IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

Case No.: 68434

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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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Petitioners, Rhonda Helene Mona ("Rhonda") and Michael J. Mona, Jr. ("Mike") (collectively "the Monas"), hereby submit this reply in support of their petition for 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. 2 Petitioners' Appendix ("Pet. App.") 348-58.

I

INTRODUCTION

The District Court's order improperly and without personal jurisdiction or due process imposed sanctions, subjecting Rhonda's separate property to execution by Far West. *Id.* Far West has improperly gained full execution rights over Rhonda's separate bank accounts, even though she is a non-party and not a judgment debtor. Yet, Far West has completely avoided the statutory procedures of NRS Chapter 21 and other procedural safeguards owed to Rhonda. Far West's answer filed in this Court discounts any notion of fairness or procedural due process in favor of its own mischaracterization of the events of this case. To reach its erroneous sanctions order, the District Court improperly relied upon community property case law that is outdated and not supported by the plain language of NRS Chapter 123, NRCP Rule 37, or more recent case law from this Court. Under the proper legal framework, Rhonda should not have been sanctioned or subjected to Far West's judgment.

In its answer, Far West argues that the District Court had personal jurisdiction over Rhonda and that the summary sanctions hearing provided due

process. The Monas dispute these assertions on all points. First, the District Court did not have personal jurisdiction over Rhonda, as she was never served in her personal capacity in this action. Second, the District Court and Far West improperly rely upon a holding in *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) to subject Rhonda to the fraud judgment against Mike, which is based upon repealed and overruled law and is not sound in the context of NRS Chapter 123. Third, more recent case law prohibiting the addition of parties to a case post-judgment in *Callie v. Bowling*, 123 Nev. 181, 160 P.3d 878 (2007), is more applicable to this case than *Randono*, which should be overruled. Fourth, the sanctions against the Monas violated their due process rights for at least three reasons: (1) Far West's ex parte motion limited the Monas' ability to dispute facts in issue; (2) meet and confer was required; and (3) an evidentiary hearing was required as the District Court imposed "ultimate" sanctions. Finally, the District Court's order did not analyze the *Young* factors, and a discussion of only some of the factors is legally insufficient, particularly for the ultimate sanctions ordered against the Monas.

II

LEGAL ARGUMENT

A. Personal jurisdiction over Rhonda, as an individual, was never established.

1. Rhonda was never served in her individual capacity, but only as a trustee for the Mona Family Trust.

Far West has misapprehended the personal jurisdiction issue in this case by arguing that service by mail was appropriate. *See* Ans. at 19. Rhonda has

not argued that service by mail under NRS 14.090 is invalid or a violation of due process, as Far West contends. Rhonda objects to personal jurisdiction on the basis that she was never served, personally or by mail, in her individual capacity. Far West served Rhonda only as a trustee of the Mona Family Trust by mail. 1 Pet. App. 62-90. Far West has never attempted to serve Rhonda, individually, in this case.

Although Far West attempts to characterize the case law on service of third-party subpoenas, such as *Consol. Generator-Nevada Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998), as irrelevant to a judgment debtor examination of a trustee of a trust (Ans. at 20), the law is applicable under the facts of this case. Rhonda, in her individual capacity, was not a party but was ordered only as a trustee to appear for the judgment debtor exam. 1 Pet. App. 49-60. Thus, proper service upon Rhonda in her individual capacity was required before she could be compelled to appear or required to produce documents.

Far West attempts to limit *Salman v. Newell*, 110 Nev. 1333, 1335, 885 P.2d 607, 608 (1994) to its facts by arguing that the case had nothing to do with personal jurisdiction. Ans. at 22. The Monas cited *Salman* (Pet. at 15) not as a case on personal jurisdiction but to demonstrate that Nevada courts recognize an individual appearing in court in her own capacity is not the same as a person appearing as a representative of a trust. *Id.* at 1336.

Other courts have similarly held that service upon a trustee in a representative capacity is not the same as service upon an individual. *See*

Banerjee v. Roberts, 641 F.Supp. 1093, 1099 (D. Conn. 1986) ("The trustee defendants in the instant case likewise have not been served personally, or in accordance with one of several alternatives prescribed by Rule 4(d), with any complaint that asserts a ***claim against them in their individual capacities***. Accordingly, this action shall be dismissed without prejudice against the trustee defendants ***in their individual capacities***.") (emphasis added); *Thomas v. Marshall*, 482 F.Supp. 160, 168-69 (S.D. Ala. 1979) ("To begin with the trustees were sued only in their representative rather than their individual capacities. . . . Because the trustees were sued only in their representative capacities the Court has not been presented with the question whether the trustees violated any fiduciary responsibility owing. . . . The trustees were never served in their individual capacities. This action did nothing to resolve the trustee's personal liability, if any, for any breach of a fiduciary duty owed under either the terms of ERISA or the money purchase pension plan.").

Rhonda has relied on the basic legal principle that service upon her in the capacity as a trustee and her appearance as a trustee in a judgment debtor examination does not excuse Far West from serving her in her personal capacity before seeking to impose personal liability. As a matter of law, "A district court is empowered to render a judgment either for or against a person or entity only if it has jurisdiction over the parties and the subject matter." *See Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987). The District Court never acquired personal jurisdiction over Rhonda in her individual capacity due to Far West's failure to personally serve her.

2. Rhonda objected repeatedly to the lack of personal jurisdiction in her individual capacity and did not waive her objection by appearing as a trustee for the Mona Family Trust.

Far West has argued that Rhonda failed to object to the lack of personal jurisdiction by appearing for the judgment debtor exam in her representative capacity. Ans. at 21. Far West argues, "Mrs. Mona appeared pursuant to the Fourth JDE Order on June 26, 2015, without raising any objection as to personal jurisdiction." Ans. at 21. Yet, Rhonda was never served with notice for a judgment debtor examination in her personal capacity. And, although the District Court allowed Far West to ask questions about Rhonda's personal assets in the trustee debtor examination, Rhonda objected during the judgment debtor examination on the issue of the capacity in which she was served and appeared. 2 Supplemental Appendix ("Supp. App.") 185-98.[1]

During the judgment debtor examination, in telephone conference with the District Court, Rhonda's attorney stated, "Your Honor, I'm looking at the order and notice and the order for the examination of Rhonda Mona as trustee of Judgment Debtor Mona Family Trust. That is how she's appearing today.

[1] Notably, this judgment debtor examination transcript does not bear a file stamp, contrary to the requirements of NRAP 30(c)(1) and NRAP 21(a)(4). This transcript and other materials presented in Far West's supplemental appendix were not filed in the District Court, including the judgment debtor examination transcript for Mike (1 Supp. App. 16-160), the second judgment debtor examination transcript for Mike (3 Supp. App. 498-979), and Far West's new lawsuit against the Monas just filed on September 16, 2015 (4 Supp. App. 980-997). Since these subsequent materials cannot legally form the basis of the District Court's prior sanctions order (July 15, 2015), the new materials should be stricken. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

She is a former trustee. . . ." 2 Supp. App. 185:5-11. Rhonda's counsel also pointed out that she was noticed "in a very limited capacity." 2 Supp. App. 186:4-5. As a further objection to Far West questioning Rhonda about her personal assets, her counsel stated,

> [T]hat was the subject of our ***objections***, is that we're not here to talk about her individual property. ***It says the examination of Rhonda Mona as trustee of judgment debtor***. ***Rhonda Mona, an individual, is not a judgment debtor in this case***. . . . But if we're going to delve into what amounts to be a full-blown examination of Rhonda Mona about her personal assets, that simply wasn't on the table today, and I don't think it's fair to put her through that right now.

2 Supp. App. 190:2-17 (emphases added).

In the later order to show cause hearing, Rhonda's counsel again referred to the objections previously raised during the judgment debtor examination:

> And you'll recall at our telephonic conference, I raised this very issue. I have no doubt or dispute that they are entitled to take discovery from Rhonda Mona. But to call her a judgment debtor defendant—calling her a judgment debtor is simply an error.

2 Pet. App. 318:1-5. Far West's argument that Rhonda Mona failed to object to personal jurisdiction is contrary to the record.

3. Because Rhonda, in her personal capacity, is not a party to this action and NRCP 37(b) does not authorize sanctions against a non-party other than a deponent, the District Court lacked personal jurisdiction to impose sanctions against Rhonda personally.

The District Court lacked jurisdiction to sanction Rhonda under NRCP 37, because she was not a party or a deponent. NRCP 37 authorizes sanctions against parties, non-parties who are deponents, and corporations or entities under Rule 30(b)(6) or Rule 31(a). *See* NCRP 37. Under

NRCP 37(a)(2)(A), a party may be sanctioned for failing to make a disclosure required by Rule 16.1(a) or 16.2(a). Under NRCP 37(a)(2)(B), a deponent, corporation, or party may be sanctioned. A deponent may be sanctioned for failing to answer a question under Rules 30 and 31. *Id*. A corporation or other entity may be sanctioned for failing to make a designation under Rule 30(b)(6) or 31(a). *Id.* A party may be sanctioned for not complying with a request for inspection under Rule 34. *Id.* Far West argues for the first time that NRCP 37(b)(2) permits sanctions against a "managing agent of a party." Ans. at 22. But, the Mona Family Trust was not separately sanctioned in the District Court's sanction order. 2 Pet. App. 348-58. And, there was never any legal or factual basis for Rhonda to be a "managing agent of a party" for the purpose of applying her assets to Far West's fraud judgment against Mike. As such, the District Court exceeded its jurisdiction by imposing sanctions on Rhonda as a non-party and non-judgment debtor personally. Therefore, the Monas urge this Court to vacate the District Court's impermissible sanctions order.

B. The District Court's reliance on *Randono* was improper because it is not sound under Nevada's statutory scheme for community property, and a separate action against Rhonda was required under *Callie v. Bowling*.

Far West has characterized the sanctions extending to Rhonda's separate bank accounts as permissible under *Randono*. The District Court relied upon *Randono* and a single Nevada case that mentioned *Randono*, *Cirac v. Lander County*, 95 Nev. 723, 731, 602 P.2d 1012, 1017 (1979), along with law from other jurisdictions including unpublished opinions. *See* 2 Pet. App. 352. There are several material problems with the District Court's analysis. First, *Randono*

is no longer supported by Nevada's community property statutory scheme. *Randono* also relies on repealed and overruled law for its reasoning. Second, the District Court's decision runs contrary to *Callie v. Bowling*, which holds that new parties cannot be added to post-judgment proceedings based on an alter ego theory, because the new party is deprived of notice, discovery, fact finding, and opportunity to be heard. 123 Nev. at 186, 160 P.3d at 881. Third, Far West argues that it is only executing on community property, but Far West did not follow the procedures for execution under NRS Chapters 21 and 31, which would have provided Rhonda an opportunity to claim exemptions and other due process mechanisms that were not available to her.

1. ***Randono*** **is not supported by the current statutory scheme for community property in NRS 123.220.**

Randono finds no support in the current community property statutory scheme and instead relies on law that has been overruled or repealed. Currently, NRS 123.220 defines community property and its exceptions, but it does not allow community debt to be levied upon a spouse that is not party to the underlying lawsuit. Although Far West wholly relies upon *Randono*, the holding of this case is infirm because it based its decision on case law that has been overruled by statute, and statutes that have been repealed and not replaced. *See id.*, 86 Nev. at 132, 466 P.2d at 223-24. *Randono* states:

> If community property can be given away by the husband (*Nixon v. Brown*, 46 Nev. 439, 214 P. 524 (1923)) and is subject to his debts upon his death (NRS 123.260), we see no reason why it is not

> subject to his debts, whether arising out of tort or contract, during his lifetime.

Id. at 132; 466 P.2d at 224 (1970). The *Randono* holding draws upon two components of Nevada community property law that no longer exist: NRS 123.260 and *Nixon v. Brown*. NRS 123.260 was repealed in 1975 and has not been replaced.[2] *Nixon* is no longer good law under the current community property statutory scheme. *Nixon* held that a husband could give away community property,[3] but under NRS 123.230(2), which became law many years after *Nixon*, community property could not be given away by a husband without the wife's consent. NRS 123.230(2) states, "Neither spouse may make

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[2] *See* Legislative Counsel Bureau, *list of NRS repealed and replaced 120A.440-159.080*, available online at *https://www.leg.state.nv.us/NRSRepealed/R_R007.html*; *compiled legislative history* SB 506, 1975, available online at *http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1975/SB506,1975.pdf* (last accessed October 20, 2015).

[3] *Nixon v. Brown*, 46 Nev. 439, 214 P. 524, 529-30 (1923) states:

> [W]e are of the opinion that the state of Nevada, by constitutional and statutory enactment, adopted the community property law as it existed in Spain and in Mexico, and as it existed in California at the time of its cession from Mexico. . . . they have laid down what we believe to be the true rule with respect to the limitations imposed upon the husband during coverture on his right to dispose of community property, and that is ***that he may make a voluntary disposition of a portion of the community property, reasonable in reference to the whole amount***, in the absence of a fraudulent intent to defeat the wife's claims. (citation omitted and emphasis added). Whether or not the gift is reasonable or unreasonable is a question to be decided by the courts in each particular instance, and no hard and fixed rule can be laid down as to just what proportion of the community interest can be so disposed of by the husband.

a gift of community property without the express or implied consent of the other."

A rule from case law should not continue to be applied when the current statute does not support the basis of that case law, and the reasoning of that case is not sound. *See Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364, 367 (2013). In *Egan*, this Court overruled *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009) after determining that *Fierle* had expanded the meaning of the medical malpractice statute beyond the plain meaning of the statute. *Id.* The Court concluded that the application of *Fierle* beyond the plain language of the medical malpractice statute would be inequitable and contrary to the plain language of the statute. *Id.*; *see also ASAP Storage v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007) (overruling case law that expanded a statute beyond its plain meaning and stating that "[l]egal precedents of this court should be respected until they are shown to be unsound in principle").

Randono is unsound in principle and under Nevada law. The holding in *Randono* has no support in the current community property statutory scheme. This case law relied fully upon law that has been repealed or overruled in Nevada. It is illogical and inequitable to follow a rule from case law that has expanded this rule far beyond the statutory scheme and the Legislature's intent. *See Egan*, 129 Nev. Adv. Op. 25, 299 P.3d at 367 (2013).

2. *Callie* is applicable here because Far West has pursued Rhonda, a non-debtor in her individual capacity, to hold her responsible for a debt she did not incur without personal jurisdiction or due process.

The atypical procedure Far West followed, by requesting a judgment debtor exam of the Mona Family Trust, post-judgment, with Rhonda as trustee, and obtaining sanctions against Rhonda personally on this basis is more like adding a party, post-judgment, rather than "executing" on community property assets under the procedures set forth in NRS Chapters 21 and 31. *Callie*, 128 Nev. at 182-83, involved a nonparty to original proceedings who was added to proceedings on an alter ego theory after the judgment. *Id*. This was a violation of due process rights, because the nonparty did not receive notice and an opportunity to be heard before he was held individually liable on the domesticated foreign judgment. *Id*. Far West attempts to distinguish *Callie* based on the following facts: (1) Rhonda was not added as a party; (2) Far West did not assert an alter ego claim; and (3) *Callie* did not involve sanctions or community property (Ans. at 24).

The distinctions raised by Far West do not make *Callie* inapplicable. Rhonda was not added as a party, but this fact is similar to attempting to add a party to a case post-judgment for purposes of collection. The District Court sanctioned Rhonda, a non-judgment debtor, and permitted execution of the judgment upon her personal accounts. The arguments brought by Far West, that the Mona Family Trust was holding assets of the judgment debtor and the trustee must be held personally responsible, is similar to an alter ego claim. In addition, Far West has not proceeded under NRS Chapter 21 for executions by

judgment creditors of community property, which provides for an opportunity to claim exemptions and an opportunity to be heard. This case did not proceed as a typical execution involving community property, but proceeded by attempting to add Rhonda to Far West's judgment indirectly, through her status as a former trustee, and to hold her personally responsible for a debt she did not incur. Under these facts and this procedural history, *Callie* should apply, and the District Court should have required Far West to file a new lawsuit against Rhonda.[4] Thus, the Monas respectfully request that this Court vacate the District Court's sanctions order.

3. Far West cannot now characterize its actions as execution proceedings against a spouse since Far West did not proceed under NRS Chapters 21 and 31.

If Far West had availed itself of the collection procedures outlined in NRS Chapters 21 or 31, Rhonda would have had an opportunity to claim exemptions. Instead, Far West attempted to gain access to all of Rhonda's personal assets, including separate property, by noticing a judgment debtor examination for her representative capacity, and then exceeding the scope of that notice to sanction Rhonda under Rule 37 to obtain her individual assets.

Far West erroneously claims that an order mirroring NRS 21.320 authorized the District Court to order Rhonda's separate bank accounts be applied to the judgment. Ans. at 33. Yet, the provisions of NRS Chapter 21

[4] In an effort to both subvert this Court's stay order of all District Court proceedings in the instant case and seek assets from Rhonda directly, Far West has now filed a new lawsuit based upon the same and similar allegations. 4 Supp. App. 980-997.

were never invoked because Far West chose not to initiate execution proceedings. In fact, the plain language of NRS 21.320 contains the phrase "not exempt from execution." There has been no determination of exemptions, as outlined in NRS 21.090, because Far West has not sent out writs of execution for the property involved in this case. Thus, if the District Court has modeled its order after a statute that was not utilized by Far West, the entire basis of the order is flawed because Far West seeks to take advantage of the benefits of the statutory scheme without being responsible for the burdens, including the procedural safeguards that should have been extended to the Monas.

C. The sanctions against the Monas are a violation of due process.

1. Meet and confer was required.

Far West argues that the meet and confer requirements of NRCP 37(a)(2)(A) only applies to NRCP 16.1(a) and 16.2(a) disclosures. Ans. at 34. To support this argument, Far West attempts to characterize its requested relief in the District Court as a judgment enforcement action rather than a discovery dispute. *Id.* But, NRCP 37(a)(3) extends the meet and confer requirement (even under Far West's characterization) because "an evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond." Notably, EDCR 2.34(d) does not contain any arguable exception to avoid the meet and confer requirement, nor does Far West attempt to point to any such exception. If Far West had complied with the mandatory meet and confer requirements, the Monas would have had predeprivation notice and an opportunity to be heard before Far West simply

attached bank accounts. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972) (a later hearing does not remedy the prior deprivation in a replevin case); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("[T]he right to prior notice and a hearing is central to the Constitution's command of due process" absent extraordinary circumstances). Thus, the Monas were first deprived of their procedural due process by Far West's failure to meet and confer before seeking ex parte relief from the District Court.

2. Far West's ex parte motion also violated the Monas' due process rights.

In its answer, Far West did not explain why its motion for sanctions was submitted on an ex parte basis, without an affidavit articulating the purposes for ex parte relief. Instead, Far West jumped to the self-serving conclusion that "Petitioners' due process rights were satisfied in that they had notice and an opportunity to be heard" in the show cause hearing. Ans. at 16. Far West also states that the Monas were provided time for briefing and "refused" the offer of additional time. *Id.* The Monas "refused" the offer for additional time for briefing at the show cause hearing because the ex parte motion had already been submitted, and Rhonda's separate bank accounts were already attached. 2 Pet. App. 317; *see also Fuentes*, 407 U.S. at 82, 97; *James Daniel Good Real Property*, 510 U.S. at 53. Counsel for the Monas explained this deprivation issue was the basis for rejecting the offer for additional time for briefing:

> Yeah, would I like to see this 45 days out? I absolutely would. I'm in a dilemma where you've signed an order as against two clients, one of whom is not a party, that effectively enjoined them from using—using their money. . . . I'd love to have time. But at this

> point, I don't think that that's available to me with the status of your order.

2 Pet. App. 317. The ex parte motion and order had already violated the Monas' due process rights, and any offers for additional time under these circumstances could not undo the violation of due process that had already occurred.

3. An evaluation of the *Young* factors was required under these circumstances, where the sanctions were "ultimate" sanctions, and the Monas disputed the meaning of the order they were sanctioned for failing to obey.

An analysis of the factors in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990) was required for consideration of the sanctions in the instant case. *Young* instructs that a district court should enter specific findings and conclusions when dismissing a party from a legal proceeding under NRCP 37. *Id.* at 780. Far West has argued the *Young* factors are not mandatory and only apply to cases involving dismissal with prejudice. Ans. at 40. However, Nevada case law has applied the *Young* factors beyond dismissal with prejudice when sanctions are severe and effectively terminate the legal proceedings. *See, e.g., Chamberland v. Labarbera*, 110 Nev. 701, 704-05, 877 P.2d 523, 525 (1994).

In *Chamberland*, the district court sanctioned a party under Rule 22, refusing a trial de novo, where the party had not acted in good faith in arbitration. *Chamberland*, 110 Nev. at 704-05. In expanding that application of the *Young* requirements beyond the exact factual and procedural circumstances of *Young*, this Court stated:

> Although the procedural and factual climate of *Young* is different from the case at bar, the sanction at issue is the same. In the present case, the district court terminated the legal proceedings due to Chamberland's alleged misconduct. ***The magnitude of the sanction brings the action under the purview of Young***. *Young* instructs that the district court must enter specific findings and conclusions when dismissing a party from a legal proceeding under NRCP 37. This not only facilitates appellate review, but also impresses upon the district court the severity of such a sanction.

Chamberland, 110 Nev. at 704-05 (emphasis added).

In the dissenting opinion of *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. Adv. Op. 26, 235 P.3d 592, 602-03 (2010), Justice Pickering explained that even the sanction of striking an answer could be a case concluding sanction:

> While the majority distinguishes this case from *Nevada Power* [*v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992)] by characterizing the sanctions as 'non-case concluding,' the reality is that striking Goodyear's answer did effectively conclude this case. The sanction resulted in a default liability judgment against Goodyear and left Goodyear with the ability to defend on the amount of damages only. Liability was seriously in dispute in this case, but damages, once liability was established, were not, given the catastrophic injuries involved. Thus, striking Goodyear's answer was akin to a case concluding sanction, placing this case on the same footing as *Nevada Power.*

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. 26, 235 P.3d 592, 602-03 (2010) (Pickering, J., dissenting).

Like *Chamberland*, the sanctions here are not the identical "procedural and factual climate of *Young*," but the sanction is of a magnitude that it brings the action under the purview of *Young*. The sanctions order in this case is "case concluding" in several respects. The order found facts proving fraudulent transfer "are deemed established" and found Far West was entitled to execution

upon the bank accounts in the name of Rhonda. 2 Pet. App. 357. The order also prohibited the Monas from claiming any money transferred in the post-marital property settlement agreement and any money in the bank accounts in Rhonda's name is exempt from execution. 2 Pet. App. 357. These are undoubtedly "case concluding sanctions," even if they are not a dismissal with prejudice. A discovery sanction that eliminates a party's entire case is akin to a case-concluding sanction and puts the case on the same footing as *Nevada Power*. What action could the Monas take at this point, when the order conclusively established fraudulent transfer, prohibited any further fact finding on the post-marital property settlement agreement, and permitted Far West to execute on the funds in non-debtor Rhonda's bank accounts? The order is comparable to a dismissal with prejudice, like *Young*, or a denial of a trial, like *Chamberland*, in that it completely eliminates any opportunity for the Monas to further litigate this case.

While Far West has characterized these factors as not mandatory and factors the court "may properly consider" (Ans. at 40), Nevada case law following *Young* has stated the court "must" give consideration to the factors in *Young*:

> If a district court determines that a facially clear discovery order was disobeyed, the court ***must then give "thoughtful consideration" to all of the pertinent factors*** affecting its discretionary decision to impose the sanction of dismissal.

Nevada Power Co. v. Fluor Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992) (emphasis added) (citing *Young*, 106 Nev. at 92, 787 P.2d at 780). *Young* requires an "express, careful and preferably written explanation of the

court's analysis of the pertinent factors" in discovery sanctions of dismissal with prejudice. As previously discussed, this sanction was akin to a case concluding sanction. The *Young* factors include:

> Degree of willfulness of the offending party,
>
> the extent to which the non-offending party would be prejudiced by a lesser sanction,
>
> the severity of the sanction of dismissal relative to the severity of the discovery abuse,
>
> whether any evidence has been irreparably lost,
>
> the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to the improperly withheld or destroyed evidence to be admitted by the offending party,
>
> the policy favoring adjudication on the merits,
>
> whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney,
>
> and the need to deter both the party and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780.

Far West suggests that the order analyzed several of these factors, without actually stating that it was examining the *Young* factors. Ans. at 42-44. The analysis in the order was not the type of "express" or "careful" analysis discussed in *Young* to establish that sanctions were appropriate. Notably, the sanctions order did not discuss the feasibility and fairness of alternative, less severe sanctions. The District Court also did not discuss the policy favoring adjudication on the merits.

The majority of the support provided by Far West to establish the *Young* factors primarily focuses on Mike and does not discuss in detail the fairness of the sanctions as they apply to Rhonda. *See* Ans. at 43. The extent of Rhonda's "misconduct" analyzed in the order is the failure to produce the bank records for her separate accounts (2 Pet. App. 355), but Rhonda's basis for doing so has been based upon her objections due to the lack of personal jurisdiction. The District Court did not examine whether it unfairly penalized Rhonda by the severity of the sanction. Further, although Far West attempts to characterize this as a "less severe sanction, such as an order deeming facts. . . to be admitted by the offending party," as suggested by *Young* (Ans. at 44), the District Court also prohibited the Monas from using money in the bank accounts until the funds were applied to Far West's judgment. *See* 2 Pet. App. 357:25-28. This conclusion cannot be characterized as the District Court actually considering a "less severe sanction. . . ." of deeming facts admitted, when the result of the sanction was case concluding, and allowing Far West to execute upon the separate accounts in violation of Rhonda's due process rights. Therefore, Far West has not established that the order sufficiently considered the factors set forth in *Young* in detail. So, the proper remedy is to vacate the order.

4. An evidentiary hearing was required because there were questions of fact on the order that was the basis for the sanctions.

An evidentiary hearing was required under the circumstances of this case. *See Foster v. Dingwall*, 227 P. 3d 1042, 1047 (Nev. 2010); *Nevada Power*, 108 Nev. at 645, 837 P.2d at 1359. Under *Nevada Power*, if the party against whom

dismissal may be imposed raises a question of fact as to any of the *Young* factors, the court must allow the parties to address the relevant factors in an evidentiary hearing. *Id.* The Monas have raised several questions of fact, and the District Court was required to allow an evidentiary hearing on the relevant factors. In addition, the Monas should have received an evidentiary hearing because the sanctions involved disobeying an order, and the Monas disputed the meaning of that order and denied that they had disobeyed the order. *See Nevada Power Co. v. Fluor Illinois,* 108 Nev. 638, 644, 837 P.2d 1354, 1359 (1992).

Far West suggests that no evidentiary hearing was required because there "were no questions of fact" when the Mona's testified to the facts that Far West believed were "necessary" to find that sanctions were appropriate. Ans. at 35. Just because the District Court interpreted the facts in Far West's favor, in a summary proceeding, does not diminish the actual questions of fact that were present. Genuine issues of fact are in dispute. Specifically, Rhonda disputes the characterization of her property, and there are genuine issues of fact to be determined related to whether the post-marital property settlement agreement protects Rhonda's separate property under *Jewett v. Patt,* 95 Nev. 246, 247-48, 591 P.2d 1151, 1152 (1979).

Far West cites *Aldabe v. Adams*, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965) and argues that the Court need not "hold a hearing on a fabricated factual dispute." Ans. at 38-39. This approach wrongly assumes that any dispute the Monas have is fabricated, with no basis for such an assumption.

Where a party seeks to present inconsistent testimony, even when a summary judgment motion has been filed and the party seeks to defeat it by presenting last-minute inconsistent testimony, "under federal jurisprudence, the general rule is that an apparent contradiction between an affidavit and the same witness's prior deposition testimony presents a question of credibility for the jury, unless the court affirmatively concludes that the later affidavit constitutes a 'sham.'" *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34 (Nev. App. 2015) (citing *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir.1975); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir.1969); *In Kennett–Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir.1980) ("Certainly, every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. 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."). There is absolutely no indication that the contradictory facts that the Monas would raise, if given an opportunity to raise them, are a sham or fabricated.

Even seeming admissions made under oral cross-examination are not always treated as judicial admissions. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 277 (Nev. 2011) ("[O]ral responses to aggressive examination by trained lawyers will not be construed as a judicial admission.") (citation omitted). Particularly under the circumstances of this judgment debtor exam, when Rhonda appeared in her

capacity as trustee and objected to questions about her personal finances, an evidentiary hearing is required for material factual issues related to her personal finances. Therefore, an evidentiary hearing was required before the District Court summarily imposed sanctions against the Monas.

5. An evidentiary hearing on the issue of tracing was requested in the District Court, and this issue has not been waived.

Far West argues that the "Petitioners never raised the issue of tracing with the District Court" and thereby waive the issue on appeal (Ans. at 36), but the Monas did raise these arguments in the District Court and have preserved them for appeal. When a party raises an issue for the first time on appeal, the issue may be waived. See, e.g., *Dubray v. Coeur Rochester Inc.*, 112 Nev. 332, 337, 913 P.2d 1289, 1292 (1996). In *Dubray*, the appellant raised an issue for the first time on appeal that he was not supplied with appropriate safety equipment. The Court declined to consider the issue on appeal because the issue was not considered in administrative hearings or in the district court. *Id.* In contrast, this case is not similar to Nevada case law on waiver of issues, such as *Dubray*, because the issue of tracing was raised and considered in the District Court.

The relevant preservations inquiry is whether the ***issue*** was raised and considered, rather than whether a specific word or term has been used. *See, e.g., Dubray v. Coeur Rochester Inc.*, 112 Nev. at 337; *cf. Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (In determining finality of an order or judgment, the Court looks "to what the order

or judgment actually *does*, not what it is called."). A party does not waive an issue for appeal if the concept is clearly expressed by the party in the trial court proceedings, even if a particular word or term is not used, when the facts would give rise to the legal concept. *See, e.g., Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex. 1972) ("The defendants insist that [Plaintiff] cannot raise the question of promissory estoppel because it was neither pleaded in the trial court nor presented in the court of civil appeals. We disagree. It is true that the plaintiff did not use the words 'estoppel' or 'promissory estoppel' in its trial pleadings, but it pleaded facts which, if true, would give rise to the legal concept").

The Monas raised the issue of tracing in detail in the District Court. Although Rhonda's attorney did not formally introduce this issue by stating he was going to discuss "tracing," a basic understanding of community property law reflects that the issue was clearly discussed. In the show cause hearing, Rhonda's attorney specifically addressed the District Court's failure to provide Rhonda a proper hearing on the issue of tracing funds to determine whether the property in various bank accounts was separate or community property. For example, Rhonda's attorney stated:

> She must have the opportunity to be heard, she must have the opportunity to present evidence.

2 Pet. App. 320:22-24.

> So did Far West ever have the intent to look to Rhonda Mona for the repayment of the judgment? That's the analysis and that's what

> this court must determine on a factual basis before you can declare a separate account is, indeed, a community account.

2 Pet. App. 321:10-14.

> And so my client, Ms. Mona, has not had the opportunity to present the facts as required under the *Norwest* case, to present you the facts that would overcome a presumption of community property which I think you'll probably tell me is my burden. But I think it's their burden to overcome the presumption of community property when it's deposited in an account that is titled that way.

2 Pet. App. 320:5-7.

Rhonda did not waive the issue of an opportunity to be heard on tracing of separate and community property. She clearly argued, and the District Court refused to allow her to present evidence on whether funds in the bank accounts were community property or separate property. While the word "tracing" was not used, Rhonda clearly requested a hearing on this issue, particularly since the validity of the post-marriage settlement agreement would overcome the presumption of community property.

III

CONCLUSION

This Court should vacate the District Court's sanctions order for several reasons. In granting these sanctions, the District Court permitted Far West to employ procedural mechanisms that did not comply with requirements for personal jurisdiction and due process for Rhonda to execute upon her personal property. First, the Court permitted Far West to proceed without serving Rhonda in her individual capacity or adding her as a party, yet Rhonda was expected to participate fully in the process and produce documents in her

individual capacity. Second, the Court relied upon a community property case, *Randono*, which is based upon overruled and repealed law. Third, the District Court allowed Far West to proceed with an ex parte motion, and denied Rhonda the opportunity to meet and confer or to have an evidentiary hearing on the material issues in this case, such as tracing and the validity of the post-marital property settlement agreement. Finally, the District Court's findings for invoking the sanctions did not comply with Nevada law requiring a specific, detailed analysis under *Young* when issuing ultimate sanctions under NRCP 37. Therefore, the Monas respectfully request that this Court grant the requested extraordinary relief and vacate the District Court's sanction order.

DATED: October 29, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply in Support of Writ Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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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 deposited for mailing via U.S. mail, postage prepaid, at Las Vegas, Nevada, a true copy of the Reply in Support of Writ Petition addressed to:

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