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Supreme Court of Texas.
PNS Stores Inc., d/b/a MacFrugals Bargain Closeouts d/b/a MacFrugals, Inc.
v.
Anna E. Rivera as Next Friend of Rachel Rivera.
No. 10-1028.

January 11, 2012.

Appearances:

David A. Oliver, Jr. of Vorys, Sater, Seymour and Pease, LLP, for Petitioners.

Daniel J. T. Sciano of Tinsman Sciano, Inc., for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 1028, PNS Stores v. Anna Rivera.

MARSHAL: May it please the Court, Mr. Oliver will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF DAVID T. OLIVER, JR. ON BEHALF OF THE PETITIONER

ATTORNEY DAVID T. OLIVER, JR.: May it please the Court, in this default judgment case, it's undisputed that service was improper and when there's improper service, there is no jurisdiction of the person and when there is no jurisdiction of the person, every judgment it's had is void. Our view is that a void judgment cannot become unvoid. It cannot come into being if it was never a good judgment to begin with.

JUSTICE DEBRA H. LEHRMANN: How can you say that the notice that was provided to the registered agent was not impeded to you?

ATTORNEY DAVID T. OLIVER, JR.: Assuming that the notice given to the registered agent was, in fact, the notice here, I think, well, let me go back. First of all, yes, they were our registered agent. Our dispute is whether or not the notice and the return of service was proper or not. The idea being, of course, that because it was not and because a person has no obligation to act unless the service was proper and even though these elements of

failure to follow strictly the rules as they apply to return of service were perhaps considered technical, the rules require that they be strictly enforced. [Inaudible]

JUSTICE DEBRA H. LEHRMANN: But isn't there a distinction between improper service that results in a denial of due process because someone really does not know about what's going on and defects of the kind that are involved in this situation?

ATTORNEY DAVID T. OLIVER, JR.: Perhaps the Court is getting to the question of whether or not actual notice somehow cures technical defects.

JUSTICE DEBRA H. LEHRMANN: Not just actual notice or actually just no service or service of the wrong person or whatever.

ATTORNEY DAVID T. OLIVER, JR.: Well, perhaps the issue is one of whether or not Dispensa decided things rightly. Our position is if these rules, which were not mere formalities, not merely things for bureaucrats to do, but are strictly prima facie evidence of proper service if they're not properly followed then there is no notice. If there is no proper notice, there is no jurisdiction and no matter what the person knows, whether they know of it or not, they have no duty to act and that has been the law of both the United States Supreme Court and the State of Texas for a very long time. And so our view becomes that because there was none, we had no obligation to act. And so the question now becomes, as I perceive these cases, as to whether or not the court can look to the record as it stands and see that there was improper service or whether or not it must turn a blind eye to what is clearly in the record and that is a handful of defects that prove--

JUSTICE EVA M. GUZMAN: Did the improper service lead to a complete lack of notice going to the question of whether it is a voidable judgment and whether you can attack it directly or collaterally?

ATTORNEY DAVID T. OLIVER, JR.: I would say that it was in the technical sense. Again, the issue of whether or not we ever came to know of this, we did not factually. That's pretty clear from the record that was developed. But yes our position is even if these are technical issues, we did not get notices the law understands the notice to be and therefore no duty.

JUSTICE EVA M. GUZMAN: Did you have a registered agent at the time?

ATTORNEY DAVID T. OLIVER, JR.: We did indeed.

JUSTICE EVA M. GUZMAN: And what was the function of your registered agent?

ATTORNEY DAVID T. OLIVER, JR.: To accept service of process on our behalf.

JUSTICE EVA M. GUZMAN: Okay. Did they accept service for you in this case?

ATTORNEY DAVID T. OLIVER, JR.: They say that they did.

JUSTICE EVA M. GUZMAN: Okay. And so in any other cases service on them, service on you so to speak?

ATTORNEY DAVID T. OLIVER, JR.: Indeed.

JUSTICE EVA M. GUZMAN: Alright. But not here.

ATTORNEY DAVID T. OLIVER, JR.: But not here because it was improper.

JUSTICE EVA M. GUZMAN: Because of technical deficiencies?

ATTORNEY DAVID T. OLIVER, JR.: Because of technical deficiencies, but of course, the technical issue here, which is my second point, is whether or not the court is again or courts are, I should say, to turn a blind eye to the record merely because we have this residual limitations statute now, which it didn't exist say back when McEwen was decided in 1961 and we make some sort of distinction, some sort of artificial distinction where we don't look to the record itself and see if indeed there were these defects because they are and that takes us in the first instance, I think, to the Alfonso case. Alfonso was, as we know, a circumstance where the Court looked to the record and found that there was no subject matter jurisdiction. That leaves an issue of whether or not there was some personal jurisdictional defect that the court could also look to and I would argue what indeed could there be distinction wise that would make any sense because Austin Independent School District and all the cases that have cited it have always had the same sentence. If you don't have jurisdiction of the person, of the property or of the subject, then you don't have jurisdiction.

JUSTICE DEBRA H. LEHRMANN: Well, didn't Alfonso have to do with a child custody matter?

ATTORNEY DAVID T. OLIVER, JR.: It did indeed.

JUSTICE DEBRA H. LEHRMANN: And that really, subject matter jurisdiction cannot be waived, but it had to do with the fact that that was deciding custody, right?

ATTORNEY DAVID T. OLIVER, JR.: Indeed.

JUSTICE DEBRA H. LEHRMANN: Which is really a little different aspect, right?

JUSTICE PAUL W. GREEN: Well, but also the procedural, the service defects here. I mean there has to be some waiver issue involved; otherwise, it seems to me that you would have a lot of default judgments out there that are void and such being set aside forever and that can't be the rule. It has to come to some constitutional level, due process level, it seems to me, before it would become a void judgment.

ATTORNEY DAVID T. OLIVER, JR.: If I perceive the question rightly, it seems to be a policy sort of a question and that is are we opening Pandora's box by doing this particular thing, and I would argue that we do not because upon who falls the risk? It's the person who comes back and says, hey, we never got proper service. It's the risk to this that over time, the record is lost or destroyed and nothing remains but the judgment.

JUSTICE DON R. WILLETT: But it does have the potential to invalidate a lot of judgments that have gathered a lot of dust over the years.

ATTORNEY DAVID T. OLIVER, JR.: Well, potential perhaps, but let's take some of the cases that talk about these rules. It's very simple to get somebody served and as the cases say, it's very simple to correct defects and service once that's done. So if we have an issue of whether or not there are a lot of them, I would argue, gosh, there are hundreds and hundreds of these things done every day and they're done right. The number that are done wrong seems to be very slim and how many circumstances do we have in which a decade or decades later, someone comes forward and says, I have here a judgment no one has seen about, seen of and no one has acted upon, no one has attempted to execute upon and here I have it and we would not, under those circumstances, look to the record. And when it shows that there is no personal service and no personal service resulting in a void judgment--.

JUSTICE DON R. WILLETT: However, few there may be, there can be no finality to later attack under your theory.

ATTORNEY DAVID T. OLIVER, JR.: No finality. Well, there would certainly be finality if you were to look to the record and see that it was void. That would finalize the matter.

JUSTICE DEBRA H. LEHRMANN: No, because it's subject to attack at any time, I mean that's the issue. That if we don't make a distinction and if you look at the Peralta case, I mean that case said that, when personal jurisdictional deficiencies are such that the party subject to the judgment is without notice at a meaningful time and in a meaningful manner to be given an opportunity to be heard, that's what they're talking about. That's what violates due process, not just mere technical defects. And if we hold that technical defects do not give rise to a due process violation are going to subject these judgments to attack, not direct attack, collateral attacks, then we really are going far beyond, it seems to me, what we're directed to do by the case law out there.

ATTORNEY DAVID T. OLIVER, JR.: If we look at Peralta, then we look at say Ross v. National Center for the Disabled, we see case after case saying that the party not properly served has no duty to act. So again, if there's some issue about whether we should do something or not, there's no duty for them to go further so that these, while we may call them technical defects, they're absolute defects, it seems to me. Now back to your issue about whether or not we open again as I perceive it, some sort of Pandora's box, I don't see the problem. How often does this come up when someone comes up with a judgment in a case that has already been litigated fully and decided on its merit someplace else and then sits on it? This issue seems to me very similar to that of Alfonso v. Skadden where, again, you have circumstance where somebody waited four years and three days and then deciding, probably almost certainly I would suspect, that because if you don't look beyond the judgment itself, some injustice would be done and that's, of course, the problem with all default judgments. That's why the law abhors default judgments because almost certainly when the parties have been deprived of their opportunity to put on their evidence and argue the law, injustice is likely to have been done.

JUSTICE EVA M. GUZMAN: Well, you could have designated another agent for service or but let me take you to whether there are any fact issues that would toll the limitations here. At the time the state suit was filed, counsel was aware of opposing counsel's name and address and the default judgment rules require that you serve the party at their last known address. Rather than doing that, Mr. Tamez chose to serve through the registered agent. Does that raise any issues with respect to extensive fraud that might toll the limitations on the bill of review, for example?

ATTORNEY DAVID T. OLIVER, JR.: That was to be in our second point, which is to say that despite the residual statute of limitations in the case of extrinsic fraud, it's told in essence and here our evidence of extrinsic fraud is as follows. There was a failure to speak, an omission and there were at least two of them. First of all, the attorney who took this default judgment had just four days before he filed this second one, finished litigating this very matter in which depositions were taken and went to a magistrate and then he submitted more information and they had more arguments and they had a final judgment and he knew our local counsel. He knew his mane. He obviously had. He'd sat across from him at deposition and had been at the hearings with him and yet he did not give him notice. And furthermore and we can only assume this, I'm afraid, and that is that the trial court who rendered this default judgment must not have heard that there was this other judgment already out there.

JUSTICE DEBRA H. LEHRMANN: But doesn't extrinsic fraud really deal with the denial of allowing the other party an opportunity to fully litigate all the rights or defenses? I mean that's really how the case is defined extrinsic fraud and it seems to me that on these facts, that's not what we have.

ATTORNEY DAVID T. OLIVER, JR.: Well, certainly the testimony has developed here. If we look back we have to remember that we waived the attorney-client privilege. We allowed them to come depose our in-house counsel, our local counsel, the secretary paralegal to look through our documents in our database. We didn't have this. What we do know from our local counsel is he said, he's going to look and see if this case was ever to be re-filed. And we followed up with him months after this happened and he said, I've heard nothing further about it. So our position would be had Mr. Tamez told our local counsel that he was about to take a default judgment and he had indeed taken one, we wouldn't be here today.

JUSTICE EVA M. GUZMAN: Well, the issue is under Rule 239(a), he had to send notice to the last known address again. Is there something in the record that supports that, in fact, the last known address was known and he purposely didn't do that, but went instead for served and delivered notice to the registered agent?

ATTORNEY DAVID T. OLIVER, JR.: Well, certainly in that regard because he had contacted our risk-loss people at the home office, give a demand even before he filed the first lawsuit, he knew where we were, he knew who we were. He knew our in-house counsel. He knew our local counsel and he gave them no notice of either. Now, again, it seems to me that this case sort of turns on this distinction in large part between whether or not we can look beyond the record in a personal jurisdiction matter and I want to come back to your question because it's a profound one. And that is do we indeed open some sort of Pandora's Box if we allow people to go back and look? But I wonder about this circumstance having started practicing law in Beaumont, Texas and back in the time when it was sort of a cottage industry of people who would file these claims to be heirs of the spindle top land and these things were litigated over and over and finally done away with and I can certainly understand the court's interest in the finality of judgments, but again our argument would be here is the risk is all on us that this is lost because we agree there ought to be a presumption in favor of these old judgments are good. But if we can simply turn the page and see the rest of the record and see that they're not good, that ought to be enough and I would also argue if you look back at the oldest cases here in Texas, they use the language the record. Somewhere along the way, this idea that we're going to look only to the face of the judgment got replaced with no real explanation, replace the idea of look at the entire record and I see no distinction between subject and personal. In fact, the idea that a judgment, for example, that is bad because a justice of the peace exceeded his or her jurisdictional limit, that ought to be perhaps less offensive than a judgment being rendered against someone over whom personal jurisdiction was never obtained. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Sciano will present argument for the Respondents.

ORAL ARGUMENT OF DANIEL J.T. SCIANO ON BEHALF OF THE RESPONDENT

ATTORNEY DANIEL J.T. SCIANO: May it please the Court, one of the things, based on the questions I've heard, that is incredibly important in this case and why I took the deposition of the organizational representative for the Store in this case who I asked to be produced in the case to speak to areas of their contentions concerning what they were claiming as their defenses, as to what knowledge they had, etc., I went and took his deposition, Mr. Schlonsky, the record is filled with the references to him. Schlonsky not only is the one that's alleged to have received the notice from the agent for service of process, but he's the one that was taken and I asked him the question that the Court posed a moment ago about this issue about the agent for service of process and what his capacity was. The facts in this case are undisputed and let me make this very clear; they are undisputed. Schlonsky said, not only was he agent for service of process, the person that they wanted service to go to, the evidence in this case is undisputed that Schlonsky was the guy they wanted the notice of judgment to go to. Let me say that again. He testified as part of his testimony as the organizational representative, he wanted the notice of judgment to go to him and he said, because if it went to the office and it got lost in the office, that was a problem. He didn't want to go to the individual stores or principal places. He wanted it to go to the people that would get it to them and what's the evidence in this case? The evidence is they got it. They got it.

JUSTICE NATHAN L. HECHT: Does that matter?

ATTORNEY DANIEL J.T. SCIANO: It does matter.

JUSTICE NATHAN L. HECHT: Why? Because I thought you would concede that if a passerby just said, oh I was standing at the courthouse, I heard you got sued and actually, hey, I brought you a copy of the pleadings. That wouldn't matter would it?

ATTORNEY DANIEL J.T. SCIANO: Well, let me answer it this way. It has to matter and let me tell you why it has to. We have set up, in the old days in the 1800's and before the Special Practices Act, you know history the phrase if you don't remember it, it's bound to repeat it. Special Practices Act was the beginning of the Rules of Procedure. They applied to some of the counties not all of the counties. By 1939, Bexar County had the rules. By 40's, the district courts, all the district courts had it. By the 60's and it's a critical time period, 61, 62 is when all the courts were subject to it.

JUSTICE NATHAN L. HECHT: Well, let me bring you back to the question though. The question is, if somebody were just walking through the courthouse and heard that PNS had got sued and got a copy of the pleadings and had sent it to them just FYI, you couldn't sustain a default judgment on that could you?

ATTORNEY DANIEL J.T. SCIANO: It depends when and that's the. I disagree and here's why. Actual notice is an important. I'm sorry I misunderstood.

JUSTICE NATHAN L. HECHT: So that if the judge rendered a default judgment on that kind of notice, it could not later be set aside.

ATTORNEY DANIEL J.T. SCIANO: Notice where someone called, him out in the courthouse?

JUSTICE NATHAN L. HECHT: Yeah.

ATTORNEY DANIEL J.T. SCIANO: I think the issue of actual notice is a critical component on the Rules of Civil Procedure and let me explain why. It's three --

JUSTICE NATHAN L. HECHT: I just want the answer to my question and then you can explain all you want.

ATTORNEY DANIEL J.T. SCIANO: I'm sorry I think actual notice of any kind is adequate to start and trigger the time period expressly stated under 329 of the Texas Rules of Civil Procedure. So in other words what I'm trying to convey is the argument, and let me kind of address it in the context of Justice Calvert in 1961 authored the opinion involving McEwen and he articulated the difference between void and voidable. He described how the cases involving a technical defect involving service were going to fall into the second category where if there were recitals in the record, if there were statements in the record that identified jurisdictional facts, you couldn't go below the face of the judgment. After a certain period of time and here's the balance because that's what the rules did because otherwise here's what happens. If the rule is now going to be the following, that once a defendant receives actual notice of a judgment through the court process undisputed for the person they wanted to receive it and they can then say I'm not going to file a motion for new trial. There's no burden for them to meet the Craddick factors. They go to the state, the Hagedorn Factors in the Bill of Review. They don't have to meet those. They're better off, they're literally better off to say I didn't see it because they don't have an obligation to do anything and Rule 329 says, just the opposite. It says, if the party learns, it says, if the lawyer learns and then there's a third item, if you look at the rule it says, actual notice and that's the trigger of events for motion for new trial and in the 30-day period there's no dispute had they simply acted on what the actual notice was in the presence of their organizational representative who has designated the agent for service of process. They could have come in filed a motion for new trial and the rules and the procedures and the burdens of proof were way on their side. There's a no presumption of a judgment. All the issues and the technical I-dotting and T-crossing, a motion for new trial would have been granted more likely than not. We would have gotten our fees, they'd have been appeared before the court and we've started over. But then 30 days went by and then six months and then the rules narrow and the rules and the evidence that's allowed to be offered changes and it's got to be on the face of the record and then when it gets to four years, at six months to four years, again additional requirements and what they keep missing, and what the trial court and the courts of appeals emphasized in this case is once you received actual notice under the undisputed evidence from the person you said, should get the notice, that that point triggered the obligation to file a bill of review and then five years went by. The record,

Judge Morales didn't just sign a default judgment. Go back to it, he interlined, he reviewed evidence involving unliquidated damage, you can see by the numbers that he wrote and how he interlined the amount, he just didn't take whatever the plaintiff's lawyer offered in evidence in the case.

JUSTICE EVA M. GUZMAN: He complied with Rule 239(a) to send notice to the last known address? Did you comply?

ATTORNEY DANIEL J.T. SCIANO: The answer is absolutely, they did not comply with the rule to send to the principal office and Layton the Texas Supreme Court case says that, it is not as a matter of law extrinsic fraud, Layton. Alright. And here's why, because what their contention is that this lawyer sat down, thought about how it is that he could not give notice and hide it from them. Who better is evidence of what the evidence is, who better could he have given notice to than the person designated by them to receive the notice and it's not extrinsic fraud? And then --

CHIEF JUSTICE WALLACE B. JEFFERSON: The lawyer, the lawyer would be better.

ATTORNEY DANIEL J.T. SCIANO: I'm sorry?

CHIEF JUSTICE WALLACE B. JEFFERSON: The lawyer, the defendant's lawyer would be better.

ATTORNEY DANIEL J.T. SCIANO: I'm saying not the defendant's designated person that they said, should receive it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right, but you said, who would be better in our legal profession; usually it is a telephone call or a letter to opposing counsel, that's typically how you communicate. If you want to get the notice directly, the best way possible, you call the lawyer or you send a notice.

ATTORNEY DANIEL J.T. SCIANO: I think he could have called, up and said, hey I'm not going to take a default against you. I just want you to know file an answer. He could have done that. Then someone else would come back later and say he's got a legal obligation to zealously represent his client within bounds of the law and his obligation is to present his case. If they don't raise the statute of limitations, am I supposed to call up the defense lawyer and say, hey, by the way, you can win on the statute of limitations?

JUSTICE PHIL JOHNSON: Didn't Lawyer's Creed take care of that though?

ATTORNEY DANIEL J.T. SCIANO: And I don't understand the question, Your Honor.

JUSTICE PHIL JOHNSON: Well, Lawyer's Creed says that, you won't, if you know who's representing the other side, you won't take a default without letting them know about it does it? And the relief, and the lawyer does have an ethical obligation clearly to his or her client and then we have the Lawyer's Creed though that steps in and says, well, you've got another obligation above and beyond that and so but doesn't the Lawyer's Creed specifically address the issues?

ATTORNEY DANIEL J.T. SCIANO: I think the Texas Lawyer's Creed addresses the issue in a couple ways in this. First, the preamble said, it's not to ingrain and engender and add additional requirements in the rules of procedure and there's a specific provision that says, we're not going to have that be the basis of a new set of rules. The Legislature entered and set up a procedure on how to attack judgments by direct attack. They said, once there's actual notice, there's a set of time periods that happen and the lawyer--

JUSTICE PHIL JOHNSON: I'm not arguing with that. I'm just addressing your question that Chief Justice asked who else could you notify and the answer you say is the lawyer has an ethical obligation, yes, but we do have as a profession, we do have and we have alleviated some of that in a particular manner for default judg-

ments. So I think that's all I was going to. I don't want to argue with the Legislature or rules or anything else.

ATTORNEY DANIEL J.T. SCIANO: And two cases that have addressed that exact issue the Houston court and Dallas court have both said that, does not add an additional requirement for direct attacks. So what's the evidence of, let me answer it this way.

JUSTICE PHIL JOHNSON: Would you agree that, would you agree that we have typically examined very closely service in regard to default judgments?

ATTORNEY DANIEL J.T. SCIANO: Yes.

JUSTICE PHIL JOHNSON: And so you have someone who took over a million dollar default judgment and with the knowledge as most lawyers who have been to the court house very infrequently even much less frequently know, Texas courts have typically examined those very closely and it seems as though, we're talking about the other side, but it would seem as though if you want to keep a million plus default judgment, you would go look and make sure you had your I's dotted and your T's crossed in order to maintain that so.

ATTORNEY DANIEL J.T. SCIANO: I think, I certainly the better practice is to look at those issues and the dilemma with that is if you don't at the motion for new trial stage, that judgment's likely to get set aside. At the bill of review stage, if there's not a recital in the judgment, it's likely to get aside, but when a district judge puts a recital in his judgment and sets out the jurisdictional facts and the record that involves that discussion is gone, it's no longer in existence because they waited nine years before looking for it. Now the issue is have they brought in evidence that the trial judge didn't hear other evidence involving those issues at the time of what the service was or other evidence and they can't offer any. So the dilemma is, and his comment about there's no real disaster, that just, that was his thought. I can't think of anything real bad that would happen. Let me talk to you about something called, the Eagle Ford Shale. Maybe you all have heard about it. It's also called, the Barnett Shale up in the north. There's a little play going on south of town, lot's of stuff's going on currently.

JUSTICE DAVID M. MEDINA: A lot of earthquakes.

ATTORNEY DANIEL J.T. SCIANO: Yea a lot of earthquakes and we're going to have a battle about the water and everything else next. But think of the disaster that this has caused, that this would cause, really think about it. Because if the Court rules today that you can attack a judgment nine years, 20 years, 30 years for a technical I dot, T cross when there's a jurisdictional statement on the face of the record and no evidence offered to contradict what happened in the underlying trial court because the record is no longer there, Dan's going to open up a new business called, Dan's Defaults.com LLC and I'm going to look through and I'm going to contact every one of the courts in that area where there are oil and gas rights and I'm going to look for any evidence, not on the face of the record, I'm going to go down to the green cards and see if they put the year 2010 on it instead of just put the day and the month.

JUSTICE EVA M. GUZMAN: Dan, would you be successful in your business if there was fraud in the procurement of those judgments?

ATTORNEY DANIEL J.T. SCIANO: The answer would be absolutely not if there was fraud procured in getting the judgment.

JUSTICE EVA M. GUZMAN: Is it fraud if you represent to a judge that you have a right to proceed in a lawsuit when you knew or should have known that it had been dismissed with prejudice in the federal court?

ATTORNEY DANIEL J.T. SCIANO: Good question and the answer is the lawyer in this case had an absolute right to say it was not dismissed with prejudice. He, in fact--

JUSTICE EVA M. GUZMAN: Would the motion for summary judgment requested that the relief be with prejudice.

ATTORNEY DANIEL J.T. SCIANO: Say it again; I didn't understand you.

JUSTICE EVA M. GUZMAN: The motion for summary judgment in the federal court, going back many, many years ago, they asked that it be dismissed with prejudice.

ATTORNEY DANIEL J.T. SCIANO: Yes.

JUSTICE EVA M. GUZMAN: And in fact, in 2009, the federal court went back and amended an order and indicated that it should have been with prejudice. Did Mr. Tamez perpetrate a fraud on that court when it took a default judgment with the knowledge that it should have been with prejudice? Yes or no?

ATTORNEY DANIEL J.T. SCIANO: And the answer is no.

JUSTICE EVA M. GUZMAN: Why?

ATTORNEY DANIEL J.T. SCIANO: And I answer that by this letter, which is part of the record. It's the lawyer for PNS, who said, and it's part of the trial court record, he said that's what he thought it meant. He told them, that is Mr. Carl, Mr. Karel said, the judge is thinking Ms. Rivera may well, elect to get a different attorney and will re-file the claim. And they said, you heard it today thank God on the record, he said, we expected our lawyer to monitor that. First time it's been said. They expected their lawyer Karel to monitor and maybe that's what round two and three is in this case the lawsuits against the lawyers or against the agent for service of process for not really giving us the notice, but this isn't going to end here believe me. So the answer, Your Honor, is the case was understood by everybody to be without prejudice. I took the depositions, Your Honor, of Mr. Schlonsky. I took the depositions of Mr. White, which are the lawyers. They told me in the deposition, it's a summary judgment evidence. The way the record reads, yea, you can re-file it.

JUSTICE EVA M. GUZMAN: Is there any fraud in filing a certificate of last known address that says that, you complied when you, in fact, sent it to another address, not the last known address?

ATTORNEY DANIEL J.T. SCIANO: No, Layton says that, is not extrinsic fraud. There's already a ruling on that and it can't be because think of it; he is telling them, how can it be fraud to tell them that there is a judgment? Fraud would be to not tell them, to go on before the notice got over there and the letter is over in the mailbox and you take it out the mailbox and you rip it up so they don't get it. That's the kind of extrinsic fraud that would give rise to that basis under failing to give notice. Or in the other circumstance, never giving notice. And that's the difference in this case and why the circumstances of the way this case was tried and why the evidence was presented the way it was and why the court was right in granting a motion for summary judgment under the facts presented in the unique circumstances of this case. Every single court, every court that has looked at this issue in voiding void or voidable, every court that has addressed it even post Skadden where it involves personal service of issues, personal jurisdiction issues, has said that, those issues can be waived and after the time ticks away, those rights to attack a judgment are gone.

JUSTICE EVA M. GUZMAN: Is this Layton case that you keep referring to is that cited in your brief?

ATTORNEY DANIEL J.T. SCIANO: Yes and it's in--

JUSTICE EVA M. GUZMAN: Is that L-A-Y-T-O-N?

ATTORNEY DANIEL J.T. SCIANO: Yes and--

JUSTICE EVA M. GUZMAN: And I think you said, it was a Texas Supreme Court case; it's out of Corpus Christi.

ATTORNEY DANIEL J.T. SCIANO: Corpus, I'm sorry, I apologize. Corpus case.

JUSTICE EVA M. GUZMAN: Just so, it's out of Corpus Christi in 2004.

ATTORNEY DANIEL J.T. SCIANO: That's correct. But it--

JUSTICE EVA M. GUZMAN: So the Texas Supreme Court has not spoken on this?

ATTORNEY DANIEL J.T. SCIANO: They have not said that, 329 notice to a person that's supposed to get the notice according to the defendants is extrinsic fraud and it should not be. If the lawyer was trying to conceal the existence of the judgment fraudulently, he would never have given the notice, not give the notice to someone that has. So to conclude unless the Court has additional questions in this case, this case will cause unintended consequences. It will allow persons to go back and look at administrations and probate proceedings in South Texas. It will allow people to look at district court rulings involving trespass to try title. It will allow all of us to go back and pull out those old records and disregard recitals and look to see if there's a green card technical error and the court and the Rules of Procedure and the Legislature have dropped a balance. They say once it gets to that time period of four years, you lose the right to assert a bill of review. Absent extrinsic fraud and then extrinsic fraud only tolls it not for another five years so you knew or should have known and they actually knew and that's the difference in this case and why the court of appeals' opinion in my opinion was properly written. In my opinion, the Court should find that the petition was improvidently granted or if it wants to write on the subject because it's got nothing else to do then the Court can go back and write and discuss all of these issues because I think candidly--

JUSTICE NATHAN L. HECHT: Counsel?

ATTORNEY DANIEL J.T. SCIANO:--the Fourth Court of Appeals' decision was accurate.

JUSTICE NATHAN L. HECHT: If the Court's got nothing better to do?

ATTORNEY DANIEL J.T. SCIANO: I'm being sarcastic and I apologize if you didn't understand it that way and I apologize. What I mean by that, Your Honor, is is that there's no reason to create an ambiguity of the law and create an issue about something where the Dallas court and the Houston court have already addressed this. The San Antonio court has addressed it and they're soundly commenting about whether the rule should be and has been properly decided. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Court will hear rebuttal.

REBUTTAL ARGUMENT OF DAVID T. OLIVER, JR. ON BEHALF OF PETITIONER

ATTORNEY DAVID T. OLIVER, JR.: To address one of the questions, we don't know what Oscar Tamez thought about all this. He evaded service repeatedly. When he was finally served it was videotaped, he jumped in his car and fled, did not appear at his deposition and the certificate of non-appearance was taken. We only know what he didn't say; we don't know what he did. With regard to this question about McEwen on which Rivera relies, I think it's important to recall that this was written well, before Peralta, which obviously in a case of no service as we contend, means that these typical bill of review sorts of one, two, three meritorious defense, prevented from acting wasn't negligent in pursuing it obviated in such a circumstance. But I think equally important to recall is that when McEwen was written, there was not this four-year residual statute of limitations. If you look at the very end of the opinion, the justice goes through and says, well, this is not going to work all of these worried-about injustices because well, someone should be diligent and someone should have a meritorious

defense. Those were obviated again by Peralta. But also goes on to say, and of course you always have your bill of review to come back if there's a void judgment, if you haven't done any of these naughty things, you can come back and do this. Well, the problem here is with this four-year limitation period stuck in between, it's given incentives just like those discussed in Browning vs. Prostok for those most devious to find a way to get something done and then run out the clock. So again when you see an Alfonso, someone waiting four years and three days or in this case four years and then a few months before he attempted to abstract the judgment, we know what's going on and that is somebody's trying to run out the clock. And they're trying to run out the clock why? Because if that clock didn't run out, they have to know, and we don't know what Oscar Tamez was thinking, but he had to have known.

JUSTICE PAUL W. GREEN: We frequently address limitations questions and discovery rule and so forth and there's a constructive notice issue related to well, that was, the record was on file, it was a recorded document, you can't say that you didn't know because it was there. In the same courthouse where this lawsuit was pending, why wouldn't the same analogy rule apply with respect to the fact that the law suit was there. You may not have known it was there, but given the question related to without prejudice order out of a federal court, why wouldn't there be some duty to inquire?

ATTORNEY DAVID T. OLIVER, JR.: Well, I think the answer is twofold. First of all, I don't think there isn't anything I can find that puts a duty on a lawyer to go hunt courthouse to courthouse because he ought to be able to rely on a couple of things. First, before a default judgment is taken against him that somebody's going to tell him if he knows exactly who they are, which is the circumstance in this case, or likely then not that it's not even going to happen because we've already litigated the case and lost and finally, the issue becomes if there's no proper service, there's no duty to act at all. And again our point becomes there is no jurisdiction ex nihilo. It can't come from nothing. It can't be the case that simply by the passage of time, jurisdiction that never was comes into being.

JUSTICE EVA M. GUZMAN: Well, let's assume, go ahead.

JUSTICE PHIL JOHNSON: Well, it seems as though to criticize a lawyer for waiting four years, if that's, in fact, the law before you abstract, does not seem to be much evidence of external fraud. All the lawyer is doing is representing his or her client, letting the judgment, just to make sure. It seems like that's good representation unless there's some kind of, you say defect in service upfront.

ATTORNEY DAVID T. OLIVER, JR.: Well, and of course, the courts have always given strict scrutiny to default judgments because as I said, before, justice has very rarely worked in those circumstances.

JUSTICE PHIL JOHNSON: But waiting four years doesn't seem to be evidence to me of extrinsic fraud just because a lawyer did that.

ATTORNEY DAVID T. OLIVER, JR.: I'm not asserting that it was and I apologize if it came across that way. Instead, I'm simply saying that at the time of McEwen, if you look at the way it was written, at least to me, it clearly appears that you had a lot of time to do this and so McEwen is easily distinguished because in that case, Texaco was told at the very end to go file your bill of review. Don't worry about this. Well,, they didn't say don't worry about this, but you are without prejudice to go file your bill of review because they had lots of time then that we don't have now. Unless there are further questions.

JUSTICE DEBRA H. LEHRMANN: What is your response to the argument that let's say there was extrinsic fraud, but then they, but that only tolls things until they knew or should have known what's going on? What's your response to that?

ATTORNEY DAVID T. OLIVER, JR.: If I understand the question correctly because my first response would be again come back to the position of going all the way to [inaudible] without proper service, you're under no

duty to act and I would assume that that no duty to act extends to every sort of circumstance in which it would arise. But we knew nothing more about this after four years than after five or six or seven. It wasn't until they attempted to execute on this nine years after that we have knowledge.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause it submitted and the Court will take a brief recess.

MARSHAL: All rise.

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