IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

MATTHEW MORONEY,	)	
	)	
Appellant,	)	
	)	**S.C. CASE NO. 82948**
v.	)	
	)	
BRUCE ARTHUR YOUNG,	)	
	)	D.C. CASE NO. CV-19-5103
Respondent.	)	
	)	

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The Michael M. DeLee of DeLee Law Offices, LLC, appeared for Respondent Bruce Arthur Young in proceedings in the District Court and has appeared for Respondent before this Court.

DATED this 18th day of May, 2022.

_____/s/ Michael M. DeLee
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[1] Pursuant to NRAP 28(b)(3), Respondent does not approve of Appellant's case caption or statement of the issues. Compare the captions of the Complaint (APP1) with the Amended Complaint (APP18), pro-se Answer (APP22 1:21-22), and Motion to Dismiss (APP30 n1). The Amended Complaint was the only version of the Complaint served on Defendant Bruce Arthur Young, and was done so improperly, well after the time to appeal the Court's refusal to enlarge time to serve the Defendant. Accordingly, there is only one Defendant as Appellant's filing of the Amended Complaint, even beyond the statute of limitations, judicially estopps Appellant from now including an entity that was never served.

STATEMENT OF THE CASE[2]

The underlying incident in this matter is an alleged assault which occurred on March 19, 2017. Respondent, Bruce Arthur Young, a senior citizen resident of Gold Point, Esmeralda County, Nevada, had requested that Appellant leave the area of Respondent's home and unfavorably compared the character of the Appellant to the Appellant's father, whereupon Appellant attacked Respondent. Although surprised by the attack from behind, Respondent was not seriously injured by Appellant, a young man less than half the age of Respondent. Appellant had been working approximately fifteen (15) miles away on property jointly owned by Appellant and a third party, and had sustained injuries at that location all of which had nothing to do with the Respondent.

Appellant filed a Complaint on March 19, 2019, in the Esmeralda District Court on the last day of the statute of limitations, exactly two years after the incident, on March 19, 2017.[3] (APP1). Appellant did not promptly hire the Esmeralda County Sheriff to serve the Respondent but instead waited until July 2, 2019, to hire a Las Vegas process server to serve Respondent. (APP16). The process server made one, and only one, trip to central Nevada on July 9, 2019.

[2] Pursuant to NRAP 28(b)(4), Respondent does not approve of Appellant's statement of the case.

[3] Appellant's reference to July 3, 2017, is either a deliberate misstatement or a careless error in the Opening Brief as the record below is clear and not in dispute. (See APP2).

(APP17). Appellant's ex parte motion to enlarge time was heard by the District Court on September 3, 2019. (Docket Report). The District Court, based upon only a hearsay representation of a neighbor's purported statement to the process server that the Respondent "would not want to receive a summons" appropriately gave those unsupported, hearsay averments little weight when compared to the massive display of Appellant's lack of due diligence. (Transcript of September 3, 2019, hearing, 5:14-21). Nor did the District Court find that the Plaintiff had used due diligence in attempting to serve the Defendant where it had made one attempt, late in the term, and never bothered to pay a nominal fee to the Esmeralda County Sheriff to affect service. (Transcript of September 3, 2019, hearing, 4:21-5:2). Accordingly, the District Court properly refused to grant the Plaintiff's ex parte motion to enlarge time to serve. (Transcript of September 3, 2019, hearing, 5:14-21). The Plaintiff had specifically filed its motion to enlarge time as an ex parte proceeding, and under the circumstances there was not yet any other party in the proceedings, there was likewise no party other than the Plaintiff upon which to "serve" a notice of the decision. Additionally, the Plaintiff did not seek a request for reconsideration following the September 3, 2019, hearing. Instead, the Plaintiff, almost two months later, on November 26, 2019, sent a "Proposed Order Granting Ex-Parte Motion to Enlarge Time for Service of Defendants" to the District Court, apparently in an invitation for the District Court to sign, notwithstanding that the

District Court had actually denied Plaintiff's request. (Docket Report p.1) (Emphasis in the title supplied). The District Court did not sign the Plaintiff's document, so the Plaintiff sent another "Proposed Order Granting Ex-Parte Motion to Enlarge Time for Service of Defendants" on December 30, 2019. Rather than start a new case, the Plaintiff waited until April 27, 2020, and filed an Amended Complaint, dropping Point Mining and Milling, Inc., and naming only Bruce Arthur Young which was later served upon the Defendant, who then filed an Answer and Motion to Dismiss. The District Court heard the Motion to Dismiss on November 10, 2019, and confirmed that it did not need a written order to manage its docket on September 3, 2019, by refusing to grant Appellant's Ex Parte Motion. The District Court's decisions should be affirmed in all respects.

STATEMENT OF THE FACTS[4]

Appellant alleges that Respondent attacked him at Respondent's premises in Gold Point, Esmeralda County, Nevada on March 19, 2017.[5] (APP2). Appellant filed its first Complaint with the District Court on March 19, 2019, the final day of the statue of limitations. Appellant waited 105 out of the allowed 120 days before even hiring a process server or making any other attempt to serve the Respondent. (APP16). The process server made one, single trip on day 112 of the 120 days

[4] Pursuant to NRAP 28(b)(5), Respondent does not approve of Appellant's statement of the facts.

[5] Appellant has incorrectly used the date of July 3, 2017. See Opening Brief p. 4.

before travelling to central Nevada and thereafter did not make any other attempts to serve the Respondent. (APP16-17). The neighbor purportedly advised the process server that the Respondent was away from Gold Point on a shopping trip and speculated that the Respondent would not want to receive a summons. (APP16-17). On day 120, July 17, 2019, the final day to serve Respondent, Appellant filed his "Ex-Parte Motion To Enlarge Time for Service of Defendants." (APP6-17). The District Court conducted a hearing on the Motion on September 3, 2019 and denied Appellant's request. The Appellant thereafter filed an Amended Complaint and served the Respondent, who answered and moved to dismiss.

STANDARD OF REVIEW[6]

The Nevada Supreme Court will not disturb the district court's factual findings "unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (Nev. 2018). Decisions supported by substantial evidence will not be disturbed on appeal. *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

ARGUMENT

A. WHETHER PLAINTIFF'S APPEAL IS UNTIMELY BECAUSE IT WAS NOT TAKEN WITHIN THRITY (30) DAYS OF THE DISTRICT COURT'S REFUSAL TO ENLARGE TIME TO SERVE

[6] Pursuant to NRAP 28(b)(6), Respondent does not approve of Appellant's standard of review.

Appeals from a District Court's final decision must be taken within thirty days. *Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (Nev. 2006) ("This court lacks jurisdiction to consider an appeal that is filed beyond the time allowed under NRAP 4(a)."). To be final, an order must resolve every legal issue involved in a case and leave nothing for the court to consider except postjudgment issues like attorney's fees. *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (Nev. 2000). A final order need not be titled as such as long as the decision terminates proceedings on the matter. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 773 (Nev. 1994) (whether an order is final depends on "what the judgment actually does, not what it is called."). Ordinarily, orders must be written and signed in order to become effective. *State, Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454, 92 P.2d 1239, 1245 (Nev. 2004) ("[D]ispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective."). However, docket management orders may be oral. *Id.* ("Additionally, oral court orders pertaining to case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain an advantage are valid and enforceable.").

Plaintiff's ex parte motion to enlarge time was heard by the District Court on September 3, 2019. (See Transcript of September 3, 2019). The District Court's

decision was a final decision because the Plaintiff could not thereafter attempt to serve the Defendant and therefore proceed with the case. See *Valley Bank* at 445, 874 P.2d at 773. There were therefore no additional issues for the District Court to consider in the case. See *Lee v. GNLV Corp*., at 426, 996 P.2d at 417. Because there were no other parties to hear the Plaintiff's ex parte motion to enlarge time involving only docketing and scheduling matters (a new deadline being set), the oral order of the District Court was not required to be reduced to a written order. See *State, Div. of Child & Family Servs*. at 454, 92 P.2d 1245. The Plaintiff did not file a motion for reconsideration or timely appeal the District Court's management of its docket, but instead attempted twice to get the District Court to sign a document entitled "Order Granting Motion to Enlarge Time To Serve Defendant," (emphasis supplied) and thereafter filed and served an "Amended Complaint" in the same case in an artful attempt around the mandatory language of NRCP 4(e)(2)[7]. (Docket 82948 Document 2021-14700). The District Court Judge put the matter succinctly to Plaintiff's counsel at the November 10, 2020, hearing on the Motion to Dismiss, stating, that the Court did not need to issue a written order, noting,

[7] NRCP 4(e)(2) states, "If service of the summons and complaint is not made upon a defendant before the 120-day service period—or any extension thereof—expires, the court must dismiss the action, without prejudice, as to that defendant upon motion or upon the court's own order to show cause." (Emphasis added.)

> You are not going to get an end around. You had someone present. I explained the reasons for the denial. They clearly could have appealed that within the 30 days of the September hearing. That doesn't give you the opportunity to do a run around over a year later.

Transcript of November 10, 2020, 12:19-24.

The Appellant's questionable conduct should not be rewarded by looking past the time required to file an appeal under NRAP 4(a) and the appeal should be dismissed as untimely.

B. WHETHER THE DISTRICT COURT PROPERLY FOUND THAT THE PLAINTIFF HAD NOT USED DUE DILIGENCE TO SERVE THE DEFENDANT BY HIRING A PROCESS SERVER FROM LAS VEGAS TO MAKE A SINGLE TRIP TO CENTRAL NEVADA WITH ONLY DAYS LEFT TO AFFECT SERVICE

Under Nevada Rule of Civil Procedure 4, "[d]ismissal is mandatory unless there is a legitimate excuse for failing to serve within the 120 days. The determination of good cause is within the district court's discretion." *Scrimer v. Eighth Judicial Dist. Court ex rel. County of Clark*, 998 P.2d 1190, 1193-94 (Nev. 2000). The Nevada Supreme Court will not disturb the district court's factual findings "unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo* at 621, 426 P.3d at 596.

Appellant had waited until the last possible moment to file his Complaint. Appellant then waited until 105 out of 120 days has elapsed to hire a process server. The process server then waited another full week before even making one attempt

to serve the Respondent, and then made no further attempts at service. The Appellant then waited until day 120 to file his Ex Parte Motion to Enlarge Time To Serve. At the hearing on the Ex Parte Motion held September 3, 2019, the District Court put the matter succinctly in refusing to grant the Motion, noting, "I don't think you have met the burden for me to extend the service." (See Transcript of September 3, 2019, hearing, 7:19-20). The District Court's opinion was formed after questioning why the Respondent, "Why didn't you just send a copy of the Summons and the Complaint and hire the Esmeralda County Sheriff's Office and have them serve it?" (See Transcript of September 3, 2019, hearing, 4:21-5:2). The District Court also summarized the *Scrimer* factor for due diligence when it stated,

> I think you are untimely. I haven't heard a valid reason why I should extend the service of process. Quite frankly, you wait until the very last day to serve the Complaint before the Statute of Limitations ran, right? And then you waited about the-and-a-half, four months before you even attempted service. And then you attempted service once. And then you want me to extend it.

(Transcript of September 3, 2019, hearing, 5:14-21) (emphasis added). The District Court has before it Appellant's vague intimations that Respondent was trying to evade service. As this was based only upon an unidentified neighbor's comment to the process server that the Respondent wouldn't want to receive a summons, the District Court clearly and properly gave this factor little weight to

offset the clear lack of due diligence on the part of the Appellant. These factors were again stated in the Order entered in response to the Motion to Dismiss. (Order, 2:11-16 APP 51-55). Appellant contends that the District Court did not consider the effect of the Statute of Limitations as a *Scrimer* factor. (Opening Brief at 10.) This simply misstates the record as noted in the quoted and emphasized language from the transcript, above. The District Court was justifiably concerned about the conduct of the Appellant. The Appellant's sharp practices only further irked the District Court's efforts to manage its docket when Appellant submitted two proposed orders entitled "Proposed Order Granting Ex-Parte Motion to Enlarge Time To Serve Defendant" after the September 3, 2019, hearing, and then the filing of an Amended Complaint over a year after the time to serve the original Complaint had expired. The District Court properly confirmed its September 3, 2019, refusal to enlarge the time to serve at the hearing on Defendant's Motion to Dismiss.

CONCLUSION

The District Court did not need to reduce to a written order its denial of Appellant's Ex Parte Motion To Enlarge Time to Serve because it was merely confirming that there were no other parties in a case that would have to be re-filed in order to proceed; accordingly, Appellant's appeal is untimely. Furthermore, the Appellant has pled insufficient facts to show that the District Court abused its

discretion when the District Court specifically stated that the Appellant had failed to provide sufficient fact to support a showing of due diligence that warranted an enlargement of time to serve the Defendant. Accordingly, the appeal should be denied as set forth above.

DATED this 18th day of May, 2022.

/s/ Michael M. DeLee
MICHAEL M. DELEE, ESQ.

ATTORNEY'S CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point Times New Roman.

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 proportionately spaced, has a typeface of 14 points or more and contains 4,007 words.

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 18th day of May, 2022

/s/ Michael M. DeLee
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of DeLee Law Offices, LLC, and that I served the foregoing RESPONDENT'S ANSWERING BRIEF on the parties listed below by causing a full, true and correct copy to be served in the matter identified

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DATED this18th day of May, 2022

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