IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ALAN BARBER

Appellant,

vs.

BRIANNA TEAL BARBER

Respondent.

CASE NO. 83201

PETITION FOR REVIEW

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I. INTRODUCTION

The Nevada Court of Appeals ("COA") issued an *Order of Reversal and Remand* in this case on February 17, 2022. The COA, although not citing to *Rooney v. Rooney,* 109 Nev. 540, 853 P.2d 123 (1993), appears to have utilized the same to find that the district court should have taken further evidence as to whether an attorney representing a party in a separate case had agency to accept service and therefore whether said service was valid. The COA failed to consider the impact of apparent agency, and misapplied the standard set under *Rooney*. The COA's decision has created a situation where any litigant, unhappy with the outcome of a case, can allege improper service as a means of avoiding a Court Order and no attorney can rely on the representation of other counsel before a Notice of Appearance is filed when serving a litigant.

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in finding that a factual question existed as to whether there was an agency relationship between Ronald and his criminal attorney.

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2. Whether the Court of Appeals erred in Finding that Ronald met the burden under *Rooney v. Rooney* to require the disctrict court to take further evidence on the issue of service.

B. REASONS REVIEW IS WARRANTED

The decision of the Court of Appeals conflicts with prior decisions of this Court as to the discretion granted to the trial court under *Rooney v. Rooney*, and as to the determination of an agency relationship between an attorney and a litigant. The conflict created in the law is an issue of statewide importance as it relates to service of process.

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II. FACTS

The parties were married March 8, 2013. **JA000002.** They have two children. **JA000002.** Brianna filed her Complaint on September 15, 2020. **JA000001.** The summons issued the same day set forth the consequence of failing to respond within 20 days, including Plaintiff receiving the relief requested in the Complaint.[1] **JA000010-000011.** As detailed by Brianna's counsel at the hearing on December 20, 2020, attempts were made to obtain a valid address at which to serve Ronald. **JA000025-000026.** Ultimately, Ronald's attorney, Ryan Helmick, Esq., who was representing him on criminal charges, refused to provide Ronald's address for service, but agreed to accept service on October 7, 2020. **JA000012; 000025-000026.**

No Answer was filed, and a Three Day Notice of Intent to Take Default was filed and receipted on Mr. Helmick on October 28, 2020.[2] **JA000013.** The Default was issued on November 4, 2020. **JA000015.** Brianna provided sworn

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[1] NRCP 12 was amended in 2019 and expanded the time to file an Answer to 21 days, however the default in this matter was not entered prior to the 21 day period expiring.

[2] Although the Notice was served on the 20th day, because the default was not taken until after the 21 days expired, there was no prejudice to Ronald for that defect.

testimony at the hearing on December 20, 2020. **JA000021-000034.** The Decree was filed on January 21, 2021. **JA000039.**

Thereafter, Brianna filed a Motion to have the Clerk of the Court sign a Quitclaim Deed on Ronald's behalf, so that she could refinance the house awarded to her in the Decree. **JA000068-000075.** Ronald opposed the Motion, and countermoved for the Decree to be set aside, alleging that he had never "authorized" his attorney to accept service. **JA000081**; **000121.** At the hearing on May 25, 2021, the court granted Brianna's Motion and denied Ronald's countermotion. **JA000128-000131.** The Court specifically noted that, although Ronald alleged that he didn't believe that the signature on the Acceptance of Service actually belonged to Mr. Helmick, he provided no affidavit or testimony from Mr. Helmick confirming that it wasn't his signature. **JA000118-000119.** Contrary to the Court of Appeals' ("COA") impression, the District Court found that Ronald didn't suppley sufficient information to support a finding that Mr. Helmick did not have authorization to accept service. **JA000125-000126.** The District Court also found that, although there might have been valid arguments for a Motion to Set Aside under NRCP 60(b)(1), the same was not pled and therefore it not before the court. **JA000125-000126.**

After briefing, the COA issued its *Order of Reversal and Remand* on February 17, 2022, without hearing oral argument, finding that the district court erred in not taking additional factual information on whether service was properly effectuated on Mr. Helmick, stating that the district court had acknowledged that it didn't have sufficient information as to the agency relationship between Ronald and Mr. Helmick, and that, if on remand, the district court found that service was proper, the court should consider Ronald's arguments under NRCP 60(b)(1).

A more complete recitation of the facts is set forth in Brianna's Fast-Track Response.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH NEVADA LAW ON AGENCY AND SERVICE.

A. The Relevant Law

Nevada Rule of Civil Procedure 4.2 permits service on an individual to be effectuated by delivery of a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

In *Foster v. Lewis*, the Court found "where the evidence that a person served was not authorized by the defendant to receive service of process is

uncontradicted [] such denial of authority must be taken by the court as true." 78 Nev. 330, 333, 372 P.2d 679, 680 (1962). In *Foster*, both the party *and* the purported agent testified (in affidavit and via oral testimony) that the agent lacked authority. Additionally, service had been proved by an affidavit of the process server, and the purported agent testified he had never received the documents.

However, the Court in *Lange v. Hickman* stated, "[n]otice to an attorney is, in legal contemplation, notice to his client." 92 Nev. 41, 43, 544 P.2d 1208, 1209 (1976). In *Lange*, counsel for the plaintiffs acknowledged service of a motion filed by defendants. The attorney failed to show for the hearing on the motion, and thereafter also failed to show for the hearing on the Motion to Dismiss. The dismissal was granted and the decision upheld. The purported agent in was not an attorney, but rather a collection agent.

Thereafter in *Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (1987), the Court defined "apparent authority" for the purposes of establishing agency, as "that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence." *Id.,* at 417. In *Dixon*, the Court

upheld the preliminary injunction based on the finding that an authorization to collect payments, created a sufficient agency relationship to justify an assumption of authority. *Id.* There is a clear difference in the Court's findings in *Foster*, where the agent clearly testified that he had no authority to accept service, and in *Dixon*, which relied on apparent authority and estoppel. The apparent authority in *Dixon* was created by a reasonable assumption, that an agent's authority in collecting certain payments, extended to the authority to collect other payments.

The Nevada Court of Appeals relied on *U.S. v. Ziegler Bolt & Parts Co.*, 111 F.3d 878 (Fed. Cir. 1997). Therein, the U.S. Court of Appeals found that Ziegler's attorney was not authorized to accept service. The case was proceeding under the Court of International Trade, which has its own court rules, the CIT. CIT 4(c)(1)(C)(ii) was the rule which specifically applied in *Ziegler*. The rule required service by mail, to "an officer, a managing or general agent, or ... any other agent authorized by appointment or by law..." *Id.* at 880-881. Service was to be effectuated with an acknowledgment form required under the rules. There was undisputed evidence that there was no express authority conferred to the attorney to accept service.

. . .

The Court found that "the mere relationship between a defendant and his attorney does not, in itself covey authority to accept service... Instead, the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service." *Id.* at 881.

While the Court stated that "an attorney does not become a client's agent for service of process simply because she represented the client in an earlier action," and "an agent's authority to act cannot be established solely from the agents actions; the authority must be established by an act of the principal," the failure of the federal government to prove service hinged both the fact that the government provided no proof that there was either an express or implied authorization of authority, *and* the fact that the acknowledgment form signed and returned under the CIT only acknowledged receipt and did not purport to accept service. *Id.* at 881-882. The Court also noted that in order to survive a challenge to jurisdiction, the party asserting proper jurisdiction need only establish a *prima facie* case. *Id.*

Well after *Ziegler* was decided, the Nevada Court decided *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 322 P.3d 429 (2014). *Huckabay* states that "an attorney's act is considered to be that of the client in judicial proceedings

when the client has expressly or impliedly authorized the act." *Id.*, at 204. Importantly, in conjunction with *Lange* and *Dixon*, it is clear that Nevada Law supports a determination of apparent agency being vested in an attorney with a concurrent relationship with a client.

Most recently, in *Dezzani v. Kern & Assocs., Ltd.,* 134 Nev. 61, 412 P.3d 56 (2018), the Court analyzed the agency nature of the attorney client relationship, indicating that clients can be held liable for their attorney's actions under agency law. *Id* at 67-69. *Dezzani* also notes that the attorney-client relationship is a special type of agency relationship, because of, among other things, the attorney's ethical obligations. *Id.*, at 69. Those ethical obligations prevent an attorney from representing his authority to either the court or opposing counsel.

After this case was submitted for decision, the Nevada Supreme Court decided *Petsmart v. Eighth Judicial Dist. Ct.,* 137 Nev. Ad. Op. 75, 499 P.3d 1182 (2021), stating

> A party claiming an agency relationship based on apparent authority "must prove (1) that he subjectively believed that the agent had authority to act for the

> principal and (2) that his subjective belief in the agent's authority was objectively reasonable."

499 P.3d at 1188, internal citations omitted.

B. How the Court of Appeals Erred

The Court of Appeals' reliance on *Foster* and *Ziegler* led to an incorrect determination of the law. Nevada law differs from *Ziegler*, in that "apparent authority" in Nevada vests an attorney with agency to bind their client in cases. *See Petsmart,* supra; *Lange,* supra; *Dixon,* supra. That agency relationship, because of the ethical obligations of an attorney expand beyond the authority of an agent to bind to principal in very different circumstances, such as where service is accepted. Further, the rules of civil procedure at issue in *Ziegler* in contrast to this case naturally lead to a different result. Unlike *Ziegler,* where the attorney signed an "acknowledgment" of receipt, Mr. Helmick very specifically agreed to and then actually accepted service. The representation, therefore was affirmatively made more than once, that he was an authorized agent.

Nevada law does not require that the indicia of agency come from the principal, as required under federal law. In fact, Nevada has reviewed questions

of apparent agency through the lens of reasonable assumptions made by the person interacting with the agent. *See Dixon,* supra; *Petsmart,* supra. An offer to, and an actual, Acceptance of Service by an attorney concurrently representive the party, is an objectively reasonable indicia of agency for Brianna to have relied upon.

Unlike in *Foster*, where evidence was provided by both the purported agent and the defendant which showed that there was no agency to accept service, in this case Ronald failed to provide any evidence that Mr. Helmick was not reasonably his agent. Although *Foster* does not specifically set forth the burden of proof for showing improper service, the fact that the Court relied on the evidence provided by the defendant/moving party, shows that once a *prima facie* case of service is established (in *Foster* by virtue of an affidavit), the burden is on the moving party to rebut that showing.

A *prima facie* case of proper service was made with the filed Acceptance of Service. Factually, it was also represented by to the Court at the time of the originally prove-up hearing on December 20, 2020, that Mr. Helmick specifically volunteered to accept service. **JA000025 - 000026** (lines 18 - 1). Further, the district court did not indicate it did not have enough information to determine

service, as represented by the COA. Indeed, the court did have enough information to make a determination.

Specifically, the following relevent discussions occurred on the record:

> **District Court ("D.C."):**And you -- you've indicated that you -- you don't believe that that is Mr. Helmick's signature on the acceptance of service.
>
> **Ms. Szyc**: That's correct.
>
> **D.C.**: But -- but is there a reason I -- I don't have a statement from Mr. Helmick to that --
>
> ...
>
> -- effect?
>
> **D.C.**: ... Ms. Szyc, is there are a reason -- and I -- have no reason -- because I don't know Mr. Helmick and -- I will state I don't know that he's appeared in my court in a family law matter. I get that. But, again, he's li -- he's licensed to practice law. I would know his signature from anyone else's signature. Is there a reason I don't have an affiavit from him stating what happened?

JA000118 (line 15) - JA000119 (line 10).

> **D.C.**: Okay. Again, so I go back to what I -- I started saying, the matter before me is construed by way of the pleadings and papers on file. And -- and there may be some information out there that I -- I just simply

don't have beased on what's been filed with the Court. The -- the default was entered after there was an acceptance of service by -- signed by either Mr. Helmick or someone in his office. There was a three day notice of intent to take default that was subsequently served on -- on Mr. Helmick. I don't interpret -- the -- the motion that was filed -- and -- and it's a countermotion filed by the Defendant was not necesssarily in the nature of a 60(b) -- seeking 60(b) relief.

And I know Ms. Szyc has indicated that she was prepared to argue that, but I -- again, I'm looking at the -- I'm -- I'm narrowly confined to the papers that have been filed with the Court. And the gist of that was that Mr. Helmick was a criminal defense attorney, did not have the consent. But I don't have anything from Mr. Helmick substantiating that...

JA000124 (line 23) - JA000125 (line 17).

The district court very clearly applied *Foster*, although it did not mention it by name. *Foster* relied on uncontroverted evidence - both the purported agent and the defendant provided proof (in the form of affidavits and testimony) agreed that the purported agent had no authority. Here neither Mr. Helmick nor Ronald

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provided any evidence that Mr. Helmick did not have authority to accept service, and the papers and pleadings provided a *prima facie* case that he did.[3]

There was no basis to find that apparent agency did not exist for Mr. Helmick to accept service, nor was there a basis to find that service was improper because Mr. Helmick accepted service. This Court should review and correct the errors of law and fact by the COA.

IV. THE DECISION OF THE COURT OF APPEALS MISAPPLIES *ROONEY*.

A. The Relevant Law

The Nevada Supreme Court stated in *Rooney v. Rooney,* 109 Nev. 540, 853 P.2d 123 (1993), that a district court may decided motions on affidavits and points and authority. *Id.*, at 542. The Court determined that a moving party must establish "adequate cause" to require a hearing. The court stated

> Adequate cause requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.

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[3] The COA also indicated that the district court should have considered Ronald's Motion under 60(b), if service was proper, but in doing so, they ignored the district court's finding that Ronald did not make arguments in his countermotion for the same, making such arguments at the hearing improper as there was no notice to Brianna.

> Adequate cause arises where the moving party presents a prima facie case for modification. To constitute a prima facie case it must be shown that: (1) the facts alleged in ***in the affidavits*** are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching.

Id., at 543.

Recently, the Nevada Supreme Court issued the decision in *Romano v. Romano*, 138 Nev. Ad. Op. 1 (2022). Therein, the Court determined that Aaron Romano's Motion, in relying on application of the law to facts that showed insufficient changes (including minor changes in a timeshare which the Decree indicated was intended to be flexible), did not meet the burden for the District Court to modify the custody or child support arrangements. *Id.*, at 7-8; 10; 12.

B. How the Court of Appeals Erred

Although the COA never cited directly to *Rooney*, the decision specifically found that "[i]f [Ronald]'s allegations in his countermotion are taken as true, [Ronald] created a factual controversy as to whether service of the amended complaint was proper..." and determined that the district court abused its discretion in failing to resolve that dispute. *Order of Reversal and Remand*, page . . .

6-7. The langauge therein used clearly indicates that the Court of Appeals relied on *Rooney*.

The COA specifically misapplied *Rooney* when it found that the claims by Ronald in his countermotion were sufficient alone, as he attested to them. But *Rooney* specifically requires more than simply "allegations which, if proven, might permit inferences sufficient to establish grounds..." *Id.*, at 543. Ronald's allegations in his countermotion *might* infer sufficient grounds.

Although he has validly affirmed his allegations, Ronad has provided no other offers of proof which establish support for his claims. Other cases from the Nevada Supreme Court where adequate cause was established relied on either uncontroverted facts or offers of proof beyond the affidavit of a party. *See Arcella v. Arcella*, 133 Nev. 868, 407 P.3d 341 (2017) (uncontroverted facts such as the finishing of elementary school and the parties agreeing that the child should attend a different middle school, but disagreed as to which one); *Bautisa v. Picone*, 134 Nev. 334, 419 P.3d 157 (2018) (Facebook messages, emails and a third party affidavit).

Ronald is challenging a filed, attested document. As Brianna already discussed, the question of Mr. Helmick's agency requires more than an allegation

that Ronald did not authorize Mr. Helmick to accept service. The district court even asked why there was no affidavit from Mr. Helmick, which would have provided an offer of proof that actually showed their was a factual controversy and sufficient proof that there was a question as to valid agency and service. Without that, all the court had was a party who was challenging agency without providing any offers of proof that meets the standard under Nevada law.

The COA misapplied *Rooney* in finding that sufficient evidence existed to create a factual controversy. This Court should review and correct the error of law by the COA.

V. THIS CASE INVOLVES ISSUES OF STATEWIDE PUBLIC IMPORTANCE

Public policy in Nevada supports a goal of minimizing the time and costs expended on service; the NRCP were revised to include provisions for waiver of service, which is one means of accomplishing that goal. NRCP 4.1. Where counsel agrees to accept service on behalf of a client, that acceptance saves time and costs with respect to service of process in furtherance of those goals.[4] In fact Acceptances of service are commonly used because parties don't want to be

[4] Arguably, an acceptance of service may constitute a valid waiver under the rule.

served personally for a variety of reasons, such as embarrassment, inconvenience, or other personal reasons.

Further, the Supreme Court has recognized the need for actual notice to parties, which has resulted in changes to the rules of Civil Procedure to strengthen the probability of notice where personal service is not possible. NRCP 4.4. An acceptance of service by an attorney, given their ethical obligations, is an appropriate and reliable means of providing actual notice. Such Acceptances of Service should be encouraged.

Further, Judicial economy and the smooth running of the courts is of particular importance to the administration of justice. Additionally, public policy and Nevada law encourage settlement. It is very typical, in cases where settlement may be possible, that attorneys work together to resolve a case prior filing the same. The do so based on the representations of each counsel that they are authorized to act.

If a party who chooses not to participate in a case, or who is unsatisfied with the result of his agreement, is able to challenge an Acceptance of Service by his own attorney on an agency basis, no attorney would be able to safely rely on the representations of another attorney in their ability to accept service, or

negotiate a pre-litigation settlement, as a Notice of Appearance by that attorney would be necessary. Such a result would increase the costs and time associated with litigation and settlement and cause inconvenience to litigants. Such an increase is against public policy. The case law in Nevada supports the ability of a party whose own attorney made misrepresentations to seek relief by claims of malpractice, but it is not a basis to obviate service. *See Lange,* supra; *Nc-DSH, Inc., v. Garner*, 125 Nev. 647, 218 P.3d 853 (2009)[5]; *Dezzani*, supra at 67-68. Parties and their counsel should be able to rely on the representations of other counsel in proceeding on a case.

Judicial economy also requires that Courts not be flooded with frivolous claims and required to expend time and resources sorting through those claims with the same effort that is given to meritorious claims. That public policy underlies the decision in *Rooney.* By determining that an affidavit of a party as the sole offer of proof, which contradicts the papers, pleadings, and representations of counsel on the record in a case, requires the court to take

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[5] Brianna acknowledges that the Court in *NC-DSH* determined that certain acts of an attorney acting without authorization may be "fraud on the court," but Alan did not allege or plead the same and therefore relief cannot issue under that rule. In addition, such a claim would still necessarily need an offer of proof that the acceptance of service was invalid over and above Alan's affirmation in order to survive *Rooney.*

further evidence to resolve a dispute, the COA has indicated that any self-serving affidavit which *might* justify a claim is sufficient evidence to require further proceedings. Such a requirement can only congest the Courts with frivolous claims, slowing down the administration of justice in violation of public policy.

VI. CONCLUSION

Brianna respectfully requests that the decision made by the Court of Appeals be reviewed by the Nevada Supreme Court for correction of error.

Respectfully submitted,
KAINEN LAW GROUP, PLLC

By:_____
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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 it has been prepared in a proportionally spaced typeface using Word Perfect 2020 in 14-point Times New Roman style;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40B(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionately spaced, has a typeface of 14 points or more, and contains 3897 words, excluding exempted tables, etc.;

3. Finally, 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. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of March, 2022.

By: _____
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CERTIFICATE OF SERVICE

I the undersigned hereby certify that I am an employee of the KAINEN LAW GROUP, PLLC, located at 3303 Novat Street, Suite 200, Las Vegas, Nevada 89129, and on the 7th day of March, 2022, I served a true and correct copy of the ***Petition for Review*** on all interested parties to this action as follows:

_____ Depositing in a sealed envelope placed for collection and mailing in the United States Mail, via 1st class, postage prepaid, at Las Vegas, Nevada, following ordinary business practices:

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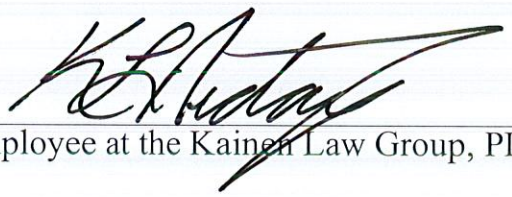

An Employee at the Kainen Law Group, PLLC