Case Number 09 PO 002/003

IN THE JUSTICE COURT OF AUSTIN TOWNSHIP
COUNTY OF LANDER, STATE OF NEVADA

VIRGINIA (SISSIE) GALLEGOS, Plaintiff *VS.* MICHAEL MARKING and ELIZABETH FLEMING, Respondents	MOTION TO VACATE JUDGMENT UNDER RULE 60(B)

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Respondents, and hereby submit their MOTION TO VACATE JUDGMENT UNDER RULE 60(B).

WHEREAS

(1) Plaintiff in this matter (see *Background*, page 4) did not disclose to this Court, during the proceedings of this matter, the paternity of then Judge Joe Dory to Plaintiff's daughter

Mary Hammon. (see *Disclosure of Judge Joe Dory's paternity*, page 4)

(2) The foregoing omission from the record constituted extrinsic fraud upon this Court, as it

(a) prevented Respondents from knowing their rights and defenses in this matter (see *Respondents were prevented from knowing their rights and defenses*, page 5); and

(b) denied Respondents their due process rights (see *Respondents were denied their due process rights*, page 5); and

(c) defrauded this Court by improperly giving Judge Dory jurisdiction of this matter (see *Concealment defrauded this Court*, page 5); and

(3) Under Rule 60(b), this Court may vacate its judgment when extrinsic fraud has been shown (see *Judgment may be set aside in cases of extrinsic fraud*, page 7); and

(4) There is no time limit for filing a motion to vacate a judgment for cause of extrinsic fraud (see *No time limit on a Rule 60(b) motion predicated on extrinsic fraud*, page 10); and

THEREFORE, Respondents pray to this Court for an Order finding extrinsic fraud in this matter, and vacating all previous judgments made by Judge Joe Dory in this matter. (see *Vacatur not sought in other cases*, page 12; also see *Summary of points and authorities*, page 12)

THIS MOTION is based on law and on the record, and requires no affidavit.

IN SUPPORT of this Motion, Respondents have attached their MEMORANDUM OF POINTS AND AUTHORITIES.

DATED this Wednesday, 25 March 2015.

Michael Marking, Respondent

e-mail: *marking@tatanka.com*

Elizabeth Fleming, Respondent

e-mail: *ryuuza@tatanka.com*

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Memorandum of Points and Authorities

1. **Background.** Plaintiff filed her application for a TPO with Judge Dory, who granted it *ex parte* despite no attempt to show the harassment needed under the statutes. Dory prohibited his clerk from filing a notice of appeal, so Plaintiffs, in a distinct case which was not an appeal, asked for a writ of mandamus from Judge Wagner in the Sixth District Court. Judge Wagner, apparently also a close friend of Plaintiff (who refers to him as "Rick"), granted the writ but opined that TPO cases were not appealable.

2. When Respondents went to appeal Wagner's decision, he blocked his own clerk from filing the notice of appeal. He relented when the Nevada Supreme Court suggested that they would entertain a petition for a writ of mandamus were the Sixth District to continue to refuse to file the notice. However, Judge Wagner sabotaged the appeal by removing the TPO itself from the record, despite it being designated by Respondents as part of the record. The Supreme Court refused to rule on the matter, on the grounds that the record was not complete.

3. Therefore, despite there being two related cases all the way up to the Supreme Court, this case has never been appealed. It is clear from the record that Judge Dory completely ignored Respondents' arguments, neither approving or disapproving them: he simply ignored them. In other words, *Respondents have been completely denied a hearing before an impartial tribunal on the substantial issues in this case, and have been denied due process*.

4. **Disclosure of Judge Joe Dory's paternity.** Any mention of Mary Hammon, or that Judge Joe Dory is the father, is completely absent from the record of this case. The disclosure was not made until a year later, in a subsequent case, *Gallegos v. Marking (II)*, Austin Justice Court Case 10 CV 002. The transcript shows clearly that Judge Dory, upon learning that Mary Hammon was his daughter, asked for confirmation and otherwise spoke as if he had not

previously been apprised of the situation.

5. **Respondents were prevented from knowing their rights and defenses.** It is clearly a violation of the Nevada Code of Judicial Conduct for a judge to sit on a matter when the mother of his child is a party to the action. Yet, by failing to disclose Judge Joe Dory's paternity, Respondents were precluded from disqualifying Judge Dory on that basis, or raising a defense based on presumption of Dory's bias, or seeking another venue, or doing any of a number of things which might have been done, given the close relationship between Plaintiff and the Judge.

6. **Respondents were denied their due process rights.** Respondents have a right to a hearing before an impartial tribunal. Failure to disclose that Judge Dory was the father of Mary Hammon denied them that impartial tribunal. How the omission of disclosure occurred is not germane: "[...] Nor does it make a particle of difference from what source the act or omission complained of emanates, for it is not the act or omission itself but its effect upon the hearing accorded by the court to the defendant that results in, or does not result in, a denial of due process of law." (*Mooney v. Holohan*, 55 S. Ct. 340, 294 U.S. 103 (U.S. 01/21/1935))

7. **Concealment defrauded this Court.** Improperly seeking a Court's jurisdiction is the basis for a substantial portion of the cases involving extrinsic fraud against the court. The instant case falls into that category: by failing to disclose Judge Dory's relationship to Mary Hammon, Plaintiff subverted the integrity of the judicial process by inducing Judge Dory to take jurisdiction over the application for the TPO and over the ensuing proceedings.

8. In *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (Nev. 02/22/1990), it was held that Dunn had not exercised due diligence in attempting to locate Price, therefore Price was entitled to a new hearing. This was deemed extrinsic fraud upon the court. One of the most fundamental

actions required for a court to gain jurisdiction is proper service.

9. In *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 906 P.2d 258 (Nev. 11/30/1995), the court held that Snappy had not used due diligence in finding Gassett. The court reversed the district court's decision, upholding Gassett's claim of extrinsic fraud. The court said, "defective service rendered the district court's personal jurisdiction over Gassett invalid and the judgment against her void. For a judgment to be void, there must be a defect in the court's authority to enter judgment through either lack of personal jurisdiction or jurisdiction over subject matter in the suit. *Puphal v. Puphal*, 669 P.2d 191 (Idaho 1983). In Price v. Dunn, 106 Nev. 100, 787 P.2d 785 (1990)." Once again, this was a question of improper jurisdiction.

10. The most recent, and perhaps the most complete, attempt to define "fraud upon the court", in Nevada is from *NC-DSH, Inc. v. Garner* (218 P.3d 853 (Nev. 10/29/2009)). Nevada said,

> " 'Fraud upon the court' has been recognized for centuries as a basis for setting aside a final judgment, sometimes even years after it was entered. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 245 (1944) (discussing 'the historic power of equity to set aside fraudulently begotten judgments' and canvassing cases and treatises and vacating a judgment entered nine years earlier), overruled on other grounds by *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976). It is, of course, true that 'in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.' Id. at 244. For this reason, a final judgment, once entered, normally is not subject to challenge. However, the policy of repose yields when 'the court finds after a proper hearing that fraud has been practiced upon it, or the very temple of justice has been defiled.' *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946). '[A] case of fraud upon the court [calls] into question the very legitimacy of the judgment.' *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). Put another way, '[w]hen a

> judgment is shown to have been procured' by fraud upon the court, 'no worthwhile interest is served in protecting the judgment.' Restatement (Second) of Judgments 70 cmt. b (1982).
>
> The problem lies in defining what constitutes 'fraud upon the court.' Obviously, it cannot mean any conduct of a party or lawyer of which the court disapproves; among other evils, such a formulation 'would render meaningless the [time] limitation on motions under [Rule] 60(b)(3).' *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (Friendly, J.), cited with approval in *Occhiuto*, 97 Nev. at 146 n.2, 625 P.2d at 570 n.2, and *Murphy*, 103 Nev. at 186, 734 P.2d at 739. The most widely accepted definition, which we adopt, holds that the concept embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . and relief should be denied in the absence of such conduct.

11. The failure by Plaintiff to disclose Judge Dory's relationship with Plaintiff meets these requirements, making it an instance of fraud upon the court. Certainly, the very legitimacy of the judgment is questionable. Certainly, no worthwhile interest is served in protecting the judgment. Certainly, the integrity of this Court was subverted. And certainly, "judicial machinery cannot perform in the usual manner its impartial task of adjudging cases" when the judge shares a child with one of the parties: such a situation is defined as biased by common sense as well as by the Code of Judicial Conduct.

12. **Judgment may be set aside in cases of extrinsic fraud.** Rule 60(b) allows the vacatur of judgments in case of fraud.

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud,

> Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: [...] (3) fraud (whether heretofore denominated intrinsic or extrinsic), […] The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served. A [...] This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (JCRCP 60(b))

13. The salient point from this rule as invoked here is that a judgment may be set aside for extrinsic fraud, which applies in the instant case. Although the Rule implies a six-month time limit for some bases of a Rule 60(b) motion, that limitation does not apply when the basis of the motion is extrinsic fraud, as explained below in *No time limit on a Rule 60(b) motion predicated on extrinsic fraud* , page 10.

14. It remains in this section to be discussed the distinction between "intrinsic" and "extrinsic" fraud, and to show that the fraud complained of in this motion was extrinsic.

15. One explanation for the terms, intrinsic and extrinsic, is their appearance on the record: extrinsic fraud involves to an omission or act which does not appear on the record. That clarification was used by California, and repeated in *Mooney v. Holohan* (cited above).

16. Regardless of the origin of the terms, however, the distinction has been clarified at various times by Nevada and by the United States Supreme Court.

> *fn18 It has frequently been said that where the ground for review fraud, review will not be is granted unless the fraud was extrinsic. See *United States v.*

> *Throckmorton*, 98 U.S. 61. The distinction between extrinsic and intrinsic fraud is not technical but substantial. The statement that only extrinsic fraud may be the basis of a bill of review is merely a corollary of the rule that review will not be granted to permit relitigation of matters which were in issue in the cause and are, therefore, concluded by the judgment or decree. The classical example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness. While perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one of the matters on which the trier of fact must pass in order to reach a final judgment. An allegation that a witness perjured himself is insufficient because the materiality of the testimony, and opportunity to attack it, was open at the trial. Where the authenticity of a document relied on as part of a litigant's case is material to adjudication, as was the grant in the Throckmorton case, and there was opportunity to investigate this matter, fraud in the preparation of the document is not extrinsic but intrinsic and will not support review. […] (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 64 S. Ct. 997, 322 U.S. 238, at footnote 18 (U.S. 05/15/1944))

17. In the instant case, Joe Dory's fathering of Mary Hammon was not on the record, there was no opportunity for Respondents to avail themselves of it, and therefore the fraud was extrinsic.

18. Nevada's use of the term is consistent. "[...] We there recognized that perjury alone does not constitute extrinsic fraud. However, we held that such perjury, together with the fraudulent concealment of the true facts from the opponent, thereby preventing the exposure of such perjury at the time of trial, does constitute extrinsic fraud." (*Moore v. Moore*, 78 Nev. 186, 370 P.2d 690 (Nev. 4/9/1962)) In the instant case, Plaintiff certainly concealed a material, true fact from this Court. Rather than preventing the exposure of perjury, however, it prevented the exposure of Judge Dory's disqualification.

19. The scope of fraud recognized under Rule 60(b) was broadened in 2004. According to the Advisory Committee's Notes (*q.v.*), prior to 2004 the language restricted motions under the fraud portion of the Rule. Then, the Rule permitted relief only when the fraud "would have justified collateral attack upon the judgment"; that restriction was removed effective 2005. Nevertheless, even under the more restrictive, former version of the Rule, a collateral attack based on Judge Dory's disqualification is justified by the fraud, so this Motion would have qualified under the earlier Rule.

20. **No time limit on a Rule 60(b) motion predicated on extrinsic fraud.** Nevada has consistently held that the time limit for other Rule 60(b) motions does not apply to those based on extrinsic fraud.

21. "[...] The first guideline, that the moving party must show some excuse for setting aside the judgment, is addressed by NRCP 60(b) which provides that a court may relieve a party from a final judgment for extrinsic fraud upon a court with no time limitation. [...]" (*Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (Nev. 02/22/1990), footnote omitted)

22. "The six-month limitation on allegations of fraud is inapplicable to fraud upon the court. *Savage v. Salzmann*, 88 Nev. 193, 195, 495 P.2d 367, 368 (1972)." (*Murphy v. Murphy*, 103 Nev. 185, 734 P.2d 738 (Nev. 3/31/1987))

23. "[...] While a motion under NRCP 60(b)(3) must be made 'not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served,' NRCP 60(b) does not specify a time limit for motions seeking relief for "fraud upon the court." (*NC-DSH, Inc. v. Garner*, 218 P.3d 853 (Nev. 10/29/2009)) Nevada, in the same case, goes on to explain the possibly confusing wording of Rule 60(b) in this regard.

> "Labeling the basis for the Garners' motion 'intrinsic' rather than 'extrinsic' fraud does not bring it within NRCP 60(b)(3) or make NRCP 60(b)(3)'s six-month limitations period apply. Ever since its 1981 amendment to import the

parenthetical phrase-- '(whether heretofore denominated intrinsic or extrinsic)' --from its federal model, NRCP 60(b)(3) has applied to both intrinsic and extrinsic fraud. See *Carlson v. Carlson*, 108 Nev. 358, 362 n.6, 832 P.2d 380, 383 n.6 (1992); *Occhiuto*, 97 Nev. at 146 n.2, 625 P.2d at 570 n.2.*fn3 The 1981 amendment to NRCP 60(b)(3) abrogated the older cases like *Gilbert v. Warren*, 95 Nev. 296, 299, 594 P.2d 696, 698 (1979), and *Manville v. Manville*, 79 Nev. 487, 489-90, 387 P.2d 661, 662 (1963), to the extent they relied on the distinction between intrinsic and extrinsic fraud to decide whether a motion fell under NRCP 60(b)(3) and its six-month deadline. See 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* 2868 (2d ed. 1995) (noting that the distinction between extrinsic and intrinsic fraud 'rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply') (footnote omitted).

More germane: NRCP 60(b)(3) by its terms only applies to fraud 'of an adverse party.' The district court found that neither Valley Hospital nor its lawyer had any knowledge of or complicity in Davidson's fraud. Davidson victimized them, equally with the Garners. NRCP 60(b)(3) and its six-month limitations period thus do not apply, because the Garners' motion was not based on 'fraud (whether . . . intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.' NRCP 60(b)(3) (emphases added). Other courts, applying like rules to like facts, have so held, and we read our rule no differently. *McKinney v. Boyle*, 404 F.2d 632, 633-34 (9th Cir. 1968) (holding that where the movant's lawyer and nonparty wife committed fraud in concluding his case, the motion did not involve fraud 'of an adverse party,' taking it outside Fed. R. Civ. P. 60(b)(3) and its one-year time limit); *Flowers v. Rigdon*, 655 N.E.2d 235, 236 (Ohio Ct. App. 1995) (holding that, while '[f]raud, inter partes, without more, should not be a fraud upon

> the court, but redress should be left to a motion under [the Ohio counterpart to NRCP] 60(b)(3) or to the independent action,' a lawyer who defrauds his clients by stipulating to a bogus judgment concluding their claims commits a 'fraud upon the court') (quotation omitted); see *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1102 (9th Cir. 2006) (holding that '[s]ubsection (b)(3) permits relief only when the fraud was committed by 'an adverse party'')"
>
> (*NC-DSH, Inc. v. Garner*, footnote omitted).

24. In the instant case, the fraud was both extrinsic (it involved an issue which never came before this Court) and against this Court (because this Court was induced to take jurisdiction, when it should not have done so). The above opinion (in *NC-DSH, Inc. v. Garner*) was not a change in the interpretation of the Rule. Rather, it was a clarification. In fact, several of the Nevada Supreme Court cited herein continue to use the terms "intrinsic fraud" and "extrinsic fraud" even after the mentioned 1981 amendment of the Rule. A close reading shows that the substance of the interpretation has not changed, while the Nevada court is recommending a new way to understand the distinction.

25. The common thread, both before and after *NC-DSH, Inc. v. Garner*, is that a matter which subverts the proper functioning of the court, is grounds for review and not subject to the time limitation. This is consistent with other due process decisions. The assumption is that, if facts are brought before a court, then the court will deal with them appropriately, but in cases of extrinsic fraud the court is prevented from acting properly (such as in jurisdictional decisions) because the facts were not before it.

26. **Vacatur not sought in other cases.** This Motion does not seek vacatur of judgments in any cases except the instant case.

27. **Summary of points and authorities.** This Motion is based upon a claim of extrinsic

fraud against the court, which, under Rule 60(b), is grounds for vacatur of the judgment without time limit.

28. The United States Supreme Court, relies on the distinction between intrinsic and extrinsic fraud to determine whether of not the time limit is effective. A diligent search of the opinions shows that the U.S. Court's opinions are consistent, in that, where a fact was concealed or misrepresented to the court, such that the opposing party had no opportunity to take advantage of the fact or to question it during the trial, extrinsic fraud existed and the time limit did not apply. There appear to be no contrary cases.

29. Nevada cases are consistent in the same way: there appear to be no contrary cases. Although in *NC-DSH, Inc. v. Garner*, Nevada held that the intrinsic-extrinsic distinction was not what was important, but rather the presence or absence of fraud upon the court, the facts of *NC-DSH, Inc. v. Garner* are still consistent with the extrinsic-intrinsic distinction: the fraud by Davidson in *NC-DSH, Inc. v. Garner* was not about the issues before the court; rather, it was about Davidson's authority to settle a case. (Davidson forged his clients' signatures.)

30. In this case, the fraud is extrinsic, and against the court. The omission was not related to the claims or defenses, and – being undisclosed – was never litigated. Nevertheless, it was material to this Court's jurisdiction over this case.

31. Although it was learned afterward, Judge Dory was disqualified from sitting on this case. Because of Judge Dory's disqualification, there has never been a hearing before an impartial tribunal of the issues of this case. According to this criterion, as well, setting aside the judgment is justified, according to relevant opinions. Once again, this is consistent with other readings of the opinions: due process was denied because of the fraud, and, as a consequence, the function of this Court as an impartial tribunal was subverted.

32. In summary, the concealment of the fact of Judge Dory's paternity of Plaintiff's daughter Mary Hammon precluded his disqualification, so that no hearing was ever had before an impartial tribunal, denying them due process. The concealment was a fraud against

this Court, and was extrinsic to the record. Rule 60(b) allows this motion, and puts no time limit on bringing it before this Court. Respondents respectfully request that this Court set aside the granting of the TPO, and all amended judgments, and vacate all rulings and orders made by Judge Dory in this matter. Justice demands no less.

Certificate of Service

I hereby certify under penalty of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, US. postage prepaid, at Austin, Nevada, addressed as follows:

Ruben Gallegos and Virginia (Sissie) Gallegos; Post Office Box 221; Austin, Nevada 89310

Austin Justice Court; Post Office Box 100; Austin, Nevada 89310

Dated Wednesday, 25 March 2015.

_____

Nancy E. Fleming

Affirmation

(Pursuant to NRS 239B.030)

I hereby affirm that the preceding document filed in the above-described manner does not contain the social security number of any person.

Dated Wednesday, 25 March 2015.

_____

Michael Marking

(Respondents' electronic document name: *gvmf_motion_vacate_judgment_rule_60(b)_20150323c*)