IN THE SUPREME COURT

OF THE STATE OF NEVADA

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FILED

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RICHARD J. GOHEEN,

Appellant,

vs.

JACQUELINE J. GOHEEN,

Respondent.

SUPREME COURT NO.: 41677

DISTRICT COURT CASE NO: D271889

RESPONDENT'S ANSWERING BRIEF

Appeal from Eighth Judicial District Court, Department A

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the District Court erred in denying Appellant's Motion for Relief from Decree of Divorce.

STATEMENT OF THE CASE

This is an appeal from the District Court Order, entered by the Honorable William O. Voy on June 10, 2003. Appellant, RICHARD J. GOHEEN (Richard) was not present at the May 29, 2003 hearing which resulted in that order.

Respondent, JACQUELINE J. GOHEEN (Jacqueline), filed her Complaint for Divorce under Case D271889 on July 19, 2001. *Record on Appeal* (*ROA*), 1. The following day, July 20, 2001, Jacqueline filed her Motion for Temporary Fees and Allowances. *ROA,* 5. Those issues were heard on August 27, 2001.

Richard was served with the Summons, Complaint and Motion on July 26, 2001. *ROA,* 21. He was residing at the Clark County Detention Center prior to initiation of the Divorce action. *Id.*

Richard filed an Answer to the Complaint on August 9, 2001; however, the Answer and Counterclaim were not verified by Richard, but rather was submitted under the signature of Richard's sister, Nora Goheen, under the guise of a Power of Attorney. *ROA,* 27.

In the Order from the August 27, 2001 hearing, filed September 4, 2001, Judge Jones ordered

> ...that Defendant's opposition shall be stricken by this Court for failure to comply with the Rules of Civil Procedure. Notwithstanding the same defect for the Answer, the same shall stand, if already filed.

ROA, 40.

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Richard refused to participate in a Joint Case Conference. Thus, an individual Case Conference Report was filed by Jacqueline's attorney on April 24, 2002. *ROA*, 45.

The initial Order Setting Civil Nonjury Trial was filed June 4, 2002, and set the trial date for July 25, 2002. A copy was sent to Richard at the address that he previously gave to the Court. *ROA*, 49.

However, Jacqueline's counsel was scheduled to be out of town on that date. As a result, he attempted to contact Richard--who continued to be incarcerated for the molestation of Jacqueline's daughter--to stipulate to a continuance, but without success. Thus, Jacqueline's counsel filed a Motion to Continue Trial on an Order Shortening Time on July 17, 2002. *ROA*, 55.

The Motion to Continue Trial was granted, and an Amended Order Setting Civil Nonjury Trial was filed by the Court on July 23, 2002. *ROA*, 60. A copy of that Amended Order was sent to Richard at High Desert State Prison in Indian Springs on July 23, 2002. *ROA*, 61.

On September 3, 2002, at 8:00 a.m., Jacqueline and her attorney appeared in Dept. C, prepared and ready to attend the scheduled trial. Richard asserts that he believed the trial would not go forward on September 3, 2002, because of his refusal to file a Pretrial Memorandum. *ROA*, 110. Richard was not present at the Trial.

Notice of Entry of the Decree of Divorce was filed September 12, 2002, and mailed to Richard on that same day. *ROA*, 77. Thus, conservatively, by September 15, 2003, Richard was aware that the trial went forward without him and that a Decree of Divorce had been entered.

Notwithstanding that notification, Richard failed to file his Motion for Relief from Decree of Divorce until April 1, 2003. *ROA*, 96. Such was approximately six-and-one-half months following the Notice of Entry of the Decree of Divorce.

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Richard did not file an Appeal from the Entry of Decree of Divorce. In fact, nothing further was filed with the Court until April 1, 2003.

Richard complained that he was unaware that he needed to apply for an Order for Transport to trial for the September 2002 trial. Notwithstanding that argument, and then admittedly understanding the need for a transport order, Richard also failed to appear at the hearing on his Motion for Relief, held May 29, 2003. *See ROA*, 158. Richard offers no excuse for his failure to appear on that date.

Richard had every opportunity to appear at the May 29, 2003 hearing to present his case beyond what was already contained in his moving papers. He chose not to appear.

As a result of the May 29, 2003 hearing, an Order was entered June 10, 2003. *See* ROA 158. In addition to awarding attorney's fees to Jacqueline's counsel, the Court ordered "that Defendant's Motion for Relief from Decree of Divorce was not timely filed and therefore must be DENIED." *Id.*

Richard's motion, filed April 1, 2003, contains all the arguments which he includes in his Opening Brief. *ROA*, 96-103. Since Richard failed to appear at the hearing, the Court considered all the documentation submitted by Richard, in addition to the Opposition and Countermotion, filed by Jacqueline on May 12, 2003. *ROA*, 129. After reviewing all arguments, the Court rendered its decision.

It is that Order, filed June 10, 2003, from which Richard appeals.

STATEMENT OF THE FACTS

From the outset, Richard has not followed any of the rules set out by either the Nevada State Legislature, the Nevada Supreme Court or the Nevada Rules of Civil Procedure. His Answer and Motion were not even signed by him. *ROA*, 25, 30. In fact,

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the first document ever signed by Richard in this case came following the entry of the Decree of Divorce, that being his Motion for Relief from Decree of Divorce, filed April 1, 2003. *ROA*, 96.

Richard is incarcerated based on his conviction of sexual assault and sexual assault with a minor under 16 years of age in Case C176666. *ROA*, 7. The sexual abuse was of Jacqueline's daughter, Alexis, born March 24, 1989. *Id.*

Notwithstanding Richard's failure to comply with court rules, the Court refrained from taking an initial default on his improperly prepared Answer and required that the Nevada Rules of Civil Procedure be followed from that point forward. *See ROA*, 40. It appears that those instructions did not convince Richard, based on his subsequent actions.

The Decree of Divorce granted the entire proceeds from the sale of the marital residence to Jacqueline in consideration for the mortgage and other household expenses born solely by Jacqueline since Richard's incarceration, as well as Jacqueline's claim for spousal support and attorney's fees. *See ROA*, 73, 74.

Richard's main concern appears to be that he was not awarded any proceeds from the sale of the marital residence. *ROA*, 96. However, the Court considered that request, along with Jacqueline's requests, in rendering the decisions contained within the Decree of Divorce.

It appears as though Richard, while incarcerated for the sexual assault of Jacqueline's daughter, has determined that he will continue to haunt Jacqueline through the legal system. Richard made no effort to appear at the September 3, 2002 trial or at his own Motion for Relief from that judgment, held May 29, 2003.

Notwithstanding the lack of any effort on Richard's part, he comes before this Court requesting relief, based upon his allegations that the Clark County Clerk improperly

delayed the filing of his motion and that the Entry of the Decree of Divorce violates the U. S. Constitution. Such logic is difficult to follow.

ARGUMENT

A. The District Court Did Not Err in Denying Appellant's Motion for Relief from Decree of Divorce.

Richard claims that the District Court erred in denying his Motion for Relief from Decree of Divorce because, as he claims, he attempted to submit his Motion for Relief to the Court five (5) months following the entry of the Decree, but it was not filed until after more than the six (6) months expired.

The District Court is given little discretion in this matter. A judgment in a divorce case becomes final upon the expiration of six (6) months after its entry, and the District Court is therefore without jurisdiction to modify the judgment. *Schmutzer v. Schmutzer*, 76 Nev. 123, 350 P.2d 142 (1960). As such, the District Court made the proper ruling based on the filing of the Motion for Relief.

B. Even If Appellant's Motion Is Considered Timely Submitted, He Cannot Meet the Requirements of Nevada Rule of Civil Procedure 60(b).

Richard understood that he could not appeal the Decree of Divorce, so he attempted, contrary to the intent of the rules, to sidestep that requirement by filing a Motion for Relief "under NRCP 60(b)." *ROA*, 148. Such is further example of Richard's following his own set of rules. However, Richard could not even follow the necessary rules and time frames established in the Nevada Rule of Civil Procedure 60(b).

By Richard's own admission, he did not even begin to attempt filing his Motion for Relief until early February 2003--five (5) months after he received Notice of Entry of the Decree of Divorce.

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Nevada Rule of Civil Procedure (N.R.C.P.) 60(b) states, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void.

The evident object of this provision is to relieve a party from the effects of some judgment or order made by the court in its regular proceedings--not to give a party some affirmative right which he has lost by his own conduct. *Killip v. Empire Mill Co.*, 2 Nev. 34 (1866). To condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside judgment would turn Section (b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be. *Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980).

This Court has previously indicated that the salutary purpose of Section (b) of this rule is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party. *Nevada Indus. Dev., Inc. v.Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987); *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992).

Richard has no excusable neglect. He admits he was notified of the trial scheduled for September 3, 2002. *ROA*, 110. His only excuse is that he "believed *in good faith* that the trial date of September 3, 2002, would be vacated and rescheduled." *Id.* (emphasis added). It is difficult to understand how refusing to participate in litigation and expecting a benefit can be deemed "good faith." Such cannot be deemed a valid excuse.

Further, Richard's argument for why he was not at the September 3, 2002 hearing becomes significantly weakened by the fact that he failed to appear at the hearing on his

Motion for Relief on May 29, 2003. After admitting that he was too late to file an appeal of the Decree of Divorce, choosing to utilize the provisions of N.R.C.P. 60(b) and failing to appear at that hearing are not indicative of someone who is entitled to receive equity.

Richard has failed to establish that he meets the grounds for relief under N.R.C.P. 60(b) even if he had timely filed his Motion. He has no excusable neglect; there has been no mistake and no surprise or inadvertence is alleged.

C. Appellant Cannot Show a Meritorious Defense to the Decree of Divorce.

The showing of a meritorious defense to the action is required when a motion to set aside a judgment is made pursuant to Section (b)(1) of this rule upon the ground of mistake, inadvertence, surprise or excusable neglect. *Deros v. Stern*, 87 Nev. 148, 483 P.2d 648 (1971).

Richard failed to demonstrate that he has a meritorious defense to the result rendered within the Decree of Divorce. His chief complaint is that he did not receive any proceeds from the sale of the marital residence. However, He failed to contribute any money to the community since he was arrested for the sexual abuse of Jacqueline's daughter.

It was necessary for Jacqueline to retain counsel, who attempted on numerous occasions to settle the matter with Richard but received no response. It was also necessary for Jacqueline to maintain all of the household expenses, counseling costs for her daughter, prepare for and attend the trial.

Those issues were taken into consideration when the Court entered its order granting the entirety of the sales proceeds from the marital residence to Jacqueline. Richard has failed to present any evidence that he has a meritorious defense as is required. Thus, his request must fail.

. . .

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D. Appellant's Argument That the Decree of Divorce Is Void under Nevada Rule of Civil Procedure 60(b)(3) Lacks Merit.

Richard claims that the Decree of Divorce is a void order as it violates the U.S. Constitution. Although Richard's logic is difficult to follow, the reality of the situation is that he made that argument in his moving papers; thus the same was considered by the District Court. *ROA*, 101, 102.

All required procedural issues were completed prior to the entry of the Decree of Divorce. Entering a Decree without the presence of a party, under a default situation does not render the resultant Decree violative of the U.S. Constitution.

E. Even If the District Court Erred, Any Error must Be Deemed Harmless.

As stated hereinabove, the fact that Richard's motion was not timely filed gives the District Court no discretion in rendering the decision it made. However, even if this Court were to agree with Richard's argument, that since he made an attempt to file before the six-month time frame had elapsed and the lower court should have considered his motion, the resulting Order would not have changed.

As referenced hereinabove, Richard cannot maintain a case under Nevada Rule of Civil Procedure 60(b), or any of its subsections. As such, even if his motion had been timely filed, the result in the lower court would have been the same. Thus, it must be considered harmless error, if error at all.

CONCLUSION

Based on the foregoing, the District Court did not err in denying Richard's Motion for Relief from Decree of Divorce. Richard sat on his rights, failed to appear at any hearing beyond the initial fees and allowances hearing--including the hearing for his Motion for Relief--and now expects this Court to overturn the lower court judgment.

The lower court made the proper determination based on the late filing of the Motion for Relief. However, even if the Motion had been timely filed, the result would have been the same in that Richard cannot demonstrate that he is entitled to relief under N.R.C.P. 60(b). Thus, any error by the lower court in denying the Motion based upon the six-month time frame must be considered harmless and the resulting order confirmed.

DATED this 24th day of November 2003.

HOSKIN & ASSOCIATES

By _____
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CERTIFICATE OF COMPLIANCE

I certify that I have read the above and foregoing **Respondent's Answering 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, and particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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.

DATED this 24th day of November 2003.

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CERTIFICATE OF MAIL

I hereby certify that I am an employee of HOSKIN & ASSOCIATES and that on the 24th day of November 2003, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully prepaid thereon, a true and correct copy of the above and foregoing **Respondent's Answering Brief**, addressed to:

Richard J. Goheen, #72882
Lovelock Correctional Center
P.O. Box 359
Lovelock, NV 89419-0359
Appellant in Proper Person

An employee of Hoskin & Associates

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