In the
Supreme Court of the State of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

ERIC THOMAS MESI,

Appellant,

vs.

VANESSA MARIE MESI, A/K/A VANESSA MARIE REYNOLDS,

Respondent.

Case No.: 79137

District Court Case No.:
D-19-585846-D

Judge: Hon. Rhonda K. Forsberg

Respondent's Answering Brief

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure (hereinafter, "NRAP"), Respondent Vanessa Mesi a/k/a Vanessa Marie Reynolds submits this 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 so that the justices of this Court may evaluate possible disqualification or recusal.

1. Respondent is an individual party. Therefore, she has no parent corporations or corporations owing 10 percent or more stock to disclose pursuant to NRAP 26.1(a).

2. Respondent is represented by Wolf, Rifkin, Shapiro, Schulman, and Rabkin, LLP in this appeal. Respondent appeared pro se in the district court proceedings.

3. Respondent is not using a pseudonym for the purposes of this appeal.

DATED this 17th day of April, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ A. Jill Guingcangco*

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I. SUMMARY OF THE ARGUMENT

Respondent (hereinafter, "Vanessa") takes no position on Appellant's Statement of Issues Presented for this Honorable Court's Review, i.e., (1) whether the district court denied Eric Mesi due process when it did not give him notice and the opportunity for a hearing before dismissing his case, and (2) whether the district court denied Eric Mesi's due process when it dismissed his case based on a substantive ex parte communication, without giving him an opportunity to respond to the communication.

However, if this Court finds that the district court erred by not giving Appellant (hereinafter, "Eric") notice and an opportunity for a hearing, or an opportunity to respond to the ex parte communication, Vanessa maintains that the error was harmless as the First to File Rule nonetheless applies to the underlying case. Eric's substantial rights were not affected to the extent that, but for the alleged error, his case would not have been dismissed. As such, because the error was harmless, reversal and remand of the district court's decision is not warranted.

II. STANDARD OF REVIEW

"Where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Barelli v. Barelli*, 113 Nev. 873, 880, 944 P.2d 246, 250 (1997).

III. ARGUMENT

A. If The District Court Committed Error, It Was Harmless Error That Does Not Warrant Reversal And Remand Of Its Decision.

Rule 61 of the Nevada Rules of Civil Procedure ("NRCP") states:

> Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or

> otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

NRCP 61. "When an error is harmless, reversal is not warranted." *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). However, if the movant demonstrates that the error is prejudicial, reversal may be appropriate. *Id.* To determine whether an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached. *Id.; see also Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 747, 192 P.3d 243, 257 (2008). Even if the district court commits error, if the fact finder more probably than not would have reached the same result absent the error, the error is harmless, and the party's substantial rights have not been affected. *Drayton v. Scallon*, 685 Fed. Appx. 557, 559 (9th Cir. 2017).

Here, if this Court finds that the district court committed error by not giving Eric notice and the opportunity for a hearing, or not giving him an opportunity to respond to the ex parte communication, the error was harmless, and reversal is not warranted. This is because Eric will not be able to show that the alleged error was prejudicial or affected his substantial rights. The fact finder more probably than not would have reached the same result—dismissal of Eric's case pursuant to the First to File Rule—absent the district court's alleged error. Therefore, this Court should affirm the district court's order deferring jurisdiction to the California court and dismissing Eric's case.

B. The Underlying Issue Of Law—Dismissal Pursuant To The First To File Rule—Was Correct, And Reversal And Remand Of The District Court's Decision Is Not Warranted.

The First to File Rule is a comity rule that resolves conflicts of jurisdiction where parallel or substantially identical actions are filed in different courts. *Saes*

Getters S.P.A. v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002). The two prerequisites of this rule are chronology and identity of the parties involved. *Alltrade, Inc. v. Uniweld Prods.*, 946 F.2d 622, 625 (9th Cir. 1991). This rule "permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). Sound judicial administration would indicate that when two identical actions are filed in courts of simultaneous jurisdiction, the court that first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second lawsuit. *Id.* As such, under the doctrine, a district court may transfer, stay, or dismiss the second lawsuit if it determines that it would be in the interest of judicial economy and convenience of the parties. *Id.* The Supreme Court has emphasized that the solution of these problems involves decisions concerning "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," and that "an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84, 72 S. Ct. 219, 221 (1952). The purpose of the First to File Rule is to promote efficiency and avoid duplicative litigation, and as such, it should not be disregarded lightly. *Alltrade*, 946 F.2d at 625. Exceptions to the First to File Rule include filing the first action in bad faith, filing the first action in anticipation of the second action, and filing the first action to engage in forum shopping. *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006).

In *Sherry v. Sherry*, respondent Wendy Sherry (hereinafter, "Wendy") filed a complaint for dissolution of marriage in Illinois state court in 2010. 131 Nev. 1346 (2015). Appellant Stephen Sherry (hereinafter, "Stephen") initially filed a petition to declare the marriage invalid in Illinois, which was consolidated with Wendy's

dissolution action, but after moving to Nevada, Stephen filed a motion to voluntarily dismiss his petition, stopped participating in Wendy's dissolution action, and filed a complaint for annulment in Nevada. *Id.* The district court applied the First to File Rule and determined that the first-filed Illinois action and the later-filed Nevada action involved the same parties and sought to resolve the shared issue of the termination of the parties' marriage. *Id.* The district court further found that considerations of wise judicial administration and comprehensive disposition of litigation counseled in favor of applying the First to File Rule and extending comity to its Illinois sister-court. *Id.* Accordingly, the Court affirmed the district court's order dismissing Stephen's case. *Id.*

Here, on January 23, 2019, after a largely unstable marital history, Vanessa filed her complaint for divorce in the Family Court of County of Santa Clara, Superior Court of California (case no. 19FL000267). I JA 69-70. After approximately fifteen (15) failed attempts at serving Eric (through certified process servers and the Clark County Sheriff's Department), Eric was finally served with the summons and complaint for divorce on March 18, 2020, and the Proof of Service was filed with the County of Santa Clara on March 26, 2020.

Alternatively, on March 13, 2019, Eric filed his complaint for divorce in Clark County, Nevada. I JA 1-8. However, due to procedural deficiencies, Eric has had to re-file his divorce decree several times, to then have them returned to him unsigned by the district court. I JA 51-55 and 66.

On June 19, 2019, the district court held a telephonic conference with the Family Court of County of Santa Clara wherein the district court decided to dismiss Eric's case pursuant to the First to File Rule, and defer jurisdiction to the California court. I JA 130-131, III JA 708-710 and 715-722.

The two prerequisites of the First to File Rule clearly have been met. The first is chronology, as Vanessa filed her action in California prior to Eric filing his

action in Nevada; the second is the identity of the parties involved, and the parties here are identical. These issues were thoroughly discussed between the district court and the California court. Specifically, the California court stated that "[Vanessa] filed January 23rd, 2019," and the district court responded, stating that Eric filed on "March 13, 2019, so it appears that California court has the first to file." III JA 717:23-718:3. The California court then confirmed, "I have the first to file." *Id.* at 718:4.

Like *Sherry*, the district court determined that the first-filed California action and the later-filed Nevada action involved the same parties and sought to resolve the shared issue of the termination of the parties' marriage. III JA 715-722. As the *Sherry* court found that considerations of wise judicial administration and comprehensive disposition of litigation counseled in favor of applying the First to File Rule and extending comity to its Illinois sister-court, so did the district court in the underlying action. Thus, the district court declined jurisdiction and dismissed the underlying action as no purpose would be served by proceeding with Eric's Complaint for divorce. Further, it was within the district court's discretion to dismiss Eric's case in order to promote efficiency and avoid duplicative litigation. The district court's conduct in not giving Eric notice and the opportunity for a hearing, and not giving him an opportunity to respond to the ex parte communication, if considered error, is harmless error as the First to File rule nonetheless applies—Eric's case would have been dismissed regardless, as nothing can change the fact that Vanessa filed her action in California first.

Finally, Vanessa does not satisfy the exceptions to the First to File Rule as she did not file the first action in bad faith, in anticipation of the second action, or to engage in forum shopping. Therefore, this Court should affirm the district court's order deferring jurisdiction to the California court and dismissing Eric's case.

C. Reversal And Remand Back To The District Court Would Prove Futile.

Because the underlying issue of law is correct, reversal and remand would prove futile. It would clearly be a waste of judicial resources, time, and expense to remand the matter back to district court merely to have the case dismissed pursuant to the First to File Rule. Reversal and remand would extend the case only to be re-dismissed promptly anyway, resulting in unnecessary legal proceedings and parties' legal fees and costs. The district court judge has already evaluated the facts and would merely be engaging in an empty formality to reach the same conclusion.

IV. CONCLUSION

While Vanessa takes no position on the due process issues addressed in Appellant's Opening Brief, the First to File Rule nonetheless applies to the underlying case. If this Court finds that the district court committed error, it was harmless error as Eric's substantial rights were not affected to the extent that, but for the alleged error, his case would not have been dismissed. Accordingly, reversal and remand of the district court's order is not warranted. Therefore, Vanessa respectfully requests this Honorable Court to affirm the district court's order deferring jurisdiction to the California court and dismissing Eric's case.

CERTIFICATE OF COMPLIANCE

1. I certify that Respondent's Answering 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). It has been prepared in a proportionally-spaced typeface, Times New Roman, size 14 font.

2. I further certify that Respondent's Answering Brief complies with the type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of Respondent's Answering Brief exempted by NRAP 32(a)(7)(C), it contains 2,676 words.

3. Finally, I hereby certify that I have read Respondent's Answering 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 Respondent's Answering Brief complies with all applicable rules of NRAP, in particular NRAP 28(e)(1), which requires every assertion in Respondent's Answering 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.

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I understand that I may be subject to sanctions in the event that the accompanying Respondent's Answering Brief is not in conformity with the requirements of NRAP.

DATED this 17th day of April, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2020, a true and correct copy of the foregoing **Respondent's Answering Brief** was served on the following by United States Mail, first class, and by the Supreme Court Electronic Filing System:

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