IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 81379

ROCHELLE MEZZANO,

Appellant,

vs.

JOHN TOWNLEY,

Respondent.

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
CASE NO. DV19-01564

APPELLANT'S REPLY BRIEF

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NRAP 26.1 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 in order that the judges of this court may evaluate possible disqualification or recusal.

The following persons / entities are disclosed:

- F. Peter James, Esq.;
- Law Offices of F. Peter James, Esq., PLLC.

As to the Appellant, there are no other parent corporations or publicly-held companies at issue. Appellant is not using a pseudonym.

Dated this 10th day of May, 2021

/s/ *F. Peter James*

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The Court should reverse the district court, grant the Motion to Set Aside, set aside the default and the default Decree of Divorce, and remand this matter for a trial on the merits.

Husband's arguments are meritless. Husband is grasping at straws because they have no valid arguments. Service of process was improper. It is a rookie mistake to not verify the affidavit of service for proper service of process—which none existed in this case. This case comes down to that fact alone.

Timeliness

Husband argues for the first time that Wife has an affirmative duty to argue that her motion to set aside was timely. Husband, however, provides no law whatsoever that says a party filing a motion to set aside has an affirmative duty to argue that it is timely. (*See generally* Answering Brief). Failure to cite to any authority properly results in court not considering argument. *See Cummins v. Tinkle*, 91 Nev. 548, 551, 539 P.2d 1213, 1215 (1975). The cases cited by Husband in support of this proposition actually do not support the argument that Wife had an affirmative duty to state the motion was timely.

Wife addressed the issue as the district court erroneously based its denial of the set aside upon that premise. Naturally, Wife responded to it.

Husband simply is declining to address the elephant in the room—that Wife was never properly served.

Wife Was Never Served

Husband argues in creative ways that Wife was properly served. This argument is insupportable. Nevada law requires service to the person or proper substituted service. *See* NRCP 4.2. Neither happened in this case. (AA 31). As such, there was no service of process.

Husband cites to *Currie v. Wood*, 112 F.R.D. 408, 408 (E.D.N.C. 1986) in support of the contention that personal service need not be face-to-face. (Answering Brief at 9). Currie limits the actual personal service requirement to cases where the defendant was evading service of process and where service had previously been made by certified, restricted delivery mail. *Id*. None of these exist in this case. Wife was not evading service. (*See generally* AA). There was no certified, restricted delivery mail as well—there was no need to as Wife was not evading service. (*Id*.).

Husband also cites to *Scott v. G.A.C. Fin. Corp.*, 486 P.2d 786, 787 (Ariz. 1971). In *Scott*, personal service was made to one party (the wife) and substituted service to the other (her husband). *Id*. The issue was if the husband actually lived with wife at the time of service (they were divorcing)—so the issue was if

service was at the proper address. *Id.* Here, the issue is if there was personal service or not. As such the case is wholly inapplicable.

Moreover, *Scott* is an Arizona case. Nevada has a strict policy on improper service being no services at all. *See Quinlan v. Camden*, 126 Nev. 311, 236 P.3d 613 (2010). Arizona's persuasive authority is even less persuasive when Nevada law differs from Arizona law, which can be inferred as Husband did not address this issue in his brief. Other cases cited by Husband have the same problems.

Husband ignores clear Nevada law (*Quinlan*) in favor of law from other jurisdictions, which do not have Nevada's strict policy of improper service being no service at all. Husband has failed to provide any Nevada law that contradicts *Quinlan*. *Quinlan* controls.

Wife Did Not Need to Explain Any Delay as the Motion was Quite Timely

In a further attempt to divert the Court's attention from the real issue of there being a complete lack of the jurisdictional service of process in this matter, Husband is trying to flip the table and blame Wife.

As explained in the Opening Brief, the limitation period for requesting a set aside as to a void decree is two years. *See e.g. Deal v. Baines*, 110 Nev. 509, 512, 874 P.2d 775, 778 (1994). Here, the motion to set aside was filed approximately four months after the decree was entered—but only two months into constructive knowledge of the entry of the decree. (*Compare* AA at 83 *with*

AA at 123; *see* AA at 178). A motion to set aside an order that is void filed more than six months into after entry of the judgment is timely—and any argument against it is meritless. *See Foster v. Lewis*, 78 Nev. 330, 337, 372 P.2d 679, 683 (1962). As such, the motion to set aside was timely filed.

Husband is merely trying to blame Wife when he failed to effectuate basic service of process upon Wife. As stated, service of process is jurisdictional. *See C.H.A. Venture v. G.C. Wallace Consulting Engineers, Inc.*, 106 Nev. 381, 384, 794 P.2d 707, 709 (1990).

As such, Wife's motion to set aside was very timely—Nevada law provides that any argument to the contrary is meritless. *See Foster*, 78 Nev. at 337, 372 P.2d at 683.

Wife is Not Estopped from Challenging the Decree

Husband yet again is grasping at straws in an attempt to sway the Court from the fact that there was absolutely no proper service of process in this matter. Husband now asserts that Wife is estopped from challenging the decree. This is, once again, meritless.

The controlling case is *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989). In *Ford*, wife filed a motion to dismiss the appeal due to husband benefitting and accepting properties under the terms of the decree of divorce. *See Ford*, 105 Nev. at 675 n.1, 782 P.3d at 1307 n.1. The husband in *Ford* was not barred from

appealing under the premise that acceptance of benefits from a judgment bars an appeal therefrom, as a reversal of the judgment on appeal would not affect his right to benefits already secured. *Id*. In other words, the husband was not barred as he was seeking more property than he was awarded. *Id*.

Here, there are two main issues. First, is procedure. Husband included this estoppel request in the Answering Brief, which is improper. Under *Ford*, the proper procedure is to file a motion to dismiss. The policy implications of this are readily apparent—Wife would have to introduce matters not in the district court record to respond to this. In fact, Husband put documents in his Respondent's Appendix which were not reviewed by the district court and which were not filed before the Notice of Appeal, if they were filed at all.

The Court should take note that the Notice of Appeal was filed on June 12, 2020. (AA 187). Husband is showing a check dated August 6, 2020. (RA 126). This is clearly months after the Notice of Appeal was filed. As such, it could not have been reviewed by the district court. To respond, Wife would need to go outside the district court file and present new evidence to the district court. This is not permitted in an appellate brief.

As such, Husband's argument under Ford is procedurally improper and should not be considered.

As to the merits, Wife falls directly into the exception under *Ford*—that she is claiming a higher division of assets than provided in the decree. (*See e.g.* AA at 133; RA at 77). As such, the estoppel argument is wholly without merit.

As stated, Husband is trying desperately to divert the Court's attention from the complete lack of service of process in this case. The Court should not be fooled by Husband's desperate and meritless claims.

Quinlan is on Point

Husband desperately wants the Court to think that *Quinlan v. Camden U.S.A., Inc.*, 126 Nev. 311, 236 P.3d 613 (2010) is inapplicable in the present matter. Husband's arguments are, once again, meritless. Husband makes a futile argument that strict construction of the service of process rules is not required.

Husband cites to *Brockbank v. District Court*, 65 Nev. 781, 201 P.2d 299 (1948) in support of his argument that substantial compliance is required, not strict construction, as to service of process. Husband's reliance on this case is misplaced. *Brockband* states that "for constructive or substituted service of summons[,] faithful observance of the statute is essential." 65 Nev. at 785. *Brockband* does not stand for what Husband claims.

Husband also cites to *Little v. Currie*, 5 Nev. 90 (1869). Similarly, this case also does not stand for what Husband claims.

Neither *Brockband* nor *Little* stand for the position that there must only be substantial compliance with the service of process rules. As such, Husband's arguments are misplaced.

Moreover, Husband's misplaced arguments do not negate *Quinlan*—that improper service is no service. Husband offers nothing of substance to negate *Quinlan*. Husband also offers nothing to negate the fact that there was no proper service of process.

Husband continues to try to evade the elephant in the room—that there was no service of process.

Husband's Futile Frustration of Judicial Process Argument

Husband asserts that Wife "acknowledged" service of process. If true, it is irrelevant. In *Quinlan*, the attorney who was "served" by fax acknowledged receipt of it—but as it was not properly served, the document was deemed not served. 126 Nev. at 311, 236 P.3d at 613. Wife was never properly served, as argued throughout this appellate process. The process server left the documents on the door (which is no service). (AA 31). At best, the process server left the documents with a handyman who did not reside at the residence. (*Id*.). Either way, there was no service of process. *See* NRCP 4.2(a).

In yet another failed attempt to cite to a case that might support his position, Husband cites to *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 428

P.3d 255 (2018). In *Rodriguez*, a pro se litigant filed to set aside a judgment a week before the six-month deadline. Rodriquez was the plaintiff—as such the district court had jurisdiction over him when he filed the complaint. Rodriguez was eventually defaulted out for not responding to the litigation, though he did appear at the hearings.

This is quite different than the present case where the district court never had jurisdiction over Wife as she was never properly served. As stated, service of process is jurisdictional. *See C.H.A. Venture*, 106 Nev. at 384, 794 P.2d at 709.

As such, Husband's citation to this case is misplaced at best and is merely an attempt to avoid the issue he does not want to discuss—that there was no service of process on Wife.

CONCLUSION

Husband's process server did not serve Wife with the Complaint and Summons. There was no proper service of process. Nevada law is clear that improper service is no service at all. Service of process is jurisdictional. The district court had no jurisdiction over Wife and had no jurisdiction to take action against her. The district court abused its discretion in failing to grant the request to set aside the default Decree and the Default. The Motion was meritorious and timely.

Husband offered no valid response to Wife's arguments. This matter is very simple—there was no service of process. As such, Husband had to try to blame Wife or her counsel for things. All that had to be done was for Husband to read the Affidavit of Service to see if there were service of process or not. As Husband did not do that and as the district court did not properly vet the service of process, reversible error exists.

Accordingly, the Court should reverse the district court, grant the Motion to Set Aside, set aside the default Decree and the Default, and remand the matter back to the district court for a trial on the merits.

Dated this 10th day of May, 2021

/s/ *F. Peter James*

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ROUTING STATEMENT

Pursuant to NRAP 3E(d)(1)(H), Appellant submits the following routing statement:

- This appeal is not presumptively retained by the Supreme Court pursuant to NRAP 17(a);
- This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(10) as it is a family law matter not involving termination of parental rights or NRS Chapter 432B proceedings; and
- Appellant asserts that the matters should be routed to the Court of Appeals as there are no issues that would keep the matter with the Supreme Court.

Dated this 10th day of May, 2021

/s/ *F. Peter James*

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CERTIFICATE OF COMPLIANCE (Rule 28.2)

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 N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a page reference to the page 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 10th day of May, 2021

/s/ *F. Peter James*

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CERTIFICATE OF COMPLIANCE (Rule 32)

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 14 point Times New Roman in MS Word 2013; or

   [ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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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   [X] Does not exceed 15 pages.

Dated this 10th day of May, 2021

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CERTIFICATE OF SERVICE

The following are listed on the Master Service List and are served via the Court's electronic filing and service system (eFlex):

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I certify that on this 10th day of May, 2021, I caused the above and foregoing document to be served by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the attorney(s) / party(ies) listed below at the address(es) indicated below:

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