

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 RONALD ALAN BARBER

4 Appellant,

5 vs.

6 BRIANNA TEAL BARBER

7 Respondent.

Case No.: 83201

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11 **REPLY BRIEF TO RESPONDENT’S PETITION FOR REVIEW**

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1 **I. INTRODUCTION**

2 The Nevada Court of Appeals (COA) issued an Order for Reversal
3 and Remand in this case on February 17, 2022. On or about March 7, 2022,
4 Respondent filed a Petition for review seeking clarification on two questions
5 based on that order. This all arises from an appeal filed by Appellant raising
6 questions related to service and the agency of the attorney client
7 relationship.
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11 **A. QUESTIONS PRESENTED BY RESPONDENT**

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- 13 1. Whether the Court of Appeals erred in finding that a factual
14 question existed as to whether there was an agency relationship
15 between Ronald and his criminal attorney?
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 - 17 2. Whether the Court of Appeals erred in Finding that Ronald met
18 the burden under *Rooney v. Rooney* to require the district court
19 to take further evidence on the issue of service.
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22 **B. REVIEW IS NOT WARRANTED**

23 The COA's February 17, 2022, decision does not conflict with
24 existing or prior decisions of this court. The decision to reverse and remand
25 for the district court to take additional evidence on the agency relationship is
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1 consistent with the existing progeny of case law in Nevada. The Court of
2 Appeals did not misapply *Rooney* as implied.
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1 **II. FACTS**

2 The parties were previously married on March 8, 2013, in Las Vegas,
3 Nevada. BBJA000002. There are two minor children. BBJA000002. Alan¹
4 is accused of sexual assault against the party's oldest daughter. *id.* The
5 Amended Summons and Amended Complaint were filed by Brianna in
6 September of 2020. BBJA000010; BBJA000001. The documents were
7 served on Alan's criminal attorney, Ryan Helmick, Esq. BBJA000013.

8 Mr. Helmick was not authorized or retained to accept service or
9 otherwise act on Alan's behalf in his divorce. BBJA000079. Therefore, no
10 answer or otherwise responsive pleading was filed on Alan's behalf. On
11 October 28, 2020, a Three-Day Notice of Intent to take Default was filed
12 and delivered to Helmick's office. BBJA000013. On November 4, 2020, a
13 Default was filed. BBJA000014.

14 Prior to the Notice of Entry of Default, there was a prove up hearing
15 held on December 2, 2020. BBJA000033. At the December prove up
16 hearing the District Court noted that Mr. Helmick was Alan's attorney in the
17 criminal proceeding but that no appearance was made in the divorce
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28 ¹ Ronald Alan Barber is the Appellant who will hereinafter be referred
to as "Alan" as he is referred to in documents filed with the lower court.

1 proceeding. BBJA000023-24. It was represented by Brianna's counsel that
2 Helmick was only the attorney on the criminal case and not on the family
3 case. BBJA000025. Brianna's counsel referenced an email in which
4 Helmick refused to provide Alan's address but volunteered to accept
5 service; that email has never been produced as part of the case filings.
6 BBJA000025-26. The court found that the case had been properly served at
7 the December hearing. BBJA000026. Brianna then provided testimony
8 related to child custody, child support, as well as assets and debts.
9 BBJA000027-BBJA000028; BBJA000029; BBJA000029-30.

14 Following the December hearing a Default Decree was entered and
15 again sent to Helmick. BBJA000052-53. There were no further filings on the
16 case until March of 2021 when Brianna filed a pro-per motion "seeking
17 relief from the court to sign a quick[sic] claim deed on behalf of defendant
18 so plaintiff can refinance home. BBJA000067. Alan filed an opposition and
19 counter-motion. BBJA000076.

23 At that hearing Brianna's counsel argued that whether or not the client
24 gave the attorney consent is not the issue of the person serving them.
25 BBJA000123. Alan's attorney argued that Helmick did not have the
26 authority to accept service on his behalf and the burden of service lies with
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1 Brianna. BBJA000117. It was also argued that the matter should be set aside
2 to allow Alan to be heard on at least the child custody and child support
3 issues. BBJA000122.

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5 The District Court noted that the case must be construed on the
6 pleadings and papers on file and that there may be some information that the
7 District Court simply does not have based on what was filed. BBJA000125.
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9 The District Court noted that there was nothing from Helmick substantiating
10 that he did not have consent to accept service, which maybe irrelevant but
11 the countermotion was not necessarily interpreted as a 60(b) motion. *id.*
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14 The District Court denied Alan's requested relief. BBJA000126. The
15 District Court concluded that it simply did not have enough information
16 given the fact that it appeared acceptance of service was signed by an
17 attorney who was duly licensed to practice law in the State of Nevada. *id.*
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20 **III. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT**
21 **WITH NEVADA LAW ON AGENCY AND SERVICE**

22 **A. The Relevant Law**

23
24 NRCP 4(c)(1) places the duty of service on the plaintiff in a civil
25 action. NRCP 4.2 permits service on an agent authorized by appointment or
26 by law to receive service of process. The phrase 'an agent authorized by
27 appointment to receive service of process' is intended to cover the situation
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1 where an individual actually appoints an agent for that purpose. *Foster v.*
2 *Lewis*, 78 Nev. 330, 372 P.2d 679 (1962). Agent is generally defined as
3 “someone who is authorized to act for or in place of another; a
4 representative. *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 67, 412 P.3d
5 56, 61 (2018).
6

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8 The Court has recognized the substantial countervailing argument that
9 a client who hires a lawyer establishes an agency relationship and that,
10 ordinarily, the sins of an agent are visited upon his principal, not the
11 innocent third party with whom the dishonest agent dealt. *NC-DSH v*
12 *Garner*, 125 Nev. 647, 218 P.3d 853 (2009). The relationship between
13 attorney and client is more than a mere agency relationship and is subject to
14 established professional standards. *Dezzani v. Kern & Assocs., Ltd.*, 134
15 Nev. 61, 67, 412 P.3d 56, 61 (2018).
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19 The COA Order for Reversal and Remand relied on *U.S. v Ziegler*
20 *Bolt & Parts Co.*, 111 F.3d 878 (Fed. Cir. 1997) which held that the mere
21 attorney-client relationship does not in itself convey the specific authority
22 necessary for the attorney to receive process on the defendant’s behalf. The
23 authority to accept service cannot come from mere broad powers to
24 represent a client in litigation. The record must show that the attorney
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1 exercised authority beyond the attorney-client relationship, including the
2 power to accept service. *id* at 881. Where the evidence that the person
3 served was not authorized by the defendant to receive service of process is
4 uncontradicted, as in this case, such denial of authority must be taken by the
5 court as true. *Foster v. Lewis*, 78 Nev. 330, 372 P.2d 679 (1962).
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8 *Lange v. Hickman*, sets forth that “notice to an attorney, is in legal
9 contemplation, notice to his client. 92 Nev. 41, 43, 544 P.2d 1208, 1209
10 (1976). In *Lange*, a motion to set aside a dismissal was denied because
11 Plaintiff’s previous counsel failed to inform Plaintiffs’ that they needed to
12 sign medical consents. Even when the court expanded *Lange* in *Arteaga v.*
13 *Ibarra*, 109 Nev 772, 858 P.2d 387 (1993) and the imputable knowledge
14 between attorney and client, it was directly related to the case in which the
15 attorney’s services were retained.
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20 In *Huckabay Props v. NC Auto Parts*, 130 Nev. 196, 322 P.3d 429
21 (2014), the court found consistent with federal jurisdiction and general
22 agency principles that bind a client to its attorney’s acts and omissions.
23 However, it should be noted that the *Huckabay* court started the analysis by
24 examining *Link v Wabash*, 370 U.S. 626, 633-34 (1962) which held that the
25 litigant cannot seek a do-over of their dismissed action based on arguments
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1 that dismissal is too harsh a penalty for counsel's unexcused conduct as to
2 do so would offend general agency principles. The *Link* court recognized
3 that the petitioner in that case voluntarily chose this attorney to represent
4 him and could not avoid the consequences of the freely selected agent. *id.*
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7 **B. There was no Error in the Application of Law By the Court of**
8 **Appeals**
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10 Here, the Court of Appeals' reliance of *Foster* and *Ziegler* was
11 correct. The mere attorney-client relationship between Alan and Helmick
12 was not sufficient to establish the authority necessary for Helmick to accept
13 service on Alan's behalf. The progeny of case law related the agency
14 relationships between attorneys and clients which imputes the attorney's
15 behaviors on the client are all directly related to cases in which the client
16 voluntarily or freely chose to engage that attorney's services for the civil
17 litigation in question. That is not the case here. Alan retained Helmick to
18 represent him in the unrelated criminal matter. Alan did not engage his
19 services in any way to represent him in the divorce proceedings.
20 BBJA000081; BBJA000117.
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22 The Order for Reversal and Remand for the District Court to take
23 additional evidence related to the issue of service is consistent with *Foster v.*
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1 *Lewis*, 78 Nev. 330, 372 P.2d 679 (1962). Where the evidence is
2 uncontroverted that the person served did not have the authority to do so it
3 must be taken as true. In this case the District Court clearly indicated there
4 may be some information that it did not have based on what was filed with
5 the court.
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8 The Court... “And the gist of that was that was that Mr.
9 Helmick was a criminal defense attorney, did not have
10 consent. But I don’t have anything from Mr. Helmick
11 substantiating that, and that may be irrelevant.
12

13 BBJA000125.
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16 The issue of consent of service is not irrelevant. That the District Court
17 would consider it irrelevant highlights the import of not only Alan’s
18 arguments related to the service issue, but also the COA’s Order regarding
19 the need to take additional testimony on the issue related to service. If
20 service was not proper, any subsequent order would be either void or
21 voidable as pointed out by the COA in the Order for Reversal and Remand.
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24 The distinction in this case from every other case cited in Brianna’s
25 brief is that when the attorney’s actions in those cases were imputed on their
26 client’s the clients freely and voluntarily hired or chose those lawyers to
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1 perform those functions in that particular litigation. Alan did not hire,
2 authorize, or otherwise consent to Helmick acting on his behalf in this
3 matter. Something even Brianna's counsel acknowledged at the hearing in
4 December. BBJA000025-BBJA000026.

7 NRCP 4 allows for other means in which service could have been
8 effectuated without having to email criminal courts, DA's, or criminal
9 defense attorney's to attempt to locate Alan. BBJA000025. Brianna took a
10 short cut in service. The duty to serve lies with plaintiff. NRCP 4. In this
11 case, Helmick was not authorized to accept service. BBJA000079. The
12 agency relationship between attorney and client should not be imputed to
13 Alan when the lawyer acted beyond the scope of representation, without
14 consent and the consequences are catastrophic to the client. *Foster and*
15 *Ziegler* support Alan's position. The COA was correct to order the reverse
16 and remand.

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22 **IV. THE DECISION OF THE COURT OF APPEALS DOES NOT**
23 **MISAPPLY *ROONEY***

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25 The Court of Appeals Order does not cite to *Rooney*. *Rooney v.*
26 *Rooney*, 109 Nev. 540, 853 P.2d 123 (1993) was a case of first impression to
27 determine if the district court must hold a hearing on a motion to modify
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1 custody or whether a district court may decide such a motion on affidavits
2 and points and authorities alone. The *Rooney* court ultimately held that the
3 moving party must establish adequate cause to require a hearing. *Rooney* is
4 not applicable to the COA Order here, *see* COA Order pgs. 6-7 the COA as
5 the factual controversy at issue is related to service, which inherently
6 creates a jurisdictional issue. The need for additional evidence to clarify the
7 issues related to service are also clearly outlined in the COA order and do
8 not indicate a reliance or misapplication of *Rooney*.
9

10 The COA order is clear. *Foster* requires the uncontradicted evidence
11 presented by Alan to be taken as true. *Ziegler* raises the exact issue at point
12 here: that the attorney-client relationship between Alan and Helmick does
13 not automatically convey authority to accept service. The COA succinctly
14 makes these points in the order.
15

16 If Alan's position regarding service is determined to be true and
17 Helmick's acceptance is not imputed onto him, jurisdiction is affected,
18 subsequent orders are affected. The need for a hearing to answer and clarify
19 this factual question raised by Alan is key to all remaining issues of the case
20 (as noted by the COA).
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1 That the District Court acknowledged that there was not enough
2 information regarding the service issue supports the COA's order that
3 additional evidence should be taken on this issue. That is not a miss
4 application of the *Rooney* standard.
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7 **V. THIS IS NOT AN ISSUE OF STATEWIDE PUBLIC**
8 **IMPORTANCE, BUT RATHER A CASE OF**
9 **DISTINGUISHING FACTORS**
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11 To the extent this Court may consider an Acceptance of Service by an
12 attorney as a waiver of service under NRCP 4.1, then a whole different set
13 of issues arises in this case, in that Default was taken to early. Under NRCP
14 4.1(c) a Defendant who timely returns waiver of service need not serve an
15 answer to the complaint until 60 days after the request was sent. In the
16 instant case, the three-day notice of intent to default was sent 21 days after
17 the acceptance of service was filed. BBJA000012.
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22 Alan does not argue, that in principle, having the ability to utilize the
23 acceptance of service is an acceptable tool in the litigation process.
24 However, that tool should only be utilized when authorized to by the client
25 and within the scope of representation. Registered agents must be registered,
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1 because the express authority to accept service has been conferred upon
2 them.
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4 The relief that Alan is seeking will not, as is implied by Brianna,
5 create such a mistrust in the litigation system that no attorney will ever be
6 able to reasonably rely on an acceptance of service again. However, in this
7 unique set of facts the totality of the circumstances once examined make it
8 clear: this is not a statewide issue. This is a jurisdictional issue because
9 Brianna did not want to serve Alan properly at the onset of the case. *Foster*
10 and *Ziegler* make clear the importance of personal service. Helmick did not
11 have Alan's consent to accept service. There was no agency relationship
12 between Alan and Helmick as related to the divorce proceedings. Service in
13 this case was improper. Brianna's reliance on Helmick's acceptance of
14 service was improper.
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20 If an agent is going to be served, that agent must be designated for the
21 purpose of accepting service. The mere relationship between an attorney and
22 client does not convey consent sufficient to accept service and in the
23 progeny of cases determining the agency relationship between attorney and
24 client in civil matters the key thing they all have in common (that
25 distinguishes them from this case) is the litigant who suffered the impunity
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1 of the lawyers' actions freely and voluntarily choose their counsel for the
2 civil litigation in question.
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4 **VI. CONCLUSION**

5 The Court of Appeals did not err. The Order for Reversal and Remand
6 should stand.
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1 I further certify that this brief complies with NRAP 40(B)(d) and
2 40(B)(e) and excluding the parts exempted by NRAP 32(a)(7)(C) it is
3 proportionately spaced, has a typeface of 14 points or more, and contains
4 2309 words.
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