CASE NO. 78284

IN THE SUPREME COURT OF THE STATE OF NEVADA

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TRISHA KUPTZ-BLINKINSOP nka TRISHA MARGOLIS, an individual

Appellant

vs.

THOMAS R. BLINKINSOP, an individual

Respondent

OPENING BRIEF ON APPEAL

For Appellant TRISHA KUPTZ-BLINKINSOP

Appeal from the Eighth Judicial District Court, Clark County, Nevada
District Court Case # A-18-783766-C
The Honorable Senior Judge Charles Thompson

BENJAMIN B. CHILDS, ESQ.
Nevada Bar No. 3946
318 S. Maryland Parkway
Las Vegas, Nevada 89101
(702) 385-3865
Attorney for Appellant
TRISHA KUPTZ-BLINKINSOP

Docket 78284 Document 2019-31719

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRISHA KUPTZ-BLINKINSOP nka TRISHA MARGOLIS Appellant v. THOMAS R. BLINKINSOP Respondent	)	No. 78284

NRAP 26.1. DISCLOSURE

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 judges of this court may evaluate possible disqualification or recusal.

1. Appellant TRISHA KUPTZ-BLINKINSOP nka TRISHA MARGOLIS is an individual and does not own or control any corporation.
2. The law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court are set forth below.

   Benjamin B. Childs, Esq., (Nevada Bar Number 3946) of BENJAMIN B. CHILDS, LTD. 318 S. Maryland Parkway Las Vegas, NV 89101.

DATED this July 26, 2019

/s/ Benjamin B. Childs
BENJAMIN B. CHILDS, ESQ.
Nevada Bar No. 3946
Attorney for Appellant

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JURISDICTIONAL STATEMENT

The basis of appellate jurisdiction is NRAP 3A(b)(1), appeal after final judgment. Appeal was timely taken. An Order granting summary judgment in favor of Thomas R. Blinkinsop [referred to herein as Thomas] was filed February 27, 2019, with Notice of Entry of Judgment being filed and served by electronic service on February 28, 2019. [Joint Appendix "JA" 163-166] Thomas filed a separate Declaratory Judgment which was filed March 9, 2019 with Notice of Entry of Judgment being filed and served by electronic service on March 12, 2019. [JA 167-176] Notice of Appeal was timely filed by Trisha Kuptz-Blinkinsop nka Trisha Margolis [referred to herein as Trisha] on February 28, 2019 within 30 days pursuant to NRAP 4(a)(1). [JA 177] with an Amended Appeal being filed March 17, 2019 [JA 178] upon receipt of Thomas' separate Declaratory Judgment.

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ROUTING STATEMENT

The matter should be assigned to Court of Appeals pursuant to NRAP 17(b)(7) as the case involves injunctive relief in the from of quiet title orders.

ISSUES PRESENTED FOR REVIEW

ISSUE 1. Whether the district court erred in granting summary judgment to Thomas.

ISSUE 1. Does this Court's holdings in Leven v. Frey 123 Nev. 399, 168 P.3d 712 (2007) and Davidson vs. Davidson, 132 Nev. 709, 382 P. 3d 887 (2016) overrule the holdings in Terrible v. Terrible, 91 Nev. 279, 534 P. 2d 919 (1975) and Univ. of Nevada v. Tarkanian 110 Nev. 581, 879 P.2d 1180 (1994) ?

ISSUE 3. Is the holding in Davidson restricted to money judgments?

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STATEMENT OF THE CASE

This is a very straightforward case seeking this Court to clarify that the holding in Davidson does apply to non-monetary judgments in divorce decrees. Alternatively, summary judgment can not be granted when material factual disputes exist. Equitable cases are uniquely factually based, making summary judgment inappropriate.

The case presents this Court with an opportunity to affirm the holding in Davidson, or to clarify or overrule that holding.

STATEMENT OF FACTS

The parties were divorced May 19, 2009. [JA50 - 55] Multiple parcels of real property were addressed in the Decree of Divorce [JA 53], along with a property settlement payment [JA 51] and multiple personal property allocations. [JA 52 - 53] The Decree of Divorce addressed the jointly owned the Subject Property, known as 2042 Deer Springs Henderson, NV 89074 [JA 53, 3-7],

which the parties had owned jointly since October 28, 2005 [JA 41-46].

Neither party took any steps to enforce the provision in the Decree of Divorce regarding the Subject Property. The filing of the district court case was November 1, 2018 [JA 1], over nine years after Notice of Entry of the Decree of Divorce was filed and served. [JA 48 -49]

At the January 15, 2019 hearing Trisha's Motion for Declaratory Relief in the form of Partition was denied, as was her prayer for discovery pursuant to NRCP 56(f), and Thomas' Motion for Summary Judgment was granted by Judge Thompson based on the May 19, 2009 Decree of Divorce. He referred to the Decree, and concluded "That's just not right." [JA 188:18]

Written orders were submitted with Findings of Fact, Conclusions of Law and Order being filed February 27, 2019 [JA 164-166] in which the district court expressly ruled that Davidson and that NRS 11.190(1) do not apply in this case. The doctrine of res judicata/claim preclusion pursuant to Univ. of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) was also cited as a basis for denying Trisha's motions.

Declaratory Judgment was also filed March 9, 2019, attaching the 2005

deed as an Exhibit. [JA 170-176]

Trisha appeals from those rulings.

SUMMARY OF THE ARGUMENT

This Court's holdings in Leven v. Frey 123 Nev. 399, 168 P.3d 712 (2007) and Davidson vs. Davidson, 132 Nev. 709, 382 P. 3d 887 (2016) impliedly overrules the holding in Terrible v. Terrible, 91 Nev. 279, 534 P. 2d 919 (1975). Thomas relied on Terrible in his legal arguments, which the district court adopted, that equitable estoppel precluded Trisha from arguing that she retained ownership of the Subject Property after the Decree of Divorce was filed on May 19, 2009. [JA 79 - 81] Terrible was impliedly overruled by Davidson.

The district court erred by granting summary judgment in favor of Thomas on equitable issues when there are existing factual disputes.

As succinctly stated in oral argument, Thomas could not enforce the May 19, 2009 Decree of Divorce in family court "Because the family court judge will say the Davidson precludes them because it wasn't renewed and it wasn't

brought within six years under 11.190". [JA 188:2-4] Thus, another court is enforcing an order which could not be enforced in the originating court.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review for issues regarding summary judgment is de novo. This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. GES, Inc. v. Corbitt ,117 Nev. 265, 21 P.3d 11 (2001). Summary judgment is appropriate "'when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" McKinney v. Consol. Mortgage Corp., 124 Nev. 1492, 238 P.3d 837, at *1 (2008) (quoting Tucker v. Action Equip. And Scaffold Co. ,13 Nev. 1349, 951 P.2d 1027 (1997)). Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper only if the "pleadings and other evidence on file demonstrate that no genuine issue as to

any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." Id. (internal quotation marks omitted). When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party.

The review of a district court's legal conclusions is also *de novo*. Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 170 P.3d 508 (2007). Likewise, review of statutory interpretation is *de novo*. Liberty Mut. v. Thomasson , 130 Nev 27, 30, 317 P.3d 831, 833 (2014) (citing Washoe Cnty. v. Otto, 128 Nev. 424, 430-31, 282 P.3d 719, 724 (2012)); Cromer v. Wilson, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010) ("The construction of statutes is a question of law, which we review de novo.").

B. SCOPE OF THE APPEAL

This appeal raises narrowly confined legal and factual issues. Trisha asserts that the holding in Davidson applies to all aspects of a divorce decree, not just to money judgments. Further, when an additional action is expressly required to implement the terms of a divorce decree and no such action is taken

within the statutory deadline, the provision involving that action lapses and is void.

C. THE NEVADA SUPREME COURT'S UNANIMOUS DECISIONS IN DAVIDSON AND LEVEN IMPLICITLY OVERRULED TERRIBLE AND TARKANIAN

Nevada courts have adopted the doctrine of implicit overruling of precedent. See Harris v. State, 133 Nev. ____, 407 P.3d 348 (Nev. App. 2017) (published opinion holding that a subsequent, contradictory decision implicitly overrules prior decisions). The standard for determining whether precedent has been implicitly overruled has been set forth by the Ninth Circuit as follows: "[T]he relevant court of last resort must have undercut the theory or reasoning underlying the priority circuit precedent in such a way that the cases are clearly irreconcilable." Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003); see also, U.S. ex rel Klein v. Omeros Corp., 897 F.Supp.2d 1058, 1064 (W.D. Wash. 2012) (citing Miller with approval).

The Davidson decision was 41 years after the Terrible decision. Leven was 32 years after Terrible. The simple question is whether Davidson and Levin are contradictory decisions that resulted in Terrible being implicitly overruled. The holding of Terrible was that partition could not be pursued after a divorce decree divided property. Based on the facts of the instant case, and the existence of the Davidson decision, Terrible cannot remain viable.

The same can be said for the holding in Tarkanian, which was decided in 1994. In light of the Davidson holding that divorce decrees lapse just as any other judgment, Tarkanian cannot be relied upon to preclude partition of real property which was addressed by the May 19, 2009 Decree of Divorce as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall receive as his sole and separate property the real property located at 2042 Deer Springs Drive, Henderson, Nevada. Defendant shall assume, and hold Plaintiff harmless from, any and all encumbrances on said real property. Plaintiff shall execute a quitclaim deed to remove Plaintiff's name from title within 10 days of entry of this decree.

Thomas was well aware that he could have required Trisha to execute a

quitclaim deed to remove her name from the title to the Subject Property. Thomas never sought to enforce that provision, likely because if he had Trisha would have raised other issues as addressed in her declarations dated November 15, 2018 [JA 39] and January 7, 2019 [JA162] which describe how Thomas stopped paying the mortgage on the 2405 W. Serene Avenue # 814 Las Vegas, NV, which mortgage was solely in Trisha's name. Despite the May 19, 2009 Decree of Divorce requiring him to "assume, and hold Plaintiff [Trisha] harmless from, any and all encumbrances on said real property" [JA 53:10-11], Trisha's November 15, 2018 declaration [JA 39] states :

> "Thomas literally made only one payment on the Serene property after the May, 2009 Divorce Decree and made no payments after that time, while receiving rental income until it was foreclosed in 2014. Plus, I bought one of the cars that was in his name. During our marriage Thomas and I invested approximately $70,000 in renovations and improvements into the Subject Property, paying cash using the proceeds from a Home Equity Line of Credit [HELOC] on another parcel of real property located at 10169 Quilt Tree Street Las Vegas, NV, which HELOC was solely in my name. This HELOC was subsequently discharged in a bankruptcy I had to file in 2011."

Trisha's November 15, 2018 declaration [JA 162] states how when she was forced to claim Bankruptcy, the HELOC was forgiven on the Subject Property and was removed, so Thomas had a gain in equity. "Thom has the windfall of this situation to my detriment and is the one with unclean hands."

D. DECREE OF DIVORCE WAS FILED ON MAY 19, 2009 REQUIRED AN ADDITIONAL STEP AND THE DECREE BECAME VOID

As set forth the quote from the May 19, 2009 Decree of Divorce above, there as an additional requirement after the decree was entered, for Trisha to "execute a quitclaim deed to remove Plaintiff's name from title", which step Thomas never requested. Thomas failed to timely renew the decree, and it lapsed by operation of law.

When the decree was not renewed as required by NRS 17.214[1], the decree became void. Pursuant to NRS 17.214(1)(a), a judgment must be renewed "within 90 days before the date the judgment expires by limitation."

[1]. The February 27, 2019 Order has a typographical error in the statute citation. [JA166:3]

Leven v. Frey 123 Nev. 399, 168 P.3d 712 (2007) is the seminal case interpreting NRS 17.214. The judgment creditor in Leven timely filed the Affidavit of Renewal, but did not serve the Affidavit until 12 days later, and did not record the Affidavit until 17 days after it was filed, "well beyond the three-day requirement for recording and service." Id @ 399

Leven held by a unanimous decision that absent strict compliance with the time and service requirements of the statute, the judgment is void. Court's decision is unambiguous.

> ...we conclude that a judgment creditor must strictly comply with the timing requirement for service under NRS 17.214(3) in order to successfully renew the judgment. As Frey failed to comply with this service requirement as well as the recordation requirement, the judgment against Leven was not properly renewed and thus, it expired.
>
> CONCLUSION
>
> NRS 17.214 requires a judgment creditor to timely file, record (when the judgment to be renewed is recorded), and serve his or her affidavit of renewal to successfully renew a judgment, and strict compliance with these provisions is required. As Frey did not timely record and serve his affidavit of renewal, he did not comply with NRS 17.214(1)(b) and (3), and thus he failed to successfully renew the judgment. . We therefore reverse the district court's order denying Leven's motion to declare void the expired judgment and remand this matter to the district court with instructions that it grant the motion. Id @ 409

Thus, an unrenewed judgment is VOID, not just voidable. VOID. Once expired, the judgment is "dead" and is void and unenforceable. This holding is consistent in other states.

Counsel also located an older Ohio App case, Pavarini v. Rini, 1981 Ohio App. LEXIS 10930 (1981). In that case, the Ohio creditor was trying to enforce a foreign judgment from Arizona. This effort was denied and was appealed. In the appellate opinion, the court said that if the judgment had expired under Arizona law, it was "dead" for all purposes and could not be revived by any means.

Burshan v. Nat. Union Fire Ins. Co., 805 So. 2d 835 (Fla. Dist. Ct. App. 2001) was Florida collection case in which a creditor was attempting to collect on a New York judgment by garnishing assets in Florida after the judgment had expired. The Florida District Court of Appeals held that untimely proceedings to enforce a final judgment, which Thomas effectively is seeking in his Countermotion, are barred by the statute of limitations. The Burshan case was reiterated in Desert Palace, Inc. v. Wiley, 145 So.3d 946 (Fla. App., 2014).

E. STATUTE OF LIMITATIONS IN NRS 11.190(1)(a) PRECLUDES THOMAS' COUNTERCLAIM

NRS 11.190(1)(a) requires that "An action upon a judgment" be commended within 6 years. Thus, Thomas is precluded from recovery on his counterclaim because it was filed November 8, 2018 [JA 6], over nine years after the Notice of Entry of Decree of Divorce was filed and served [JA 48].

F. EQUITABLE ISSUES RELIED UPON THE DISTRICT COURT ARE EITHER IRRELEVANT OR THEY BENEFIT TRISHA

Given the express holding above, Thomas' equitable arguments based on estoppel, waiver, and unclean hands are all irrelevant because those preceded the filing of the case on appeal. They are based on the Divorce of Decree that is now dead for all purposes relevant to the instant proceeding.

In fact, Thomas's equitable arguments should be equally applied against him and merely serve to further justify the result required by Leven and

Davidson, that being that the 2009 Divorce Decree expired, and is void. He certainly has unclean hands as outlined above in that he collected rent without making mortgage payments on the Serene Property, as was required in the 2009 Decree of Divorce, thereby forcing Trisha to file bankruptcy.

CONCLUSION

This Court should take this opportunity to clarify that (1) Davidson overrules the Terrible decision to the extent that any action based on a divorce decree must be filed within 6 years (2) Davidson applies to property division as well as monetary judgments.

For the foregoing reasons, the judgment below should be reversed with instructions that Trisha has a 50% ownership interest in the Subject Property and the her partition action should proceed.

/s/ Benjamin B. Childs

BENJAMIN B. CHILDS, ESQ.
Nevada Bar No. 3946
Attorney for Appellant

ATTORNEY'S CERTIFICATE OF COMPLIANCE [NRAP Form 9]

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Wordperfect in proportionally spaced typeface using Times New Roman, 14 point type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is :

[xxx] Proportionately spaced, has a typeface of 14 points or more and contains 2,842 words;

3. Finally, I hereby certify that I have read this appellate 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 brief 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.

DATED this July 26, 2019

/s/ Benjamin B. Childs
BENJAMIN B. CHILDS, ESQ.
Nevada Bar No. 3946
Attorney for Appellant