

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 81379

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Elizabeth A. Brown
Clerk of Supreme Court

ROCHELLE MEZZANO,

Appellant,

vs.

JOHN TOWNLEY,

Respondent.

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT CASE NO.

DV19-01564

RESPONDENT'S ANSWERING BRIEF

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1 **NRAP 26.1 DISCLOSURE STATEMENT**

2 The undersigned counsel for record certifies that the following are
3 persons and entities as described in NRAP 26.1(a) and must be disclosed.
4 These representations are made in order that the judges of this court may
5 evaluate possible disqualification or recusal.

6 Respondent, John Townley, is a resident of the state of Nevada.

7 The following law firm has appeared as counsel of record for John
8 Townley: Silverman Kattelman Springgate, Chtd.

9 Dated this 18th day of March 2021

10 /s/ Alexander Morey

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ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals under
NRAP 17(b)(10).

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2 **STATEMENT OF THE ISSUES**

3 Whether Ms. Mezzano waived her right to dispute the trial court's
4 conclusion she did not timely move to set aside the decree of divorce under
5 NRCP 60(b)(4) because she did not affirmatively argue the timeliness of her
6 motion below, did not address the controlling case law on timeliness, and did
7 not address the issue even after Mr. Townley presented it in his opposition to
8 her motion.

9 Whether Ms. Mezzano has waived her ability to proceed with this appeal
10 by affirmatively proposing a method of delivery for documents and things
11 awarded to her by the decree of divorce that she claims is void, accepting the
12 benefit of the decree.

13 Whether, if this Court permits Ms. Mezzano's appeal to proceed, the
14 trial court properly denied Ms. Mezzano's motion to set aside the decree of
15 divorce under NRCP 60(b)(4) because Ms. Mezzano was both properly served
16 and did not timely act.

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2 This matter arises from a divorce action in which Rochelle Mezzano, after
3 receiving the summons and complaint and notifying John Townley she was served,
4 did not try to recant her admission of service or participate in the action and
5 permitted entry of a default judgment. After entry of the decree, Ms. Mezzano
6 alleged she was not properly served but then, despite having all relevant facts in
7 her possession, delayed over two months before moving to set aside. Mr. Townley
8 opposed the motion having earlier sought enforcement of the decree and orders
9 about distribution of money and property to Ms. Mezzano. Ms. Mezzano did not
10 file a reply to Mr. Townley's opposition. The trial court denied Ms. Mezzano's
11 motion to set aside.

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On September 11, 2019, counsel for John Townley sent a letter to Rochelle Mezzano advising her counsel represented Mr. Townley, that Mr. Townley was proceeding with a divorce, and that her immediate action was required, or he would proceed with litigation. (AA 152,153.) Ms. Mezzano did not respond, and Mr. Townley initiated the underlying divorce action. (AA 142-143, 147.) A complaint was filed, and a summons obtained. (AA 1-5, 30-33.)

19 On October 4, 2019, a process server arrived at Ms. Mezzano's home at 735
20 Aesop Court, Reno, Nevada. (AA 31.) The process server determined Ms.

1 Mezzano was in the home when she responded to an oral notice she should come
2 to the door to get documents. (Id.) Ms. Mezzano, who knew a divorce was
3 imminent,¹ refused to come to the door. (Id.) The process server, therefore, posted
4 the summons and complaint and left the property. (Id.) It is certain Ms. Mezzano
5 received the documents; she emailed Mr. Townley at 6:54 p.m. on the day of
6 service which read "I got served papers today. I have twenty days including the
7 weekend to respond. Which means I need to retain an attorney. So, I need a
8 retainer. How would you like to proceed?" (AA 155.) The trial court held this to be
9 an appearance by Ms. Mezzano. (AA 178.)

10 Mr. Townley and Ms. Mezzano then corresponded directly and agreed to
11 meet at counsel's office to discuss resolution. (AA 143, 147.) The meeting was to
12 occur on the Morning of October 22, 2019. (Id.) Ms. Mezzano did not appear. (Id.)
13 Mr. Townley proceeded with the divorce.

14 Ms. Mezzano was kept advised of the proceedings. On October 8, 2019, she
15 was mailed a Notice to Set the case management conference required by NRCP
16 16.2. (RA 001-003.) On October 29, 2020 Ms. Mezzano was mailed a Notice of
17 Intent to Take Default. (AA 34-35.) Ms. Mezzano's default was entered on
18 November 1, 2019. (AA 39.) On that same date, Ms. Mezzano was mailed a
19
20

¹ The trial court determined Ms. Mezzano was aware of the divorce suit. (AA 178.)

1 Declaration in Support of Default. (AA 36-38.) On November 19, 2019, Ms.
2 Mezzano was mailed a Notice of Intent to Take Default Judgment, (AA 60-61.), a
3 Notice of Case Management Conference, (RA 004-006), a Notice of Intent to Take
4 Default Judgment, (AA 60-61.), and the related documents to substantiate the
5 default judgment, (AA 45-47, 57-59.) On November 27, 2019, Ms. Mezzano was
6 mailed a copy of the declaration of Mr. Townley's resident witness, (AA 62-64.),
7 and an Application for Default Judgment, (AA 65-82.) At no point did Ms.
8 Mezzano recant her admission of service to Mr. Townley, counsel, or the Court.
9 (AA 175-176.). She ignored the proceedings. (AA 178.)

10 Ms. Mezzano did not appear before the Court on December 11, 2019. (AA
11 100.) At the time of the hearing, the Court sent a courtesy email to Ms. Mezzano,
12 which she did not respond to. (AA 100.) The Court entered a default divorce on
13 December 11, 2019. (AA 83-96.) Notice of entry of the divorce decree was sent to
14 Ms. Mezzano by mail and email on December 12, 2019. (AA 106-122.) Ms.
15 Mezzano took no action.

16 On December 31, 2019, counsel for Mr. Townley sent a letter to Ms.
17 Mezzano about necessary tasks to complete the division of property and deliver
18 money and property to her post-divorce. (AA 158-162.)

19 On January 4, 2020, counsel for Mr. Townley received a letter from an
20 attorney in Las Vegas, Nevada, alleging he represented Ms. Mezzano and claiming

1 Ms. Mezzano would shortly move to set aside the decree of divorce. (AA 164.)

2 On January 7, 2020, counsel for Mr. Townley spoke to Ms. Mezzano's putative
3 counsel by phone. (AA 144.) On January 10, 2020, counsel for Mr. Townley
4 Townley sent a letter to Ms. Mezzano's putative counsel. (AA 166-171.) There
5 was no response. (AA 144, 147.)

6 On January 27, 2020, counsel for Mr. Townley sent a letter to Ms.
7 Mezzano's putative counsel. (AA 144.) There was no response. (Id.)

8 On March 4, 2020, Ms. Mezzano was served with Mr. Townley's motions
9 seeking enforcement of the divorce decree. (RA 062-064.) F. Peter James, Esq., at
10 last filed a Notice of Appearance as Ms. Mezzano's counsel on March 13, 2020,
11 over two months after his first letter about the matter. (RA 065-067.) After counsel
12 for Mr. Townley permitted two extensions of time for Ms. Mezzano to file any
13 oppositions to his motions, (RA 068-069 and 070-071.), Ms. Mezzano at last
14 moved to set aside the decree on March 23, 2020. (AA 123-141.) As the trial court
15 noted, "all the facts alleged in Ms. Mezzano's Motion to Set aside were within her
16 knowledge, yet she waited two months after contacting Mr. Townley's counsel to
17 take any action." (AA 178.)

18 Mr. Townley's opposition to Ms. Mezzano's motion to set aside was filed on
19 March 30, 2020. (AA 142-171.) Ms. Mezzano did not file a reply or any argument
20 in response to the points raised in Mr. Townley's opposition. (AA 176.) Ms.

1 Mezzano did not timely submit her motion. Mr. Townley had to submit the motion
2 for decision, which he did on April 8, 2020. (RA 101-102.) Ms. Mezzano belatedly
3 submitted the motion for decision on May 12, 2020. (RA 103-105.)

4 The trial court considered Ms. Mezzano's motion, Mr. Townley's
5 opposition, and Ms. Mezzano's failure to file a reply and entered its Order Denying
6 Motion to Set Aside Decree of Divorce and for Related Relief on May 22, 2020.
7 (AA 174-178.) The trial court found Ms. Mezzano had actual notice of the
8 proceedings, had been served, had notice of the default proceedings, had all the
9 facts she alleged to support her motion in her possession well before she filed her
10 motion, and not been diligent in seeking to set aside the decree. (Id.)

11 Simultaneously as Ms. Mezzano moved to set aside the decree of divorce, on
12 March 23, 2020, she also filed her Consolidated Oppositions to Motions Filed March
13 23, 2020. (RA 072-080.) Therein, Ms. Mezzano requested "denial of the following
14 Motions . . . save as agrees herein." (RA 072-073.) Then, in response to Mr. Townley's
15 request for orders about delivery of property and money due Ms. Mezzano under the
16 decree of divorce, Ms. Mezzano proposed that Mr. Townley drop off the items at her
17 brother in law's home, have Mr. Townley's significant other deliver them, or mail them

1 to her counsel. (RA 074.) The documents and funds were delivered to Ms. Mezzano's
2 counsel. (RA 124-126.) Neither delivery was returned or refused.²

3 SUMMARY OF THE ARGUMENT

4 First, Ms. Mezzano presented no argument below establishing she timely
5 filed her Motion to Set Aside Decree of Divorce. Her motion brought under NRCp
6 60(b)(4) had to be filed within a reasonable time, which Mr. Townley pointed out
7 in his opposition. Ms. Mezzano did not file a response to the argument, and the
8 trial court determined she did not timely pursue relief. Her failure to make the
9 argument below is a waiver of her right to raise the issue on appeal. Because a
10 motion under NRCp 60(b)(4) must be brought within a reasonable time, and the
11 trial court's decision is final, Ms. Mezzano's waiver is dispositive.

12 Second, the trial court appropriately denied Ms. Mezzano's motion to set
13 aside the decree because Ms. Mezzano was served and did not move for relief
14 within a reasonable time or was estopped from claiming she was not served. Ms.
15 Mezzano was personally served with the summons and complaint because
16 Ms. Mezzano was on notice litigation was proceeding, the service of process was

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18 ² These facts concerning delivery of money and property to Ms. Mezzano pursuant
19 to the decree of divorce arose after the trial court denied Ms. Mezzano's motion to
20 set aside. These facts are included here and substantiated by documents in the
Respondent's Appendix because they demonstrate Ms. Mezzano's acceptance of
benefits under the decree she challenges, which effects a waiver of her ability to
challenge the decree on appeal.

1 reasonably calculated to give Ms. Mezzano actual notice of the proceedings,
2 Ms. Mezzano received the summons and complaint and actual notice of the
3 proceedings, and Ms. Mezzano admitted she was served. Ms. Mezzano did not
4 move for relief under NRCP 60(b)(4) within a reasonable time or was estopped
5 from denying service of process by her failure to advise Mr. Townley or the trial
6 court of her claim there was a defect in service, by permitting the matter to proceed
7 to default judgment, and—despite possession of all the facts involved in her NRCP
8 60(b)(4) motion during the proceedings—waiting nearly three months after her
9 counsel first appeared to file her motion.

10 Third, Ms. Mezzano may not proceed with this appeal as she has accepted
11 the benefits of the decree of divorce by, inter alia, requesting delivery of property
12 set over to her and receiving the property.

13 ARGUMENT

14 **BECAUSE MS. MEZZANO DID NOT RAISE ANY ARGUMENT IN**
15 **DEFENSE OF MR. TOWNLEY'S ASSERTION SHE DID NOT BRING**
16 **HER NRCP 60(B) MOTION WITHIN A REASONABLE TIME, SHE MAY**
17 **NOT CHALLENGE THE TRIAL COURT'S DETERMINATION HER**
FAILURE TO MAKE A PROMPT APPLICATION WAS SUFFICIENT
GROUND TO DENY HER MOTION.

18 Points not raised in the trial court may not be raised for the first time on
19 appeal. *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Here,
20 Mr. Townley asserted Ms. Mezzano's NRCP 60(b) motion was untimely under

1 *Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980), and *In re:*
2 *Harrison Living Trust*, 121 Nev. 217, 112 P.3d 1058 (2005), in his Opposition to
3 Motion to Set Aside. (AA 144.) Ms. Mezzano did not file a reply to Mr. Townley's
4 Opposition and presented no evidence or argument establishing she brought her
5 NRCP 60(b) motion within a reasonable time. (See, generally, AA 176.) Now, for
6 the first time, she argues her motion was made within a reasonable time.
7 Ms. Mezzano's failure to raise this point in the trial court is a waiver of her
8 arguments on appeal. Ms. Mezzano is precluded from challenging the trial court's
9 conclusion that her NRCP 60(b) motion "can also be denied for her failure to make
10 a prompt application to set aside the default judgment." (AA 178.)

11 This point is dispositive. This Court need not analyze any of Ms. Mezzano's
12 claims as she cannot challenge the trial court's decision her NRCP 60(b) motion
13 was untimely, which is "ground enough for denial." *Union Petrochemical Corp. v.*
14 *Scott*, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980).

15
16 **EVEN IF THIS COURT PROCEEDS WITH AN ANALYSIS OF THE**
17 **OTHER ISSUES, THE TRIAL COURT'S DECISION MUST BE UPHELD**
18 **AS MS. MEZZANO WAS SERVED AND, IN ANY EVENT, SHE**
19 **UNREASONABLY AND WITHOUT EXPLANATION DELAYED TAKING**
20 **ANY ACTION TO ADVISE THE COURT OF HER CLAIM OF**
DEFICIENT SERVICE AND UNREASONABLY AND WITHOUT
EXPLANATION DELAYED FILING HER MOTION TO SET ASIDE THE
DEFAULT DECREE OF DIVORCE.

A. Standard of Review.

1 The district court has wide discretion in deciding whether to grant or deny a
2 motion to set aside a judgment under NRCP 60(b). Its determination will not be
3 disturbed on appeal absent an abuse of discretion. *Union Petrochemical Corp. v.*
4 *Scott*, 96 Nev. 337, 338, 609 P.2d 323 (1980).

5 **B. Ms. Mezzano was Personally Served.**

6 NRCP 4.2(a)(1) permits service of process by delivering a copy of the
7 summons and complaint to the defendant “personally”. Personal service does not
8 require a face-to-face meeting or an attempt to force papers onto a defendant.
9 *Currie v. Wood*, 112 F.R.D. 408, 409 (E.D.N.C. 1986) (citing cases). The purpose
10 of process is to provide actual notice to the addressee of the action filed against
11 them and an opportunity to respond. “It has long been recognized, as a principle of
12 law, that the purpose of process is to give the party to whom it is addressed actual
13 notice of the proceedings against him, and that he is answerable to the claim of the
14 plaintiff.³ It is this notice which gives the Court jurisdiction to proceed.” *Scott v.*
15 *G.A.C. Fin. Corp.*, 486 P.2d 786, 787 (Ariz. 1971). The rules governing service of
16 process are used to provide a likelihood of bringing actual notice to the

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19 ³ That the Nevada Rules of Civil Procedure permit alternative forms of service
20 including delivery by “including certified mail, telephone, voice message, email,
social media, or any other method of communication” evidences the true purpose
of service being to provide notice and not to rigidly conform to the dusty tradition
of intoning “you have been served”. *See* NRCP 4.4(d).

1 addressee. *Minn. Mining & Mfg. Co. v. Kirkevold*, 87 F.R.D. 317, 323 (D. Minn.
2 1980). Where a defendant has received actual notice, the service rules should be
3 liberally construed to uphold service. *Id.* Further, substantial compliance with
4 personal service requirements coupled with actual notice to the defendant is
5 sufficient. *See Brockbank v. Second Judicial Dist. Court*, 65 Nev. 781, 201 P.2d
6 299 (1948) (discussing the corollary that rules for substitute service of process
7 must be strictly followed); *see also, e.g., Wagner v. Truesdell*, 1998 S.D. 9, ¶ 9,
8 574 N.W.2d 627, 629; *In re Coleman*, 793 N.W.2d 296, 302 (Minn. 2011). That
9 strict compliance applies only to substitute service is found in case law dating to
10 1869. *See, e.g., Little v. Currie*, 5 Nev. 90, 92 (1869) (“Statutory provisions for
11 acquiring jurisdiction *by any other than personal service* must be strictly
12 pursued.”) (Emphasis Added.)

13 Here, Ms. Mezzano received actual notice; therefore, the service rules must
14 be liberally construed in favor of finding sufficient service. In this case, Ms.
15 Mezzano was on notice Mr. Townley was proceeding with a divorce when the
16 process server arrived at her home. (AA 152-153.) She was present at her home
17 and responded to a verbal inquiry. (*Id.*) She was told the process server needed to
18 give her something. (*Id.*) She refused to come to the door. (*Id.*) The process server
19 posted the documents on the door. (*Id.*) Ms. Mezzano took actual possession of the
20 documents that same day, and Ms. Mezzano emailed Mr. Townley explaining she

1 was served within hours of receiving the documents. (AA 155.) The conclusion
2 must be that the process server left the documents in a conspicuous location in
3 Ms. Mezzano's presence. The service method was reasonably calculated to give
4 Ms. Mezzano actual notice and an opportunity to respond and did give actual
5 notice and delivery of the documents within hours. The trial court had sufficient
6 evidence in the record to determine Ms. Mezzano was personally served. There
7 was no abuse of discretion.

8 **BECAUSE MS. MEZZANO UNREASONABLY AND WITHOUT**
9 **EXPLANATION DELAYED TAKING ANY ACTION TO ADVISE THE**
10 **COURT OF HER CLAIM OF DEFICIENT SERVICE AND**
11 **UNREASONABLY AND WITHOUT EXPLANATION DELAYED FILING**
12 **HER MOTION TO SET ASIDE THE DEFAULT DECREE OF DIVORCE,**
13 **THE TRIAL COURT PROPERLY DENIED HER NRCP 60(B) MOTION.**

14 An NRCP 60(b) motion, even a motion claiming a judgment is void for
15 improper service, must be brought "within a reasonable time", and lack of
16 diligence and equitable estoppel both function as bars to an NRCP 60(b)(4)
17 motion. *Teriano v. Nev. State Bank (In re Harrison Living Tr.)*, 121 Nev. 217, 222,
18 112 P.3d 1058, 1061 (2005). A "want of diligence in seeking to set aside a
19 judgment is ground enough for denial." *Union Petrochemical Corp. v. Scott*, 96
20 Nev. 337, 339, 609 P.2d 323, 324 (1980). "Lack of diligence is generally a factual
issue for the district court's consideration." *Teriano v. Nev. State Bank (In re*
Harrison Living Tr.), 121 Nev. 217, 222, 112 P.3d 1058, 1061 (2005). Therefore,

1 whether a motion under NRCP 60(b)(4) has been brought within a reasonable time
2 is within the discretion of the trial court. *Id.* at 222 n. 16 (citing cases).

3 Here, Ms. Mezzano, despite having actual notice of the proceeding and
4 receiving repeated correspondence from Mr. Townley's counsel about the
5 litigation and a coming default judgment, never apprised counsel or Mr. Townley
6 she believed service of process was improper until after entry of judgment. (AA
7 143-144, 147.) Rather, her admission of service and request for attorney's fees put
8 Mr. Townley on notice she was served and intended to participate in the case.⁴ Ms.
9 Mezzano was, therefore, estopped from challenging the validity of
10 service.² Moreover, Ms. Mezzano waited months to move to set aside the decree of
11 divorce despite having all the facts on which she relied in her possession. (AA
12 178.) She did not act until after Mr. Townley pursued informal and then formal
13 enforcement of the decree. She did not bother to promptly submit her motion. She
14 offered no justification for her delay. (See, generally, AA 123-141.) There can be
15 none, especially given Mr. Townley, through counsel, repeatedly contacting
16 Ms. Mezzano's counsel and because the only evidence she provided with her
17 motion was her self-serving affidavit. (AA 143-44, 147, 177.) As the trial court
18 noted: "all the facts alleged in Ms. Mezzano's Motion to Set aside were within her
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20 ⁴ As noted above, the trial court determined this action constituted an appearance in
the action. (AA 178.)

1 knowledge, yet she waited two months after contacting Mr. Townley’s counsel to
2 take any action.” (AA 178.)

3 As the Court explained in *Union Petrochemicals Corp.*, “The requirements
4 of the rule [NRCP 60(b)] are simple and direct. To condone the actions of a party
5 who has sat on its rights only to make a last-minute rush to set aside judgment
6 would be to turn NRCP 60(b) into a device for delay rather than the means for
7 relief from an oppressive judgment that it was intended to be.” 96 Nev. 337, 339,
8 609 P.2d 323, 324 (1980). Ms. Mezzano has done in that this case. Ms. Mezzano’s
9 unreasonable delay is “ground enough for denial” of her NRCP 60(b) motion. *Id.*
10 The trial court properly denied the motion. There was no abuse of discretion.

11 Indeed, *Deal v. Baines*, 110 Nev. 509, 874 P.2d 775 (1994), the case cited by
12 Ms. Mezzano about timeliness of an NRCP 60(b)(4) motion, supports Mr.
13 Townley’s position. Page 512 of *Deal v. Baines*, to which Ms. Mezzano directed
14 this Court, contains the Court’s discussion and holding that an unreasonable delay
15 precludes relief under NRCP 60(b)(4)—at that time NRCP (b)(3).³ The entirety of
16 page 512 reads:

17 **Discussion**

18 Since the district court did not state whether it based its order
vacating the judgment against Baines on Rule 60(b), Rule 41(e) or a
combination of the two, we consider them in turn.

19 Deal argues that the district court erred in vacating its prior
judgment since Baines failed to file his Rule 60(b) motion in a timely
20 manner. We agree. Motions under NRCP 60(b) are within the sound
discretion of the district court, and this court will not disturb the

1 district court's decision absent an abuse of discretion. *Carlson v.*
2 *Carlson*, 108 Nev. 358, 361, 832 P.2d 380, 382 (1992).

3 Baines argued below and asserts on appeal that he was entitled
4 to relief pursuant to Rule 60(b)(1) because of "excusable neglect."
5 Rule 60(b) states that a motion under subsection (b)(1) must be
6 brought "not more than six months after judgment, order, or
7 proceeding was entered or taken." Clearly, Baines failed to act within
8 this time limitation since the judgment was entered in February 1990
9 and Baines filed his Rule 60(b) motion in September 1992.

10 Baines alternatively argued that he was entitled to relief
11 pursuant to Rule 60(b)(3). He asserted that because the judgment was
12 entered on a trial that took place beyond the five-year mandatory
13 dismissal period of Rule 41(e), it was a void judgment.

14 Motions under Rule 60(b)(3) must be made within a
15 "reasonable time." NRCP 60(b). Five years passed between the
16 September 1987 trial and the filing of Baines' September 1992
17 motion. Baines argues that he did not have the opportunity to file a
18 timely Rule 60(b) motion because he did not learn of the February
19 1990 judgment until he was served with an Order for Examination of
20 Judgment Debtor in December 1990. Assuming, arguendo, that this is
true, Baines fails to explain why he then waited nearly two years to
file his motion to vacate the judgment.

We hold that under the circumstances of this case, it was
unreasonable to wait nearly two years to file a motion under Rule
60(b)(3) to vacate a judgment. This is particularly true since Deal
continued to attempt to collect on the judgment during those two
years, uncovering Baines' assets and serving writs of execution and
garnishment upon them. Granting Baines' motion to vacate

Deal v. Baines, 110 Nev. 509, 512, 874 P.2d 775, 777-78 (1994). The case stands
for the proposition a party may not know of a judgment and then without
explanation delay moving to set it aside. Here, Ms. Mezzano knew of the divorce
proceeding and judgment and, without explanation, delayed moving to set it aside
(in addition to her delay and inaction before entry of the default decree). Like the
defendant in *Deal v. Bains*, Ms. Mezzano never explained to the trial court why she

1 did not participate in the divorce case; did not notify someone she would claim a
2 defect in service; or why she waited over three months after entry of the decree,
3 almost three months after her counsel first became involved, and after Mr.
4 Townley sought enforcement of the decree to file her NRCP 60(b) motion.⁵ Ms.
5 Mezzano still does not explain her actions in her opening brief. Without excuse,
6 she sat on her hands and let this matter proceed after admitting to service. She
7 delayed for months after the entry of the decree to file her motion to set aside. Ms.
8 Mezzano unreasonably delayed, which is “reason enough for denial” of her NRCP
9 60(b) motion. The trial court properly denied Ms. Mezzano’s motion. There was no
10 abuse of discretion.

11 **BECAUSE MS. MEZZANO ACCEPTED THE BENEFITS OF THE**
12 **DECREE OF DIVORCE, SHE IS ESTOPPED FROM CHALLENGING**
13 **THE DECREE ON APPEAL.**

14 A party may not accept the benefits or act inconsistently with a judgment or
15 decree while seeking reversal of the decree on appeal. *Ford v. Ford*, 105 Nev. 672,
16 675 (1989). *See also, Black v. De Black*, 1 P.3d 1244, 1250-51 (Wyo. 2000);
17 *Hummel v. Roberts*, 70 Nev. 225, 228-29, 265 P.2d 219, 221 (1954); *Cunningham*
18 *v. Cunningham*, 60 Nev. 192, 197 (1940); *Gerbis v. Gerbis*, 60 Nev. 292, 294-96,

19 ⁵ Ms. Mezzano directs the Court to page 512 for the proposition there is a two-year
20 statute of limitations for an independent action to set aside a default judgment.
(App Opening Brief 11:5.) The case does not mention a statute of limitations and
did not concern an independent action.

1 108 P.2d 317, 318-19 (1940). An exception exists in divorce cases when an appeal
2 claims the trial court did not award enough property or alimony. *See, e.g., Ford*,
3 105 Nev. at 675 (holding a cross-appellant was not estopped because “Dr. Ford
4 does not challenge the validity of any award of property which he received
5 pursuant to the divorce decree. Instead, Dr. Ford is simply asking for more of the
6 community assets”.) Here, Ms. Mezzano is not “simply asking for more of the
7 community assets”. She has challenged the validity of the decree of divorce and
8 seeks its destruction. (AA 123.) If she were to succeed, the awards made in the
9 decree would be void, and she would not have the rights granted to her by the
10 decree to the property set over to her. Yet, Ms. Mezzano affirmatively proposed
11 delivery of documents and things set over to her in the decree and received those
12 documents and things and money due her under the decree. (RA 124-126.) Ms.
13 Mezzano took advantage of the decree and is estopped from now challenging its
14 validity on appeal.

15 **RESPONSES TO POINTS IN MS. MEZZANO’S BRIEF.**

16 **A. Ms. Mezzano’s Continued Reliance on *Quinlan v. Camden***
17 ***U.S.A. Is Misplaced; The Case Concerned An Offer Of Judgment Rule***
18 ***Creating A Claim That Did Not Exist Under The Common Law Thereby***
Imposing A Strict Compliance Standard; *Quinlan* Is Not Applicable To This
Case.

19 Ms. Mezzano’s assertion in her brief that a Nevada case dealing with service
20 of an offer of judgment by facsimile controls this matter is wrong. First, *Quinlan v.*

1 *Camden U.S.A., Inc.*, 126 Nev. 311, 236 P.3d 613 (2010), does not hold, as
2 Ms. Mezzano's contends, that "improper service is no service at all." (App. Brief
3 10:14.) The case does not contain the word "improper" or the phrase "no service".
4 Rather, in *Quinlan*, the Court determined the offer of judgment rules required strict
5 construction as a "tool not available at common law," and, on that basis,
6 determined that a lack of written consent to service by facsimile could not be
7 obtained by implied consent. Here, the test is substantial compliance, not strict
8 construction. See *Brockbank v. Second Judicial Dist. Court*, 65 Nev. 781, 201 P.2d
9 299 (1948); *Little v. Currie*, 5 Nev. 90, 92 (1869). *Quinlan* concerned a different
10 type of service governed by a different compliance standard. It is not applicable to
11 this case.

12 **B. A Policy in Favor of Resolving Cases on Their Merits is not**
13 **License for A Litigant To Attempt To Exploit The Rules Of Civil Procedure**
14 **Or Frustrate The Judicial Process In Contravention Of The Directive In**
15 **NRCP 1 The Rules Should Be Interpreted "To Secure The Just, Speedy, And**
16 **Inexpensive Determination Of Every Action And Proceeding."**

17 Ms. Mezzano acknowledged service of process and then sat on her hands
18 and ignored the proceedings through entry of judgment. (See history recounted
19 above in the Statement of Facts.) Even after hiring a lawyer, she did not pursue her
20 claim for NRCP 60(b) relief for months. (Id.) Having frustrated the judicial
process, she claims she should have been given her day in court, an opportunity
she willingly forewent. In these circumstances, the trial court has broad discretion

1 to determine whether to grant or deny an NRCP 60(b) motion. *Rodriguez v. Fiesta*
2 *Palms, Ltd. Liab. Co.*, ___ Nev. ___, 428 P.3d 255, 259 (Nev. 2018) (upholding a
3 trial court's refusal to set aside a default judgment against a pro se litigant who
4 "knowingly neglected procedural requirements and then failed to promptly move
5 for relief"). The trial court properly exercised that discretion and denied Ms.
6 Mezzano's untimely motion.

7 CONCLUSION

8 This Court must affirm the decision by the trial court. Ms. Mezzano waived
9 her right to challenge the trial court's determination she unreasonably delayed in
10 moving to set aside the decree, is estopped from challenging the decree because
11 she accepted the benefits of the order she challenges as void, and was effectively
12 served, is estopped from contending otherwise, and unreasonably delayed moving
13 to set aside. The trial court acted appropriately. Its decision should be affirmed.

14 Dated this 18th day of March 2021.

15
16 /s/ Alexander Morey
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2 **CERTIFICATE OF COMPLIANCE (Rule 28.2)**

3 I hereby certify that I have read this appellate brief, and to the best of my
4 knowledge, information, and belief, it is not frivolous or interposed for any
5 improper purpose. I further certify that this brief complies with all applicable
6 Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which
7 requires every assertion in the brief regarding matters in the record to be
8 supported by a page reference to the page of the transcript or appendix where the
9 matter relied on is to be found. I understand that I may be subject to sanctions in
10 the event that the accompanying brief is not in conformity with the requirements
11 of the Nevada Rules of Appellate Procedure.

12 Dated this 18th day of March 2021

13 /s/ Alexander Morey

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CERTIFICATE OF COMPLIANCE (Rule 32)

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☒ This brief has been prepared in a proportionally spaced typeface using 14- point Times New Roman in MS Word 2016; or

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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 either:

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3 /s/ Alexander Morey

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CERTIFICATE OF SERVICE

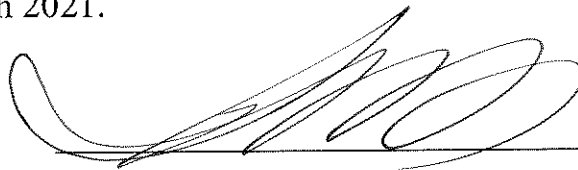
Pursuant to NRCP 5 (b), I hereby certify that I am an employee of Silverman, Kattelman Springgate, Chtd., and on the date set forth below, I served a true copy of the foregoing Respondent's Answering Brief the party(ies) identified below by:

 X Electronically, using Supreme Court's Eflex system.

addressed to:

F. Peter James
3821 West Charleston Blvd., Ste. 250
Las Vegas, NV 89102

Dated this 18th day of March 2021.

A handwritten signature in black ink, appearing to be 'F. Peter James', written over a horizontal line.