Case No. 79137

IN THE
SUPREME COURT OF THE STATE OF NEVADA

ERIC THOMAS MESI,

Appellant,

vs.

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

Respondent.

Appeal from the Eighth Judicial District Court, Clark County, Nevada
Judge Rhonda K. Forsberg, Case No. D-19-585846-D

APPELLANT ERIC THOMAS MESI'S REPLY BRIEF

DENNIS L. KENNEDY
Nevada Bar No. 1462
STEPHANIE J. GLANTZ
Nevada Bar No. 14878
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com
SGlantz@BaileyKennedy.com

Attorneys for Appellant
In conjunction with Legal Aid Center
of Southern Nevada Pro Bono Project

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Appellant Eric Mesi submits this Disclosure Statement:

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 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. Appellant is an individual party. Therefore, he has no parent corporations or corporations owning 10 percent or more stock to disclose pursuant to Nevada Rule of Appellate Procedure 26.1(a).

2. Appellant is represented by Bailey❖Kennedy in this appeal. Appellant represented himself pro se in the district court proceedings.

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

DATED this 1st day of June, 2020.

BAILEY❖KENNEDY

By: */s/ Stephanie J. Glantz*
DENNIS L. KENNEDY
STEPHANIE J. GLANTZ

Attorneys for Appellant
In conjunction with Legal Aid Center of Southern Nevada Pro Bono Project

TABLE OF CONTENTS

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Table of Authorities

Cases

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Other

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

I. INTRODUCTION

The blatant disregard of Eric Mesi's ("Eric") procedural due process rights by the district court was so manifest that Vanessa Mesi ("Vanessa") does not dispute it in her response.[1] RAB 1. Rather, Vanessa claims that such deprivation was harmless error because the district court made the correct decision on the evidence it had—the evidence derived from another deprivation of due process: an unrebutted ex parte communication. *Id.* at 2-5.

Simply put, there is no way the district court could have appropriately weighed the facts to determine whether the first-to-file rule applied—as the rule requires a court to do—when all the district court had were facts from an ex parte communication that it did not allow Eric to address or rebut. Indeed, Eric never had a chance to brief the matter—nor attend a hearing on the matter—to argue in support of his position. This alone shows that the outcome may have been different had the district court afforded Eric his due process.

But further, even on the sparse facts in the record which support Eric's position, the underlying decision was incorrect. In particular, during the ex parte communication, the California trial court informed the Nevada district court that Eric was disputing jurisdiction in California. Yet, the Nevada district court outright dismissed Eric's case, despite authority that a case should not be

[1] Vanessa also does not dispute Eric's statement of facts.

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

dismissed on a "first-filed" basis when there is jurisdictional uncertainty in the first-filed case. Instead, the Nevada district court looked at just one factor: the dates the cases were filed. But the first-filed rule is not a rule to be mechanically applied based solely on the rule's namesake. It is a rule that a district court must apply with precise discretion—weighing all the factors of the case to determine whether or not deferring jurisdiction to the first-filed court would serve judicial efficiency. By summarily dismissing the case, without giving the parties the opportunity to present all the relevant factors, to a jurisdiction where the case's future was uncertain, the Nevada district court did not properly apply the rule.

Had the Nevada district court afforded Eric his due process and allowed him to present evidence and argument in support of his position, as well as an opportunity to address the ex parte communication, the district court would likely have determined that—at a minimum—outright dismissal was not proper. Accordingly, Eric's deprivation of due process was not harmless error because a different result may reasonably have been reached had the deprivation not occurred. This Court should reverse the dismissal and remand for further proceedings.

/ / /

/ / /

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

II. VANESSA'S PROPOSED STANDARD OF REVIEW IS INCORRECT AND INAPPICABLE.

Vanessa proposes this Court use substantial evidence as a standard of review. RAB 1. This proposed standard is inappropriate. Essentially, Vanessa is arguing that the ex parte communication by the California judge is "evidence" that "conflicts" with the [lack of] evidence in the record—a result of the district court depriving Eric the opportunity to present any evidence at all. RAB 1; *see also Barelli v. Barelli*, 113 Nev. 873, 880, 944 P.2d 246, 250 (1997) ("[A] determination predicated on conflicting evidence…will not be disturbed on appeal where supported by substantial evidence."). Whether a court violated someone's due process rights is not an evidentiary question—it is a legal question that is reviewed de novo. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).[2]

/ / /

[2] Further, even the underlying decision itself, which Vanessa contends was correct, is not subject to a substantial evidence standard of review. Rather, the decision to apply the first-to-file rule is a mixed question of fact and law. *See Alltrade, Inc. v. Uniweld Prods.*, 946 F.2d 622, 628 (9th Cir. 1991) (noting that the first-to-file rule requires a judge to "weigh the facts and conclude [whether] the rule should apply"). It is reviewed for abuse of discretion. *See Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983) (explaining that the district court has discretion to invoke principles of comity); *see also Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 995 (9th Cir. 1982) (explaining that appellate courts review trial-court decisions declining to exercise jurisdiction under the first-to-file rule for an abuse of discretion).

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

III. ARGUMENT

A. IMPROPER DISMISSAL OF A CASE AS A RESULT OF DUE PROCESS VIOLATIONS IS NOT HARMLESS ERROR.

Vanessa has asserted that any due process violation was harmless, as the underlying decision was correct. RAB 1. An error is harmless when it does not affect a party's substantial rights. NRCP 61. However, an error that "affects [a] party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached" is a prejudicial error warranting reversal. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010).

Simply put, the district court's decision was prejudicial because the outcome was incorrect and Eric's case was dismissed as a result. Had Eric been afforded the opportunity to present argument and evidence, including the opportunity to address the ex parte communication, the district court may have reached the correct result and—at a minimum—stayed Eric's case.

1. THE UNDERLYING DECISION WAS INCORRECT.

Vanessa rests her conclusion that the underlying decision was correct on a rigid, mechanical application of the first-to-file rule. RAB 5. As an initial matter, the district court could not have appropriately weighed all the facts of this case without giving Eric an opportunity to present those facts. But even with the evidence the district court had at the time it made its decision—

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

including that of the ex parte communication—dismissing Eric's case was not appropriate.

The first-to-file rule is a discretionary comity doctrine "***appropriate for disciplined and experienced judges***" and used to defer jurisdiction when a complaint involving the same parties and issues has already been filed in another district court. *See Alltrade, Inc. v. Uniweld Prods.*, 946 F.2d 622, 628 (9th Cir. 1991) (*quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952) (emphasis added)). It is designed to "serve[] the purpose of promoting efficiency." *Id.* at 625 (internal quotation marks omitted). Accordingly, ***the "rule is not a rigid or inflexible rule to be mechanically applied***, but rather is to be applied with a view to the dictates of sound judicial administration." *Pacesetter Sys. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). When determining whether to decline jurisdiction, judges are required to use their discretion to "weigh the facts and conclude [whether] the rule should apply." *Alltrade*, 946 F.2d at 628.

Although courts generally give preference to the first-filed case in determining whether to decline jurisdiction among concurrent proceedings, ***timing is only one consideration of many that a court must use to determine whether to defer jurisdiction***. *See R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 976 (9th Cir. 2011) (emphasis added); *see also Saes Getters S.P.A. v.*

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Aeronex, Inc., 219 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002) ("While the determination of which case was first-filed is a necessary starting point, other considerations come into play . . . [u]ltimately, the district court is to temper its preference for the first-filed suit by yielding to the forum in which all interests are best served."). One factor in the consideration of deferring jurisdiction is whether the courts in both actions have the appropriate jurisdiction to resolve the matter in the first place. As one court has explained, the first-filed action becomes the first-filed "[b]y virtue of its prior jurisdiction over the common subject matter." *Mann Mfg. v. Hortex, Inc.*, 439 F.2d 403, 408 (5th Cir. 1971); *see also Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258, 262 (1910) (holding that because "there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same[,] that the court first seized should proceed to the determination"). Accordingly, while jurisdictional uncertainty in the first-filed action is not necessarily an exception to the first-filed rule, in the Ninth Circuit, it "at the very least it counsels against outright dismissal." *See Alltrade*, 946 F.2d at 628-29. Accordingly, "***where the first-filed action presents a likelihood of dismissal, the second-filed suit should be stayed, rather than dismissed***." *Id.* at 629.

/ / /

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Further, Nevada specifically demands that when considering comity, "there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983) (internal citations omitted). Accordingly, "greater weight is to be accorded [to] Nevada's interest in protecting its citizen[s' interests]," rather than to another state's policies. *Id.*

Lastly, there are other considerations for determining whether judicial efficiency would be best served by deferring jurisdiction. For example, a court should look at how far each case is in its respective litigation and whether the forum is capable of resolving all the issues. *Pacesetter*, 678 F.2d at 95-96. Specifically, "[t]he first filed action should not have priority when little if anything has been done to advance it for trial, and the balance of convenience favors the forum in which the latter suit is commenced." *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F. Supp. 563, 568 (S.D.N.Y. 1979). In sum, to appropriately apply the rule, a judge must go beyond a rigid application of its namesake, look at the facts of each individual case, and determine if it would serve judicial efficiency to apply the rule. *See Pacesetter*, 678 F.2d at 95-96.

The district court here did not appropriately defer jurisdiction to California using an "ample degree of discretion" suited for "disciplined and

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

experienced judges." *See Alltrade*, 946 F.2d at 628.[3] The hearing transcript reveals that the district court mechanically applied the namesake of the rule—only considering the timing of when each respective action was filed—despite other considerations being brought to the district court's attention by the California court. 3 JA 717-18 ("Mr. Mesi filed in our Courts. . . March 13, 2019, so it appears that California Court has the first to file . . . ."). This is the portion of the record upon which Vanessa rests her argument that the underlying decision was correct. RAB 5.

But the district court here did not consider anything beyond which case was first filed—ignoring the effect of the jurisdictional dispute in California, the rights and convenience of Eric, and other factors designed to serve the first-filed rule's purpose of efficiency, including those that Eric could have presented to weigh against the district court blindly applying the rule. The district court denied him that meaningful opportunity. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (holding that "procedural due process 'requires notice and an opportunity to be heard'").

/ / /

[3] Ironically, during the discussion regarding the first-to-file rule with the California Court, the district court judge here acknowledged that she took the bench less than ***two months*** prior to exercising the discretion to dismiss Eric's case, and thanked the California court for helping her figure out the issue. 3 JA 719, 722.

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

The most glaring abuse of the district court's discretion is that it dismissed Eric's case, rather than staying it, despite being aware that Eric was disputing jurisdiction in California. 3 JA 721 ("I'll dismiss our action, I'll defer jurisdiction to California and he can fight it out with her there and determine whether you guys have jurisdiction . . . ."). Even if the district court correctly determined that the first-filed rule applied here, this jurisdictional dispute demanded that Eric's case be stayed, rather than dismissed, while the jurisdictional dispute was resolved in the California case. *See Alltrade*, 946 F.2d at 629. This aligns with the first-to-file rule's purpose in promoting efficiency. *Id.* at 625. By dismissing Eric's case, the following would likely happen: the California court would ultimately dismiss the case there for lack of jurisdiction.[4] Eric would then have to refile his action in Nevada. After Eric refiles his action, he would then have to re-serve Vanessa. Then, hypothetically, the Nevada court is back to the same position it would have been had it weighed these factors and concluded against outright dismissal based on the first-to-file rule. This end result of the district court's dismissal

[4] In California, "a judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of [California] for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition." Cal. Fam. Code § 2320. Vanessa filed the California action on January 23, 2019, less than one month after abruptly moving to California, and four months prior to the district court dismissing Eric's case. 2 JA 264-65, 268; 3 JA 714, 717:25.

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

hardly exemplifies the sound judicial administration of the rule's intent. This is unsurprising, however, because Eric never had a chance to present his argument to the district court before it dismissed his case. Thus, the district court never appropriately weighed all the facts in the case as the rule requires it to do. *See Alltrade*, 946 F.2d at 628.

Further, the district court did not give "due regard . . . to the duties, obligations, rights and convenience of [Mr. Mesi]," which should have been given "greater weight" than to California's judicial policies. *See Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Indeed, the district court instead asserted in the ex parte communication that Eric was "dodging service," without giving Eric an opportunity to address the status of service in either matter. 3 JA 719:13. In any event, there is a reason Eric filed his case in Nevada—it is not possible for him to litigate the divorce in California. Eric's health issues prevent him from doing so—issues which are in the record, but were never considered by the district court. *See* 1 JA 101 (explaining that Eric is disabled); *but see generally* 3 JA 715-22 (failing to consider the convenience of Eric). But again, the district court did not consider this as both the first-to-file rule and Nevada comity jurisprudence requires it to do. *See Alltrade*, 946 F.2d at 628; *see also Mianecki*, 99 Nev. at 98, 658 P.2d at 425. It could not have—it never gave Eric the opportunity to present such evidence.

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Finally, the district court did not consider any other factors when determining whether judicial efficiency would be best served by deferring jurisdiction to California. For example, the district court was aware that Eric had completed service on Vanessa, but Vanessa would still have to effectuate service on Eric should Nevada defer jurisdiction. 3 JA 719-20.[5] Yet, the district court still determined that it would defer jurisdiction to the first-filed case without any indication of how this served the first-filed rule's purpose in judicial efficiency. If nothing else, this discussion should have indicated to the district court that there were further issues to address before being able to properly use its discretion to defer jurisdiction—certainly worthy of allowing Eric the opportunity to be heard on those issues.

The district court's decision was incorrect. Had Eric been given a meaningful opportunity to be heard and present his argument, a different result may reasonably have been reached. Accordingly, the district court depriving Eric of his due process rights—by depriving him the opportunity to be heard

[5] Vanessa cites to procedural history from the California case regarding service on Eric in support of her argument, but evidence of such procedural history is not supported by the record in this appeal. ARB 4. Although it has little effect on the analysis herein, this Court should nevertheless decline to consider such factual contentions. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of [a respondent] where the [respondent's] brief fails to cite to the record on appeal.").

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

and dismissing his case based on an improper ex parte communication—was not harmless error. *See Wyeth*, 126 Nev. at 465, 244 P.3d at 778.

IV. CONCLUSION

The district court deprived Eric of his procedural due process rights by dismissing his case based on an ex parte communication and further by denying him an opportunity to be heard before doing so. This is not, and cannot be, disputed. That deprivation could not have been harmless error when the decision itself was incorrect on the merits. Had the district court appropriately addressed the parallel cases with the parties directly, allowing Eric to present facts and argument, a different result may reasonably have been reached. Particularly, the district court may have stayed the case rather than dismissing it entirely. For that reason, this Court should reverse the district court's order and remand the matter for a hearing so that Eric has an opportunity to address the

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

improper ex-parte communication and present evidence and argument regarding the first-to-file rule.

DATED this 1st day of June, 2020.

BAILEY❖KENNEDY

By: */s/ Stephanie J. Glantz*
DENNIS L. KENNEDY
STEPHANIE J. GLANTZ

Attorneys for Appellant
In conjunction with Legal Aid Center of Southern Nevada Pro Bono Project

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

CERTIFICATE OF COMPLIANCE

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:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font 14.

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:

[x] Proportionally spaced, has a typeface of 14 points or more, and contains 2,517 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

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of June, 2020.

BAILEY❖KENNEDY

By: */s/ Stephanie J. Glantz*
DENNIS L. KENNEDY
STEPHANIE J. GLANTZ

Attorneys for Appellant
In conjunction with Legal Aid Center of Southern Nevada Pro Bono Project

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 1st day of June, 2020, service of the foregoing **APPELLANT'S REPLY BRIEF** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

A. JILL GUINGCANGCO, ESQ.
WOLF RIFKIN SHAPIRO SCHULMAN & RABKIN, LLP
3556 E. Russell, 2nd Floor
Las Vegas, Nevada 89120

Attorneys for Respondent
VANESSA MARIE MESI, A/K/A VANESSA MARIE REYNOLDS

/s/ Jennifer Kennedy
Employee of BAILEY❖KENNEDY

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820