

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARTHOLOMEW MAHONEY
Appellant,

vs.

BONNIE MAHONEY
Respondent.

Supreme Court No. 82412/82413
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District Court No. D13-47883-ADBrown
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR REVIEW

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SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming the district court's Order. The parties were divorced by Decree on February 8, 2016¹. The parties had two minor children at the time of the divorce; Brigitte Mahoney born October 29, 2001, and Sophia Mahoney born June 12, 2004². The Decree gave Bonnie Mahoney primary physical custody of the parties' minor children³. On May 9, 2019, Bonnie filed a Motion to Reduce Arrears and Penalties to Judgment⁴. Bart Mahoney filed his Opposition on August 21, 2019⁵ and Bonnie filed her Reply on October 4, 2019⁶.

On November 13, 2019, the district court set the matter for evidentiary hearing on May 7, 2020, at 1:30 pm⁷. The undersigned filed a Motion to Withdraw as counsel for Bartholomew Mahoney in March 2020⁸. An Order allowing the undersigned to withdraw as the attorney of record was filed on April 28, 2021⁹. Thereafter, counsel for Bonnie entered into a Stipulation and Order with

¹ AA00001-12

² AA000004

³ AA000004

⁴ AA000013-34

⁵ AA000192-213

⁶ AA000219-236

⁷ AA000254-259

⁸ AA000277-284

⁹ AA000289-292

Bartholomew Mahoney to continue the May 7, 2020, evidentiary hearing¹⁰. The evidentiary was rescheduled for October 29, 2020, at 1:30 pm¹¹.

On September 17, 2020, the district court rescheduled the evidentiary for December 3, 2020, at 9:15 am¹². The district court failed to serve the Notice of Rescheduling of Hearing on Bartholomew Mahoney¹³. Bonnie subsequently claims to have served the Notice of Rescheduling of Hearing on Mr. Mahoney¹⁴. An Order Setting Evidentiary Hearing was filed on October 4, 2020¹⁵. The Certificate of Service attached to the Order Setting Evidentiary Hearing list Bartholomew Mahoney but is silent as to how and if it was actually served¹⁶. At the December 3, 2020, hearing the district court made a finding “that Bart was fully noticed about the December 3, 2020, Evidentiary Hearing¹⁷.”

Even if this Court finds that Mr. Mahoney had proper notice of the Evidentiary Hearing, it is clear that the District Court abused its discretions in making its order that was not supported by substantial evidence. Therefore, the Court of Appeals erred in affirming the District Court’s Order.

¹⁰ AA000293-297

¹¹ AA000293-297

¹² AA000298-299

¹³ AA000298-299

¹⁴ AA000300-303

¹⁵ AA000304-308

¹⁶ AA000308

¹⁷ AA000392

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that Bart Mahoney had proper notice?
2. Whether the Court of Appeals erred in finding that Bart Mahoney waived his objection to the district court's finding in its order granting Bonnie's motion to reduce arrearages to judgment?
3. Whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in awarding Bonnie's attorney fees and costs?

REASONS WHY REVIEW IS WARRANTED

The Court of Appeals erred in issuing its Order of Affirmance. It overlooked and misapprehended significant issues in the record, and those errors are part of the justification for this Court to review that decision. Mr. Mahoney requests review by the Supreme Court because this case involves fundamental issues of due process.

1. Mr. Mahoney did not have proper notice of the Evidentiary Hearing

This Court of Appeals correctly found that District Court's sua sponte notice of rescheduling of the evidentiary hearing did not indicate that Mr. Mahoney as a pro se litigant was served with the notice.¹⁸ However, the Court of Appeals incorrectly found that in September of 2022, "Bonnie's attorney filed a notice of

¹⁸ Court of Appeals Decision, page 3

the new evidentiary hearing date with an amended certificate of service that showed Bart was served with the notice via mail at his Rafael River Way address.”¹⁹ Bonnie’s attorney never filed a Notice of the new evidentiary hearing date. Bonnie filed an Amended Certificate of Service indicating that she served him by mail but there is no address listed after “as follows²⁰.” There is an address listed after Certified Mail but the box next to it is not marked²¹.

The Court of Appeals correctly found that in October of 2020, “the district court entered a separate order confirming December 3, 2020, as the date for the evidentiary hearing. The certificate of service for this order listed Bart’s last-known address but did not specify that Bart was served by U.S. mail.”²² The Certificate of Service lists Bonnie’s counsel’s name and Bart’s name and mailing address²³. It does not state if or how they were served.²⁴

The Court of Appeals found that record demonstrates that Bard received notice of the reschedule hearing by mail at his last-known address.²⁵ However, as described above, the record does not unequivocally show that Mr. Bart was served

¹⁹ Id.

²⁰ AA000302-303

²¹ Id.

²² Court of Appeals Decision, page 3

²³ AA000308

²⁴ Id.

²⁵ Court of Appeals Decision, page 7

by mail. There are Certificate of Service but they all contain deficiencies in that it is not clear that notice was actually mailed to Mr. Mahoney.

The district court's ruling that Mr. Mahoney was fully noticed about the December 3, 2020, evidentiary hearing is clearly erroneous. Fundamental fairness requires the district court to provide to a proper person litigant all information regarding modification of any court dates. The Nevada Supreme Court has long held that a district court is without jurisdiction to try a case on the merits when proper notice of the trial is not given²⁶. The record is devoid of any evidence demonstrating that the district court noticed Bart of the December 3, 2020, evidentiary hearing. Based on the record, the district court appears to rely on the representations of Bonnie and her counsel regarding notice to Mr. Mahoney²⁷.

What is clear from reviewing the record is that the Notice of Rescheduling Hearing was not served on Bartholomew Mahoney²⁸. The Order Setting Evidentiary Hearing does list Mr. Mahoney on the certificate of service but does not actually provide whether or how it was served upon Mr. Mahoney²⁹. Counsel for Bonnie also claims to have served Bartholomew with the Notice of Rescheduling. The Nevada Supreme Court has long held, "something as

²⁶ Roberts Mining & Milling Co. v. Third Judicial Dist. County, 56 Nev. 299, 50 P.2d 512 (1935)

²⁷ AA000501

²⁸ AA000298-299

²⁹ AA000308

fundamental and decisive as service is best taken away from the parties or their counsel or counsel's employees³⁰.”

For obvious reasons, the veracity of Bonnie and her counsel regarding service of the Notice of Rescheduling of Hearing is subject to scrutiny. The district court had the sole responsibility to notice Mr. Mahoney of the new date for the evidentiary hearing. The district court failed to notice Bartholomew Mahoney of the rescheduled evidentiary hearing. As such, it denied him a meaningful opportunity to present evidence which resulted in a flawed and erroneous order.

The Court of Appeals also found that Mr. Mahoney had actual notice of the Evidentiary Hearing. This Court has held that actual notice is not a substitute for proper service of process.³¹ Moreover, Mr. Mahoney in fact did not have actual notice of the hearing. The Court of Appeals relies on Bonnie's argument that her counsel “sent Bart emails, containing several pretrial filings containing the date and time of the hearing, to the same email address that Bart had previously used to communicate with Bonnie's attorney.³² There is nothing in the record to indicate that Mr. Mahoney actually received these emails. Bonnie did not submit any evidence from the District Court's E-file website to show that Mr. Mahoney opened the emails that were sent to him. The District Court's e-file system has the

³⁰ Sawyer v. Sugarless Shops, 106 Nev. 265, 792 P.2d 14 (1990)

³¹ C.H.A. Venture v. G. C. Wallace Consulting Eng'rs, 106 Nev. 381, 384 (1990)

³² Court of Appeals Decision, page 7

date and time of when the parties open the documents. Bonnie could have easily produced this in the District Court, however, in her Answering Brief she only referenced a letter that she had written indicating the dates of service.³³ This leaves doubt as to whether Mr. Mahoney had actual notice.

Mr. Mahoney had neither proper notice nor actual notice of the Evidentiary Hearing. All of the above-referenced Certificate of Service show that Mr. Mahoney was not properly served with the Notice of the Re-Scheduling of Hearing by the District Court. He was thereby denied his day in court. Therefore, the Court of Appeals erred in finding that he was given proper notice.

2. The Court of Appeals erred in finding that Mr. Mahoney waived his arguments by failing to raise them in the district court proceedings.

In its Order of Affirmance, the Court of Appeals found that Mr. Mahoney waived his arguments as he did not raise them in the proceedings below.³⁴ Mr. Mahoney did not have a chance to raise the arguments in the proceedings below. These arguments would have been raised at the Evidentiary Hearing. He is not raising issues for the first time, he is arguing that based on the evidence presented, the District Court could not have made the orders that it did.

³³ Answering Brief page 11 referring to Respondent's Appendix RA063

³⁴ Court of Appeals Decision, page 8

“The courts and text writers all concur that by ‘judicial discretion’ is meant sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds-grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercised his judicial discretion he will decide and act according to the rules and equity, and so as to advance the ends of justice³⁵.” Discretion is abused when a court makes a ruling “based its ruling on an erroneous view of the law³⁶.”

The District Court made orders that were not authorized by law. When there is a question of law or the application or statement of the law at issue on appeal the Nevada Supreme Court “is obligated to make its own independent determination on this issue, and should not defer to the district court’s determination³⁷.” The district court calculated penalties for both alimony and child support. No provision under Nevada law permits the calculation of penalties for alimony arrears.

Additionally, the district court modified child support retroactively to June 1, 2019, but applied the child support calculation that went into effect on February

³⁵ Goodman v. Goodman, 68 Nev. 484, 489, 236 P. 2d 305, 306 (1951)

³⁶ Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)

³⁷ Sheehan & Sheehan v. Nelson Malley and Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005)

1, 2020, for the time period from June 1, 2019, to February 1, 2020.³⁸ The District Court retroactively applied a law without any authority allowing it.

Bartholomew Mahoney was denied an opportunity to present evidence that one of the parties' minor children was residing with him full-time during the pendency of the case. Bonnie argues that Mr. Mahoney did not file a motion to modify custody, which is true. However, he believed that it would be addressed at the time set for the evidentiary hearing. He did not believe that Bonnie would seek child support for a child who was not residing with her.

Additionally, the December 28, 2020, Order awarded Bonnie child support for a child that had already reached the age of majority. This resulted in Bonnie receiving an extra 3 months of child support for a 19-year-old subsequent to her graduation from high school. A district court lacks authority to make a child support award regarding a child beyond the age of majority³⁹. The resolution of the child support issue by default is impermissible and is a denial of due process.

Due to the absence of Mr. Mahoney, Bonnie was able to make a one-sided presentation of the facts resulted in tens of thousands of dollars in erroneous findings by the district court. Pursuant to the Stipulated Decree of Divorce, Bartholomew Mahoney was required to pay Bonnie twenty-five (25%) of his

³⁸ AA000401-402, 408-409, 412

³⁹ Ellett v. Ellett, 94 Nev. 34, 573 P.2d 1179 (1978)

annual bonuses for a four (4) year period commencing September 1, 2015⁴⁰. The district court awarded Bonnie bonuses that Mr. Mahoney received prior to the September 1, 2015, commencement date outlined in the Decree and one bonus that he received after the four-year period⁴¹.

Additionally, the language of the Decree limited the division of bonuses to the annual bonus received by Mr. Mahoney. Bonuses received by Mr. Mahoney outside of the annual bonus were included in the award granted to Bonnie in the December 28, 2020, Order.⁴²

The February 8, 2016, Stipulated Decree of Divorce has no provision as to when the payment for bonus is due. The only remedy outlined in the Stipulated Decree of Divorce was that Bonnie would receive a larger percentage of the bonuses if Mr. Mahoney failed to make timely disclosure of his bonuses. Where a document is clear on its face, it will be construed from the written language and enforced as written⁴³. The written language of Decree of Divorce clearly outlines all of the terms of the settlement agreement. As there is no due date, interest cannot be calculated. The District Court awarded Bonnie interest on the bonuses.⁴⁴ Bonnie

⁴⁰ AA000007

⁴¹ AA000398-99

⁴² Id.

⁴³ Ellison v. California State Auto Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)

⁴⁴ AA000400

only argues that the interest was proper but does not indicate when the payment to her came due. The District Court abused its discretion by awarding bonuses that were outside the time-period in the Decree of Divorce and in awarding interest.

The Court of Appeals erred in finding that Mr. Mahoney waived the above arguments by not presenting them in the lower court. Even if Mr. Mahoney had proper notice, the District Court made orders that it was not authorized to make by law. Mr. Mahoney did not have any indication that the District Court would make these orders. The Court of Appeals erred in finding that these arguments were waived by Mr. Mahoney as they are not factual but go to the legality of the orders made by the District Court.

3. The Court of Appeals erred in finding that the District Court did not abuse its discretion in awarding the attorney's fees and costs.

Although an award of attorney's fees is within the discretion of the district court, the award must still be just and equitable. When making an award of attorney's fees, the attorney's fees must be reasonable, and the district court should make written findings as to the reasonableness of the fees⁴⁵. "The decision to award attorney's fees is within the sound discretion of the district court, but an

⁴⁵ Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 455 P.2d 31 (1969)

award made in disregard of applicable legal principles may constitute an abuse of discretion⁴⁶.”

Here, the District Court abused its discretion in awarding attorney’s fees and costs. Bonnie’s Memorandum of Fees, Costs, and Disbursements and Brunzell Declaration shows that she submitted fees and costs beginning in 2017, which predates the filing of the Motion by approximately two years⁴⁷. It appears that the District Court did not review the itemized bill that Bonnie submitted. Mr. Mahoney is confident that if the District Court had reviewed it, it would not have granted her fees and costs that predate the filing of the Motion by years.

The District Court awarded hundred percent of the costs that Bonnie requested and reduced the attorney’s fees by a couple of thousand. However, the reduced amount still encompasses fees that predate the filing of the Motion. The District Court clearly abused its discretion in making its award of fees and costs. The fees predating the filing of the Motion by years is only one of the reasons that the award should be set aside. A closer look at the bill shows that all fees incurred were not reasonable. Therefore, the District Court’s Order should be set aside as it was a manifest abuse of discretion.

⁴⁶ Barozzi v. Benna, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996)

⁴⁷ AA000455-482

The Court of Appeals misapprehended Mr. Mahoney's argument regarding the award of attorney's fees and costs. Mr. Mahoney does not argue that the Court did not analyze the Brunzell factors but that the District Court awarded costs and fees for a time period that predates the filing of the motion by two years. Mr. Mahoney submits that it is a clear abuse of discretion to award fees for time period that predates filing of any motion by years.

CONCLUSION

The Court of Appeals misapprehended several important facts in reaching an erroneous conclusion in its Order of Affirmance. For the reasons contained above, this Court should grant review and overturn the District Court's order.

DATED this 22nd day of August, 2022.

RESPECTFULLY SUBMITTED
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Review 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:
2. This Petition for Review has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14;
3. I further certify that this Petition for Review complies with the page or type-volume limitations of NRAP 32(a)(5) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points containing 2,618 words;
4. Finally, certify that I have read this Petition for Review and to the best of my knowledge the information and belief it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the appendix where the matter is to be found. I understand that I may be subject to sanctions in the event the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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DATED this 22nd day of August, 2022

RESPECTFULLY SUBMITTED
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 22nd day of August, 2022 a copy of the foregoing Petition for Review was served as follows:

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