IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW MORONEY an Individual, Appellant, vs. BRUCE ARTHUR YOUNG, individually; POINT MINING & MILLING CONSOLIDATED, INC.; Respondents	CASE NO.: 82948 District Court Case No. CV1905103-C Appeal from the Fifth Judicial District Court, Esmeralda County, Nevada

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

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

Kimball Jones, Esq., with the Law Offices of **BIGHORN LAW** has appeared for Appellant in this case and is expected to appear for them in this Court.

DATED this 5th day of July, 2022.

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ARGUMENT

A. Appellant's Appeal is Timely Because Dispositive Motions Must be Written and Entered. A Case Cannot be Disposed of with a Minute Order.

Respondent's Brief argues that Appellant's Appeal was untimely because they allege that the minute order entered by the district court was a formal, enforceable order. The district court itself claimed that its minute order was "procedurally adequate" to "bar Plaintiff from filing and serving his amended complaint." See Reply Appendix at APP 4.

Yet, the Court's Order also dismisses Appellant's Complaint in the same Order, stating, "THE COURT FURTHER FINDS that it is required to dismiss the action." Id. The Court did not state that the action had been dismissed with the prior minute order—nor could it be.

Respondent himself cites to the Court's holding in *Division of Child and Family Svcs., Dept. of Human Resources ex rel. State of Nev. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark.* The Court held in this case that orders, such as those which grant dismissal, MUST be written and entered. "[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." *State, Div. of Child & Family Servs. v. Eighth Judicial Dist. Court,* 120 Nev. 445, 454, 92 P.2d 1239, 1245 (Nev. 2004).

Appellant could not appeal the Court's decision until it was disposed of by the Court. Even if the Court had attempted to dismiss Appellant's action with a minute order, this would have been ineffectual.

The Supreme Court of Nevada has been unequivocal that a district court's order must be formalized with a written order that is entered into the docket: "Before the court reduces its decision to writing, signs it, and files it with the clerk, **the nature of the judicial decision is impermanent**." *Division of Child and Family Svcs., Dept. of Human Resources ex rel. State of Nev. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (emphasis added) (footnotes omitted).

The Court plainly stated that "[t]he [district] court remains **free to reconsider the decision and issue a different written judgment**." *Id.* (emphasis added) (footnote omitted). The Supreme Court of Nevada went further, with a specific description of what types of "orders" are totally ineffective and unenforceable: "a [c]ourt's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are **ineffective for any purpose**." *Id.* (emphasis added) (footnote omitted).

Therefore, Appellant's appeal was timely made within 30 days of the Court's Entry of Order Dismissing Appellant's Case.

B. The Trial Court Erred in Ignoring its Mandatory Duty to Enlarge Time Upon a Showing of Good Cause (Issue 2)

Respondent argues that the fact that Appellant did not attempt service repeatedly after being told that Respondent Young was evading service merited the Court's refusal to enlarge time.

This argument ignores the mandatory nature of Rule 4(e)(3), which holds, "(3) Timely Motion to Extend Time. If a plaintiff files a motion for an extension of time before the 120-day service period—or any extension thereof—expires **and shows that good cause exists for granting an extension of the service period, the court must extend the service period** and set a reasonable date by which service should be made."

Turning again to the Court's holding in Scrimer, it is clear that even if NO attempt to serve is made, that good cause may still exist:

> We specifically disavow and overrule *Lacey* to the extent that it stands for the proposition that "settlement negotiations alone will not constitute good cause for a plaintiff's failure to serve process within 120 days of the filing of the complaint." *Lacey*, 109 Nev. at 345, 849 P.2d at 262. Negotiations with an eye to settlement, undertaken in good faith in a serious effort to settle the litigation during the 120-day period, may constitute good cause for untimely service under NRCP 4(i). Additionally, we renounce our dictum in *Dougan*, which suggests that an inflexible approach should be used in assessing motions to dismiss under Rule 4(i).

> *Scrimer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 507, 514, 998 P.2d 1190, 1194 (2000).

In the instant case, Appellant attempted service and was rebuffed by Respondent's evasion. This evasion constituted good cause. The trial court erred in expecting Appellant to re-attempt service—expending further time and money—attempting to find an individual in a rural area located 184 miles from Plaintiff's Counsel's place of business.

The Court made a clear error in ignoring the second *Scrimer* factor which triggered a mandatory duty to enlarge time to serve Respondent, as well as the fact that the statute of limitations would bar the refiled action.

> We note that the federal courts, under Federal Rule of Civil Procedure 4(m), the current analog to NRCP 4(i), may consider "if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service." Fed.R.Civ.P. 4 advisory committee's notes.
>
> Id.

Appellant has demonstrated that the Court erred in denying Appellant's motion to enlarge time for service. By ignoring *Scrimer* and the mandatory nature of Rule 4, Appellant's ability to have his case heard on the merits was improperly foreclosed. As such, reversal and remand is appropriately ordered.

CONCLUSION

Appellant presented the Court with good cause to enlarge time by noting that

Respondent Young was believed to be evading service. The Court did not properly analyze the *Scrimer* factors and failed to take into account Respondent's evasiveness. This presentation of good cause should have triggered a mandatory grant of enlargement of time by the Court. The Court erred by not granting the enlargement of time upon being presented with evidence of Young's evasiveness. As such, the dismissal of Appellant's Complaint was improper.

DATED this 5th day of July, 2022.

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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 this brief has been prepared in a proportionally spaced typeface us Times New Romans in 14-size font.

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)(B), it is proportionately spaced, has a typeface of 14 points or more and contains 980 words.

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

Date: July 5, 2022

BIGHORN LAW

Kimball Jones, Esq.
KIMBALL JONES, ESQ.

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of **BIGHORN LAW** and that I served the foregoing **APPELLANT'S REPLY 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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Date: July 5, 2022 **BIGHORN LAW**

/s/ Amy Cvetovich
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