctions. Since Far West did not institute a separate action against Rhonda, the Court should, alternatively, vacate the District Court's sanctions award on this basis.

(3) Further violations of the Monas' procedural due process rights. Everything about the District Court sanctions proceeding demonstrates that it should have never even taken place. Far West was required according to NRCP 37(a)(2)(A) to "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Similarly, EDCR 2.34(d) mandated that Far West was to provide an affidavit of counsel that this meet and confer had taken place or the "[d]iscovery motion[] may not be filed . . . ." Yet, Far West's motion under NRCP 37 was made ex parte and without any

certification. 1 App. 127-43. No explanation was given why Far West's motion was made ex parte.

Although the District Court imposed "ultimate" sanctions upon the Monas, the District Court refused to hold an evidentiary hearing. According to well established Nevada law, this was reversible error. *See, e.g., Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992). Although the District Court's sanctions award is premised on NRCP 37, it did not even consider the factors outlined in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). And, Far West did not even attempt to comply with any of the execution protocols in NRS Chapter 21 and Chapter 31.

The District Court's sanctions order also makes a binding determination on fraudulent transfer against the Monas according to NRS Chapter 112 (Uniform Fraudulent Transfer Act) ("UFTA"), again without any separate complaint against the Monas, no evidentiary hearing, and no opportunity to conduct additional discovery. The District Court's flagrant violation of the Monas' due process rights provides a third basis to vacate the sanctions order.

(4) The post-marital property settlement agreement protects Rhonda's separate property. According to *Jewett v. Patt*, 95 Nev. 246, 247-48, 591 P.2d 1151, 1152 (1979), Rhonda's marriage to Mike does not make her automatically liable for the foreign judgment against him, especially since the judgment was based upon fraud. 1 App. 173-93. Other courts citing *Jewett* have held that "a spouse is not personally liable for his or her spouse's

intentional torts committed during marriage merely by virtue of being married." *Henry v. Rizzolo*, 2012 WL 1376967, at *2 (D. Nev. 2012).

While the District Court claimed to have construed NRS 123.220 defining community property, it avoided the stated exception in subsection 1 of the statute for "[a]n agreement in writing between the spouses." Far West itself presented a copy of the Monas' post-marital property settlement agreement, defining Rhonda's separate property. 1 App. 144-56. Yet, the District Court concluded that the entire agreement was a fraudulent transfer without an evidentiary hearing and without hearing testimony from the Monas. Since there were factual issues regarding the property agreement, the District Court was required to hold an evidentiary hearing and trace the source of the assets before summarily concluding that the Monas committed a fraudulent transfer. *See Hardy v. U.S.*, 918 F.Supp. 312, 317 (D. Nev. 1996) ("The question whether the property belongs solely to one spouse or to the marital community depends on the source of the funds with which it was acquired."). The District Court's summary treatment of this issue similarly warrants the requested extraordinary relief of vacating the District Court's sanctions order.

III

STANDARDS OF REVIEW

A. Standards for reviewing questions of law.

This Court reviews questions of law de novo. *See Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory interpretation is a question of law which this Court reviews de novo. *See id.*

Although this Court generally reviews petitions for extraordinary relief with an abuse of discretion standard, this Court will still apply a de novo standard of review to questions of law, such as statutory interpretation, in writ petition proceedings. *See Int'l Game Tech., Inc. v. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (citation omitted).

B. Standards for reviewing discovery sanctions orders.

This Court reviews a sanctions order for an abuse of discretion. *See Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 390, 168 P.3d 87, 93 (2007) (citation omitted). However, this Court applies a somewhat heightened standard of review when the sanction is case concluding or an ultimate sanction. *Foster v. Dingwall*, 227 P.3d 1042, 1048 (Nev. 2010) (citation omitted).

C. Standards for reviewing petitions for writs of mandamus and prohibition.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse of discretion. *See Beazer Homes, Nev., Inc. v. Dist. Ct.*, 120 Nev. 575, 579, 97 P.3d 1132, 1134-35 (2004); *see also* NRS 34.160. "An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

A writ of prohibition is the appropriate remedy for a lower court's improper exercise of jurisdiction. *See* NRS 34.320; *see also Smith v. Dist. Ct.*, 107 Nev. 674, 818 P.2d 849 (1991). A writ of prohibition may issue to arrest

the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. *See id.* "Jurisdictional rules go to the very power" of a court's ability to act. *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (citations omitted).

Although an individual can appeal a final judgment, where there is no legal remedy, extraordinary relief is justified. *See Zhang v. Dist. Ct.*, 120 Nev. 1037, 1039, 103 P.3d 20, 22 (2004), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d. 670 (2008). Petitions for extraordinary writs are addressed to the sound discretion of the Court and may only issue where there is no "plain, speedy, and adequate remedy" at law. *See* NRS 34.330; *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). However, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted." *See Jeep Corp. v. Dist. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing *Shelton v. Dist. Ct.*, 64 Nev. 487, 185 P.2d 320 (1947)).

This Court will exercise its discretion to consider writ petitions, despite the existence of an otherwise adequate legal remedy, when an important issue of law needs clarification, and this Court's review would serve considerations of public policy, sound judicial economy, and administration. *See Dayside Inc. v. Dist. Ct.*, 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other*

grounds by Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. 725, 192 P.3d 243 (2008).

In this case, a writ petition is the proper vehicle for Rhonda to seek extraordinary relief from this Court because she was not a party to the District Court litigation and cannot appeal or exercise any other remedy available at law. *See Emerson v. Dist. Ct.*, 263 P.3d 224, 227 (Nev. 2011). Although Mike is a party to the District Court litigation, the sanctions order is not appealable. 2 App. 348-58. *Cf. Peck v. Crouser*, 295 P.3d 586, 587-88 (Nev. 2013) (explaining test for orders that grow out of the final judgment to determine appealability). Mike also has a beneficial interest in maintaining Rhonda's separate property as separate, as outlined in the Monas' post-marital property settlement agreement, particularly because the Monas are currently going through a divorce. *See Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004) (expressing that parties have standing when they have a "legally recognized interest" or "beneficial interest" in the outcome).

IV

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. The foreign judgment against Mike.

In April 2012, Far West obtained a judgment in Riverside, California against Mike, as one of four named defendants. 1 App. 1-7. The underlying findings of fact and conclusions of law recite that in a real estate development transaction, Far West prevailed on claims against Mike for: (1) intentional

misrepresentation; (2) negligent misrepresentation; (3) failure to disclose; and (4) conspiracy to commit fraud. 1 App. 190-92. Although the Mona Family Trust was not a named defendant in the California litigation, the presiding court made an alter ego finding to extend the judgment against it. 1 App. 192. No mention is made in the California order of Rhonda.

B. Mike's initial judgment debtor examination and production of documents.

Soon after Far West domesticated its judgment in Nevada, it began seeking Mike's judgment debtor examination on an ex parte basis, without confirming his availability. In response to Far West's document requests, Mike produced approximately 30,000 documents in 20 boxes that were delivered to Far West's counsel for physical examination. 1 App. 18. Through the document production and scheduling of Mike's debtor examination, the District Court minutes in December 2013 reflect that "the parties have conducted the judgment debtor's exam and everything is going along satisfactorily" with a status check to be set in six months. 1 App. 25.

C. A year and a half later, Far West again seeks ex parte judgment debtor examinations.

After a lull of nearly a year and a half, Far West then sought ex parte dates for judgment debtor examinations for Mike in his individual and trustee capacities and Rhonda in her capacity as trustee of the Mona Family Trust. 1 App. 26-29. Far West's ex parte application also contained a variety of documents that it wanted produced. *Id.* The District Court's order granted the requested relief in full and set the dates for the debtor examinations. 1 App. 70-

74. Notably, because Rhonda, in her capacity as trustee of the Mona Family Trust, was not represented, Far West first attempted to serve her personally and then later requested permission to serve her by certified or registered mail, as permitted by NRS 14.090, because Far West's process server was unable to enter the guard gated community. 1 App. 62-69. By the time that Far West eventually mailed the order setting Rhonda's judgment debtor examination, in her trustee capacity, there were only about two weeks until the examination. 1 App. 75-90. Rhonda, in her trustee capacity, provided testimony at a judgment debtor examination. 1 App. 163-72.

D. Mike's successful protective order against Far West.

Since Far West had a pattern of setting dates on an ex parte basis, Mike moved the District Court for a protective order for his second judgment debtor examination and given the fact that he already had his examination taken. 1 App. 91-99. Far West chose not to accommodate Mike's availability, which was documented in the declaration of Mike's counsel. 1 App. 93-94. After court intervention and a hearing, Far West had no choice but to reschedule Mike's second judgment debtor examination and the deadline for a production of additional documents. 1 App. 122-26.

E. Far West's ex parte motion to show cause for sanctions and the District Court hearing.

Without contacting Mike's counsel or attempting to contact Rhonda, Far West filed an ex parte motion for an order to show cause why the accounts of Rhonda Mona should not be subject to execution and why the court should not find the Monas in contempt. 1 App. 127-43. Noticeably missing from Far

West's ex parte motion is any attempt to meet and confer or why the motion was filed on an ex parte basis. *Id.* Although the ex parte motion sought relief against Rhonda personally, Far West did not make any effort to personally serve her with the motion. 2 App. 197-99. In addition to itemizing the issues at controversy in the upcoming hearing, the District Court's order granting the ex parte motion also placed a freeze on Rhonda's separate property. 2 App. 194-96. Mike filed a written opposition and objected to the entire proceeding. 2 App. 206-52.

In the hearing before the District Court, Rhonda's divorce attorneys appeared, but the District Court would not allow them to argue. 2 App. 303. Although the District Court offered to continue the hearing, it was inconsequential since Rhonda's bank accounts had already been frozen. 2 App. 317. Mike's counsel also pointed out that the orders for which Far West was seeking enforcement were ambiguous because they named Rhonda in her capacity as trustee, but Far West asked for relief against her personally. 2 App. 318. Mike's counsel, speaking in favor of Rhonda, stated:

> So, Your Honor, fundamental due process issue here relates to Rhonda Mona. She's not a party. And any characterization of this Court of what her assets may or may not be subject to, must have her—she must have the opportunity to be heard, she must have the opportunity to present evidence.

2 App. 320. Despite the Monas' arguments on the procedural and substantive points against sanctions, the District Court ordered the following (2 App. 348-58):

(1) that Mike violated previous court orders for not producing the post-marital property settlement agreement, even though it was attached to Far West's ex parte motion. 1 App. 144-56; 2 App. 351.

(2) that Mike "lied" in his deposition about what he had done with $3,406,601.10 that was the subject of the property agreement, even though the District Court would not allow Mike to clarify his statements made in a previous judgment debtor examination. 2 App. 351.

(3) that all the funds that are the subject of the Monas' property settlement agreement are community property, even though the District Court did not conduct a full tracing of the funds or hold an evidentiary hearing. 2 App. 352.

(4) the order also inaccurately reflects that a judgment debtor examination had been set for Rhonda, in her personal capacity, and that she violated court orders by failing to produce documents. 2 App. 352-53.

(5) that the Monas' failure to produce documents and the property settlement agreement constitute a sanction under NRCP 37 and a fraudulent transfer under NRS 112.180. 2 App. 355-56.

Without an evidentiary hearing, the District Court concluded that "the facts entitling Plaintiff to execute upon the bank accounts in the name of Mrs. Mona are deemed established." 2 App. 357. The District Court also prohibited the Monas from claiming any exemptions from execution relating to Rhonda's separate accounts and any funds that are subject to the property settlement

agreement. *Id.* With the exception of production of documents, the District Court stayed the effect of the order until July 20, 2015.

V

LEGAL ARGUMENT

A. The District Court never acquired personal jurisdiction over Rhonda.

1. As a non-party, Rhonda should have been personally served to be subject to any discovery order.

Rhonda was not a party to the foreign judgment (1 App. 1-7) originally obtained in California by Far West, nor was Rhonda ever made a party to the post-judgment proceedings in the District Court. As a fundamental right of due process, Far West was required to personally serve Rhonda before acquiring jurisdiction over her. *See, e.g., Browning v. Dixon,* 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (explaining that service of process is required to satisfy due process). The same holds true for discovery proceedings involving non-parties, which requires personal service of a subpoena according to NRCP 45. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("Nevada Rules of Civil Procedure 45(c) requires that a subpoena be personally served."). Far West's failure to serve Rhonda in her personal capacity deprived the District Court of personal jurisdiction over her. *See Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep't of Treasury*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) ("In general, a state-court litigant seeking to compel a non-party to produce documents must use the state court's subpoena power or, if the non-party is

beyond the jurisdiction of such court, use whatever procedures another state may provide."). Nevada statutes similarly conclude that a witness has a duty to appear and testify only when "duly served with a subpoena . . . ." NRS 50.165(1); *see also* NRS 50.255(6) (excusing an obligation to appear unless the required fees are paid with the subpoena). Due to the lack of personal service upon Rhonda, this Court should vacate the District Court's sanctions order. 2 App. 348-58.

2. Far West clearly understood the requirement for personal service of discovery to other non-parties.

When Far West sought Rhonda's judgment debtor examination in her capacity as trustee, it went to great lengths to personally serve her in this representative capacity. 1 App. 62-90. Yet, when Far West moved ex parte to freeze accounts belonging to Rhonda personally, Far West made no effort to send her a subpoena or otherwise serve her personally. According to Nevada law, an individual serving in a representative capacity as a trustee of a trust is not the same as an individual. *See Salman v. Newell*, 110 Nev. 1333, 1335, 885 P.2d 607, 608 (1994). The fact that Far West acknowledged the requirement to personally serve Rhonda in her representative capacity, yet completely failed to serve her in her personal capacity, operates as an estoppel. *See, e.g., NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) ("Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by intentional wrongdoing or an attempt to obtain an unfair advantage.") (citation and internal quotation marks omitted).

3. NRCP 37 did not authorize the sanctions awarded by the District Court.

When interpreting the Nevada Rules of Civil Procedure, this Court applies the same rules of statutory construction. *See Marquis & Aurbach v. Dist. Ct.*, 122 Nev. 1147, 1157, 146 P.3d 1130, 1137 (2006). The plain language of NRCP 37(b) distinguishes sanctions available against a non-party "deponent" and a "party." The only sanctions available against a non-party are that the non-party "may be considered a contempt of court." Yet, the District Court already denied Far West any contempt relief because the Monas' objected to Judge Hardy, the presiding District Court Judge, from holding a contempt hearing, which the District Court accepted. 2 App. 354-55. Thus, it was legally impossible for the District Court to impose sanctions against Rhonda as a non-party in her personal capacity, particularly since she was never subject to any court order. Therefore, due to the District Court's lack of personal jurisdiction over Rhonda, the entire sanctions award should be vacated on this basis.

B. A separate action was required before imposing liability against Rhonda.

1. As a matter of law, Far West was not permitted to add new parties, such as Rhonda, in post-judgment proceedings, even if she had been personally served.

As a matter of law, Far West was not permitted to add new parties, such as Rhonda, in post-judgment proceedings, even if she had been personally served. In *Callie v. Bowling*, 123 Nev. 181, 186, 160 P.3d 878, 881 (2007), this Court explained that new parties cannot be added to a judgment in post-judgment proceedings based upon an alter ego theory because the new party is

completely deprived of formal notice, discovery, fact finding, and an opportunity to be heard before the claim is resolved. The Court's holding in *Callie* specifically overruled the former practice of simply adding new parties to a judgment in post-judgment proceedings by amendment. *See McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 317 P.2d 957 (1957).

In the California litigation, Far West took steps to add other entities to the judgment as Mike's alleged alter egos. 1 App. 189. Yet, Far West did not attempt to add Rhonda to its judgment while the case was still in California. According to *Callie*, "[a] party who wishes to assert an alter ego claim must do so in an independent action against the alleged alter ego with the requisite notice, service of process, and other attributes of due process." *Id.* at 881. This case is even worse than the facts in *Callie* because at least the judgment creditor there moved to amend the complaint to add the new party. In the instant case, Far West simply began attaching Rhonda's separate bank accounts on an ex parte basis. To preserve Rhonda's due process, as explicitly held by the *Callie* court, this Court should vacate the District Court's sanctions order because Far West had to initiate a new action to pursue any claims against Rhonda, personally, in the post-judgment proceedings.

2. Since *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) violates Rhonda's procedural due process rights, it should be overruled on this basis.

Contrary to *Callie*, the District Court relied upon *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) for the notion that a judgment against Mike could be levied against Rhonda's separate property without due process. Since

Randono violates Rhonda's due process rights, it should be overruled on the same basis that *Callie* overruled *McCleary Cattle*. According to the District Court's interpretation of *Randono*, a community debt can be levied against a non-party spouse when the assets are also community property, without any prior notice. 2 App. 352. Indeed, many of the authorities that Far West relied upon, even from other jurisdictions, lead back to *Randono*. *Id.*

However, the fundamental flaw in the reasoning of *Randono* is that its stated holding does not find support within the enumerated statutes. For example, NRS 123.220 defines community property and its exceptions, but it does not allow an alleged community debt to be levied upon a spouse that is not a party to the underlying lawsuit. Many other statutes listed in *Randono* are either inapposite or no longer exist. *Id.*, 86 Nev. at 132, 466 P.2d at 223-24. When case law is not supported by the plain language of the governing statutes, the case law is no longer valid. *See, e.g., Egan v. Chambers*, 299 P.3d 364, 365 (Nev. 2013) ("While we acknowledge the important role that *stare decisis* plays in Nevada's jurisprudence, we recognize that we broadened the scope of NRS 41A.071, expanding the reach of the statute beyond its precise words."). Since the holding of *Randono* applied to this case does not accurately reflect the plain language of the referenced statutes, it should be overruled. Further, *Randono* should be overruled on the basis that its principles deprived Rhonda of her due process rights in a manner that was specifically prohibited by *Callie*.

3. NRS 21.330 also requires "an action" against a third party such as Rhonda.

The District Court relied, in part, upon NRS 21.330 to sanction Rhonda as a non-party. Yet, this statute expressly requires a judgment creditor, such as Far West, to "institute an action" against a non-party, such as Rhonda, instead of attaching her separate property and entering sanctions. Moreover, the District Court did more than require Rhonda to hold her separate property while a separate action was being instituted by Far West against her. The District Court bypassed the entire process outlined by NRS 21.330 and instead ordered the funds in her account to be applied toward Far West's judgment. 2 App. 356. The language in NRS 21.320 also does not support Far West's position because it qualifies a court's ability to release property with the phrase "not exempt from execution." Yet, Far West has not issued any writs of execution against Rhonda for the funds in her bank accounts. And, Rhonda has not had the opportunity to claim exemptions. Thus, the District Court abused its discretion by summarily ordering the disposal of Rhonda's separate property when Far West did not institute a separate action or commence execution proceedings. On this alternative basis, the Court should vacate the District Court's sanctions award.

C. The "ultimate" sanctions awarded against the Monas further violated their procedural due process rights.

1. Far West never conferred with the Monas before seeking ex parte relief from the District Court.

Everything about the District Court sanctions proceeding demonstrates that it should have never even taken place. Far West was required according to

NRCP 37(a)(2)(A) to "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Similarly, EDCR 2.34(d) mandated that Far West was to provide an affidavit of counsel that this meet and confer had taken place or the "[d]iscovery motion[] may not be filed . . . ." Yet, Far West's motion under NRCP 37 was made ex parte and without any certification. 1 App. 127-43. No explanation was given why Far West's motion was made ex parte. What good are these procedural rules designed to allow counsel to resolve their discovery differences if Far West will continue to run to the District Court without conferring every time it perceives a violation? After producing approximately 30,000 documents to Far West's satisfaction (1 App. 25), its counsel should have conferred according to these mandatory rules before running to the Court ex parte to complain about the omitted property settlement agreement that it already had. 1 App. 144-56.

Additionally, on what possible basis could Far West proceed in the District Court ex parte? It is hard to say because Far West did not identify any basis in its ex parte motion. 1 App. 127-43. For example, NRCP 65(b) requires an affidavit explaining why it would be impractical to give notice and to articulate the immediate and irreparable harm to seek a temporary restraining order without notice. No such affidavit was prepared in the instant case. Thus, Far West's act of failing to confer with counsel and then seeking ex parte relief to freeze Rhonda's account was nothing more than an abuse of the court process that violated Rhonda's due process rights.

2. An evidentiary hearing was required before the District Court could impose "ultimate" sanctions.

Despite counsel's protests for an evidentiary hearing, the District Court imposed "ultimate" sanctions without allowing an evidentiary hearing. 2 App. 296, 326. Instead, the District Court ordered the separate property in Rhonda's bank accounts to be released to satisfy Far West's judgment against Mike. 2 App. 356. According to well established Nevada law, this was reversible error. *See, e.g., Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992). Although the District Court's sanctions award is premised on NRCP 37, it did not even consider the factors outlined in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

In *Fluor Illinois*, this Court explained that when a district court's determination that parties failed to obey an order involved factual questions as to the meaning of the order, an evidentiary hearing was required. 108 Nev. at 644, 837 P.2d at 1359. When a district court makes a liability determination as a discovery sanction, as in the instant case (2 App. 357), an evidentiary hearing is also mandatory. *See Foster v. Dingwall*, 227 P.3d 1042, 1047 (Nev. 2010); *see also Fluor Illinois*, 108 Nev. at 645, 837 P.2d at 1359. Moreover, as reported in *Fluor Illinois* and in numerous authorities, the weighing of the *Young* factors is mandatory before an award of sanctions can be made under NRCP 37. *Id.* Yet, neither Far West's ex parte motion, the District Court's order, nor the hearing transcript even mention *Young*. Thus, the District Court's failure to hold an evidentiary hearing or even consider the mandatory *Young*

factors was an abuse of discretion that warrants this Court vacating the entire sanctions order.

3. The District Court lacked authority to make findings on a fraudulent transfer without giving the Monas an opportunity to present any defense.

Even though the District Court did not allow an evidentiary hearing, it took the extreme steps of concluding that Mike "lied" (2 App. 351) and that a fraudulent transfer was conclusively established. 2 App. 357. Instead of hearing evidence, the District Court considered Mike's statements made in a judgment debtor examination and Rhonda's statements made in her representative capacity. Yet, as the Nevada Court of Appeals has explained, "In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition." *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. No. 34, at *23-24 (Jun. 11, 2015) (citing *Miller v. A.H. Robins Co.*, 766 F.2d 1102, 1104 (7th Cir. 1985) ("An inconsistent affidavit may preclude summary judgment . . . if the affiant was confused at the deposition and the affidavit explains those aspects of the deposition testimony or if the affiant lacked access to material facts and the affidavit sets forth the newly-discovered evidence."); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983) (an inconsistent affidavit may be accepted if it was not a sham but rather was an attempt to explain certain aspects of the confused deposition testimony and therefore was not really inconsistent) (further citations omitted)).

Thus, the only way to resolve the disputed issues was through an evidentiary hearing, not a summary proceeding that lacked due process.

Equally as troubling as the District Court's refusal to provide a defense is the District Court's summary finding of a fraudulent transfer. Instead of holding an evidentiary hearing, the District Court granted Far West ex parte relief and then refused to allow the Monas to present a defense. Other courts construing the right to a trial or hearing involving UFTA claims have also allowed a hearing or a trial. *See, e.g., Workforce Solutions v. Urban Servs. of Am., Inc.*, 977 N.E.2d 267, 275 (Ill. App. 2012) (allowing an evidentiary hearing on a creditor's claim under UFTA). And, the transfer between spouses does not always violate UFTA. *See, e.g., Estes v. Titus*, 751 N.W.2d 493, 497 (Mich. 2008) ("A UFTA action will not reach such property unless both spouses are debtors on the claim that is the subject of the action."). The District Court's flagrant violation of the Monas' due process rights provides a third basis to vacate the sanctions order.

D. The Monas' post-marital property settlement agreement is a stated exception to NRS 123.220 and protects Rhonda's separate property from execution.

1. As a matter of law, Rhonda is not responsible for intentional conduct by her husband.

According to *Jewett v. Patt*, 95 Nev. 246, 247-48, 591 P.2d 1151, 1152 (1979), Rhonda's marriage to Mike does not make her automatically liable for the foreign judgment against him, especially since the judgment was based upon fraud. 1 App. 173-93. Other courts citing *Jewett* have held that "a spouse is not personally liable for his or her spouse's intentional torts committed

during marriage merely by virtue of being married." *Henry v. Rizzolo*, 2012 WL 1376967, at *2 (D. Nev. 2012). Other courts have reached similar results. *See Norwest Fin. v. Lawver*, 109 Nev. 242, 246, 849 P.2d 324, 326 (1993) ("The character of [the] property acquired upon credit during marriage is determined according to the intent of the lender to rely upon the separate property of the purchaser or upon a community asset."); *In re Miller*, 517 B.R. 145, 147 (D. Ariz. 2014) (applying Arizona law and concluding that "community property cannot be reached to satisfy a guarantee of a debt of another unless both spouses sign."); *Curda-Derickson v. Derickson*, 668 N.W.2d 736, 743 (Wis. App. 2003) ("[D]ebts created by the torts of only one spouse are an exception from those debts incurred in the interest of the family."). In fact, a bankruptcy court construing Nevada law has stated that this very issue is unresolved in Nevada law: "The question of whether community property in Nevada is liable for the judgment debt created by the tort of a spouse is one for a Nevada court not this court." *In re Bernardelli*, 12 B.R. 123, 123 (Bankr. D. Nev. 1981).

Moreover, NRS 123.230 specifically limits the ability of a spouse to encumber community property, absent a power of attorney, except in certain circumstances up to half of the community property. Thus, even absent the property settlement agreement, Far West would not have been entitled to recover Rhonda's separate property or her half of the community property. Accordingly, it was error for the District Court to conclude that the fraud judgment against Mike extended to Rhonda's separate property.

2. Nevada law specifically allows written agreements for separate property as an exception to the definition of community property.

While the District Court claimed to have construed NRS 123.220 defining community property, it avoided the stated exception in subsection 1 of the statute for "[a]n agreement in writing between the spouses." Far West itself presented a copy of the Monas' post-marital property settlement agreement, defining Rhonda's separate property. 1 App. 144-56. NRS 123.070 also allows married parties to enter into contracts with each other or other persons, the same as if they were not married. Further, NRS 123.190(1) provides, "When the husband has given written authority to the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property."

Nevada law also clearly allows married persons to transmute separate property to community property and vice versa. *See Verheyden v. Verheyden*, 104 Nev. 342, 757 P.2d 1328 (1988); *see also Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284, 286 (1994) (stating that the transmutation of separate property into community property must be shown by clear and convincing evidence). Thus, the District Court's summary conclusion that Rhonda's separate property was subject to a community debt simply because the debt was acquired during the marriage was a gross misstatement of Nevada law.

3. At a minimum, there were factual issues regarding the nature of Rhonda's separate bank accounts because the District Court failed to trace the funds.

The District Court erroneously concluded that the entire property settlement agreement was a fraudulent transfer without an evidentiary hearing and without hearing testimony from the Monas. Since there were factual issues regarding the property settlement agreement, the District Court was required to hold an evidentiary hearing and trace the source of the assets before summarily concluding that the Monas committed a fraudulent transfer. *See Hardy v. U.S.*, 918 F.Supp. 312, 317 (D. Nev. 1996) ("The question whether the property belongs solely to one spouse or to the marital community depends on the source of the funds with which it was acquired."); *In re Wilson's Estate*, 56 Nev. 353, 53 P.2d 339, 343 (1936) ("The community estate may be vested in either spouse, and the true character of the property is to be determined by the nature of the transaction under which it is acquired without reference to who retains the title.") (citations omitted). The District Court's summary treatment of this issue similarly warrants the requested extraordinary relief of vacating the District Court's sanctions order.

VI

CONCLUSION

This Court should vacate the District Court's sanctions order for a variety of reasons. The District Court lacked personal jurisdiction over Rhonda and was unable to issue any sanctions against her, particularly with regard to her separate property. Far West violated Rhonda's due process rights by trying to

include her in post-judgment proceedings without giving her notice and without filing a separate action. The entire District Court proceeding should not have taken place because Far West did not confer with counsel before seeking ex parte relief for the discovery dispute, the District Court issued an "ultimate" sanction without allowing an evidentiary hearing, and the District Court failed to consider the mandatory *Young* factors before issuing sanctions under NRCP 37. Finally, Rhonda is not liable for the debts arising from her husband's torts, especially in light of the property settlement agreement between the Monas. For any of these reasons, this Court should grant the requested extraordinary relief and vacate the District Court's sanction order.

DATED: July 17, 2015

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VERIFICATION

State of Nevada)
)
County of Washoe)

Robert L. Eisenberg, being first duly sworn, deposes and says:

That he is a member of the law firm of Lemons, Grundy & Eisenberg, attorneys for Petitioner Rhonda Helene Mona in the above-entitled Petition; he has obtained copies of district court papers relating to this case, and he is familiar with the facts and circumstances set forth in the Petition; and that he knows the contents thereof to be true, based on the information he has received, except as to those matters stated on information and belief, and as to those matters, he believes them to be true.

This verification is made pursuant to NRS 15.010.

Robert L. Eisenberg
ROBERT L. EISENBERG

Subscribed and sworn before me
on the following date: July 17, 2015

Christie R. Gellman
Notary Public

CHRISTIE R. GELLMAN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 93-5251-2 - Expires March 14, 2017

VERIFICATION

State of Nevada)
)
County of Clark)

Micah S. Echols, being first duly sworn, deposes and says:

That he is a member of the law firm of Marquis Aurbach Coffing, attorneys for Petitioner Michael J. Mona, Jr. in the above-entitled Petition; he has obtained copies of district court papers relating to this case, and he is familiar with the facts and circumstances set forth in the Petition; and that he knows the contents thereof to be true, based on the information he has received, except as to those matters stated on information and belief, and as to those matters, he believes them to be true.

This verification is made pursuant to NRS 15.010.

MICAH S. ECHOLS

Subscribed and sworn before me
on the following date: 7/17/15

Notary Public

LEAH DELL
Notary Public, State of Nevada
Appointment No. 11-4495-1
My Appt. Expires May 9, 2019

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I certify that I am an employee of Marquis Aurbach Coffing and that on this date I caused to be served at Las Vegas, Nevada, a true copy of the Petition for Writ of Mandamus or Prohibition and Petitioners' Appendix addressed to:

The Honorable Joe Hardy
Eighth Judicial District Court, Dept. 15
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Las Vegas, Nevada 89155
Via Hand Delivery

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Andrea M. Gandara
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Via Email

DATED this 17th day of July, 2015.

Leah Dell, an employee of
Marquis Aurbach Coffing