IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 65409

LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC; AND SUMMIT TECHNOLOGIES, LLC.
Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK
Respondent,

and

IRA AND EDYTHE SEAVER FAMILY TRUST, IRA SEAVER, CIRCLE CONSULTING CORPORATION.

Real Parties in Interest.

Eighth Judicial District Court, Clark County, Nevada
The Honorable Elizabeth Gonzalez, District Judge
The Honorable Elissa Cadish, District Judge

District Court Case No. A-09-587003

PETITIONER'S REPLY TO ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

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SUPREME COURT OF THE STATE OF NEVADA

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Petitioners LEWIS HELFSTEIN, MADALYN HELFSTEIN, SUMMIT LASER PRODUCTS, INC, AND SUMMIT TECHNOLOGIES, LLC. (collectively "Petitioners"), through their undersigned counsel, hereby Reply to the Answer to Petition for Extraordinary Writ Relief in the form of a Writ of Mandamus or Prohibition.

/ / /

DATED this 29th day of August, 2014.

FOLEY & OAKES, PC

/s/ J. Michael Oakes
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I.

INTRODUCTION

This reply brief will respond to points raised in the opposition brief, and will specifically address the points raised in this Court's Order Directing Answer.

The question of whether an NRCP 60(b) motion can be used to set aside a settlement agreement and a notice of voluntary dismissal has not been litigated or adjudicated by this Court. In cases where this Court held that a court loses jurisdiction over a matter following the entry of a dismissal under NRCP 41(a)(i) or (ii), the decision has suggested that the court has no jurisdiction to act, "except to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure." See: SFPP, L.P. v. P.2d Judicial District Court 173, P.3d. 715, 123 Nev. 608 (Nev. 2007). However, none of those cases have specifically authorized the use of a 60(b) motion for that purpose.

This case gives this Court the opportunity to determine whether the use of

an NRCP 60(b) motion to set aside a pre-answer settlement and voluntary dismissal is, in fact, "in conformity with the Nevada Rules of Civil Procedure." Petitioners assert it is not, based on the literal language of the rule, nor should it be, in light of the desire to promote finality of settlements.

If NRCP 60(b) can be used in this manner, this case also presents an opportunity for this Court to determine when the time begins to run on the 6 month limitation in NRCP 60(b), in a multi-defendant case, where one defendant settles prior to filing a responsive pleading and obtains a voluntary dismissal. Petitioners assert that the time should begin to run from the time of filing the voluntary dismissal, in order to follow the literal language of the rule, and in order to promote the finality of the agreed upon settlement. To hold otherwise would mean that the finality of the settlement would have to await the conclusion of the litigation between all of the other parties. The ramifications of that are significant here, in what was essentially a two defendant case, but would be even more pronounced in cases involving a large number of plaintiffs or defendants, as often occurs in multi-party tort cases. For instance, a defendant who settles early with one of 10 plaintiffs and obtains a voluntary dismissal of their claim would be subject to an NRCP 60(b) motion by that plaintiff for years thereafter, until 6 months after all of the litigation was concluded. Such a result is not called for by the rule itself, and would be completely undesirable from a policy standpoint.

II.

RESPONSE TO SPECIFIC POINTS RAISED IN THE REPLY

There are 3 major areas where the opposition brief mischaracterizes prior events in the case, and although this may be apparent from a reading of the brief itself, Petitioners wish to point out the following:

First, when this action was before this Court on a prior writ petition, and this Court entered a stay and then dismissed the remaining defendant's third party claim against the Petitioners, it had no impact whatsoever upon the ability of the Respondents herein to take action against Petitioners. Respondents were never stayed from anything, and they certainly did not need to wait until their trial was over to file their motion against the Petitioners.

Second, the signed settlement agreement is a contract that included a broad general release and a provision stating that the settlement itself would have collateral estoppel and res judicata effect as to any of the claims asserted against the petitioners. It also stated that "[T]he consideration and/or covenants for this Agreement are ... the dismissal of said legal action (Case No. A587003) with prejudice as to the Helfstein Defendants only, each side to bear their own attorney's fees and costs of suit incurred therein..." See Vol. II, PA, at 490. After taking the money, Respondents filed the notice of voluntary dismissal, omitting

the words "with prejudice," either through inadvertence or through an attempt to "hedge their bets." They now argue, in various places, that their own failure to say "with prejudice" somehow aids them at this time. It doesn't. The settlement agreement remains in effect, and NRCP 60(b) does not serve as a means to set aside the settlement agreement or the voluntary dismissal, regardless of whether the filed dismissal was with or without prejudice.

Third, the Respondents quote extensively from the trial transcript, and seek to convince this Court that Petitioners, particularly Lew Helfstein, have already been tried and convicted. Primarily, their contention is based upon the expert report of Rodney Conant. A few words about this are appropriate, not to suggest there are factual issues here, but merely to dispel, somewhat, the implication that Petitioners are bad people that deserve to be punished. Rodney Conant is the expert that Respondents hired to conduct an audit **after** they had already settled with Petitioners. He assumed and opined, based on an excel spreadsheet that had a column mislabeled as "due LH," that Lew Helfstein had absconded with all of that money. His opinion was not an opinion at all, but merely an assumption. The Petitioners were not before the court to object to his opinion, cross examine him, or present their own expert testimony, and they certainly do not concede that his assumption is true. Thus, Petitioners' contention

is that although they settled for $60,000, based on settlement negotiations that "continued for approximately 10 months, during which time the strengths and weaknesses of our case were thoroughly considered," they now think they could have won more, based upon their post settlement investigation.

III.

LEGAL ARGUMENT

A. Judgment Was Entered On May 18, 2012, A Motion To Alter Or Amend Was Filed On June 5, 2012, And The Motion To Set Aside Rescinded Settlement Agreement Was Filed On March 25, 2013

The lower court signed Findings of Fact and Conclusions of Law on May 17, 2012, and they were filed on May 18, 2012. They contained a certificate of service from the Court, stating "that on or about the date filed, this document was copied through e-mail, or a copy of this Order was placed in the attorney's folder in the Clerk's office or mailed to the proper party as follows..." Notice of Entry was then mailed by counsel for Respondents on May 21, 2012. See the Notice of Entry of Order, Vol II, PSA at 010-026. (The reference to Volume II of Petitioner's Supplement to Appendix, is referring to the supplement that is being filed simultaneously with this reply brief).

The defendant below then filed a Motion to Alter or Amend Judgment on June 5, 2012. See the Motion to Alter or Amend Judgment, Vol II, PSA at 027-

066. If this motion was untimely, then May 18, 2012 was the date of final judgment.

That motion triggered additional proceedings, including an evidentiary hearing, and a final ruling thereon was not entered until after Respondents had filed their Motion to Set Aside Rescinded Settlement Agreement on March 25, 2013.

B. NRCP 60(b) Does Not Provide A Means To Alter Or Revise A Settlement Agreement Or A Pre-Answer Voluntary Dismissal Made Pursuant To NRCP41(a)(i)

In discussing the precursor of NRCP 60(b), this Court held, back in 1866, in Killip v. Empire Mill, 2 Nev. 34 (1866), that:

> "The evident purpose of this statute is to relieve a party from the effect 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, but in regard to which the court has made no order whatsoever."

The settlement agreement in this case, which contained a standard integration clause and a disavowal of any representations other than as set forth in the agreement, is a new and separate contract. It was entered into without any involvement of the court whatsoever.

NRCP 60(b) says that "the court may relieve a party or a party's legal representative from **a final judgment, order, or proceeding**..." It also says

"[T]he 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.

Petitioners assert, in the first instance, that a voluntary dismissal under NRCP 41(a) is not a "final judgment, order, or proceeding."

In Jeep Corporation v. District Court, 98 Nev. 440, 652 P.2d 1183 (Nev. 1982), this Court held, with respect to dismissals under NRCP 41(a)(i) and (ii), that "[I]n neither case may the court intervene or otherwise affect the dismissal. In both instances, the action is terminated and the court is without further jurisdiction in the matter. The language of the rule is clear."

Then, in SFPP, L.P. v. Second Judicial District Court, 173 P.3d 715, 123 Nev. 608 (2007), this Court held, citing Greene v Eighth Judicial District Court 115 Nev. 391, 990 P.2d 184 (1999), that

> "In the present case, the order filed by Kinder and the City on June 5, 2003, terminated the City's action against Kinder and Kinder's counterclaim against the City. The order of dismissal was the final judgment and concluded the action. We thus conclude that when the district court entered the order for dismissal, its jurisdiction, with respect to this order, ended even in the face of the parties' contracting agreement purporting to extend the district court's jurisdiction beyond this termination of the case. We further conclude that for the City's new causes of action to be heard, the City must file a new civil complaint. Accordingly, Kinder has demonstrated that extraordinary relief, in the form of prohibition, is warranted."

Jeep involved a stipulation for dismissal under NRCP 41(a)(ii), submitted

following a bench trial. That stipulated judgment ended the case, even though the lower court entered findings within hours of the filing of the stipulation.

Greene involved an attempt to amend a complaint after a judgment was entered against several defendants. In that case, the time for filing an NRCP 60(b) motion had expired, and, the motion to amend was improper since the court lost jurisdiction when the judgment was entered.

Finally, SFPP involved a stipulation for dismissal with prejudice, based on a settlement agreement that arguably contained language calling for continuing jurisdiction over the settlement agreement. When one party sought to "reopen" the settlement agreement, this Court declined.

None of these cases involve a pre-answer notice of voluntary dismissal, and they all speak in terms of a "judgment."

Each of these cases involve decisions from this Court that ultimately promoted the finality of the dismissal.

Also, although both Greene and SFPP contain language stating that the court loses all jurisdiction "unless that judgment is first set aside or vacated pursuant to the Nevada Rules of Civil Procedure," they did not have to reach the issue of whether a 60(b) motion could be used at all following a dismissal under NRCP 41(a), and specifically did not reach that issue as against an NRCP 41(a)(i) dismissal. Petitioners assert that this Court should establish law on this point, and

hold that NRCP 60(b) is not a proper means for attacking a settlement agreement and voluntary dismissal under NRCP 41(a)(i).

Another way to look at this is to look at the settlement agreement itself. Petitioners assert that a signed settlement agreement should be treated as having the same level of sanctity as any other written contract, and any litigation over its formation and interpretation is a new case. The only exception to this would be where the court, in some manner, either supervised the settlement process, approved the settlement agreement, or was given continuing jurisdiction over it either through a court order or in the agreement itself.

In Hill v. Ohio State University, 870 F. Supp. 2d 526 (S.D. Ohio 2012), the court dealt with the question of jurisdiction over a plaintiff's motion for relief from a dismissal order. Relying upon the United States Supreme Court decision in Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 128 L. Ed. 2d 391 (1994), the court held that the dismissal of the action, with no retention of jurisdiction provided for in the order, resulted in a loss of jurisdiction over the case, so the court had no jurisdiction to adjudicate issues relating to the settlement agreement that preceded the dismissal, stating:

> "Generally, a district court that has dismissed a case lacks jurisdiction over a settlement agreement that preceded dismissal. However, there are certain exceptions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994). In Kokkonen, the parties entered into a

> settlement agreement and subsequent stipulation of dismissal. The dismissal entry made no reference to the settlement agreement. One party moved to enforce the settlement agreement and the other objected. Although the district court and the Ninth Circuit held that the trial court had inherent power to exercise jurisdiction over settlement agreements, the United States Supreme Court disagreed. Justice Scalia, writing for a unanimous Court, recognized that the concept of limited federal jurisdiction does not permit the court to exercise ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before it. Id. at 381. The Court did recognize that: The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal -- -- either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here."

In the case at bar, just as in Kokkonen and SFPP, no court decision making was involved in accomplishing the dismissal, and there was no continuing jurisdiction provided for in the settlement agreement itself. The settlement agreement is, itself, a new contract, and litigation relating to its formation and terms is an entirely different sort of litigation from the underlying claim. Any issues relating to its formation or interpretation are issues that give rise to a new controversy, a new case, a new trial, and a right to trial by jury.

Thus, in the most narrow sense, there is no Nevada authority to support the use of an NRCP 60(b) motion to set aside an NRCP 41(a)(i) dismissal, and any language that may support its use in connection with an NRCP 41(a)(ii) dismissal

appears to be mere dicta. The strong policy of encouragement of settlements weighs heavily in favor refusing to extend the reach of NRCP 60(b) to a settlement agreement and voluntary dismissal under NRCP 41(a).

C. If NRCP 60(b) Applies, Then The 6 Month Period Also Applies, And Runs From The Time Of The Voluntary Dismissal

NRCP only applies if the NRCP 41(a) dismissal is a "final judgment, order, or proceeding." If it is, then an NRCP 60(b) motion must be filed "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."**

For Respondents to be entitled to relief under the rule, the voluntary dismissal had to be a "final judgment, order, or proceeding." By the same token, the same words are used in setting the time limitation for bringing the motion. The words have to be given the same meaning in both parts of the rule.

So, if the dismissal was a "proceeding", thereby invoking NRCP 60(b), there was 6 months from the time when the "proceeding was taken," i.e., its filing date, to file the motion. If the dismissal was a "final judgment or order", then there was 6 months from the time when "written notice of entry of the judgment or order was served." In either case, the motion is untimely by more than 3 years. [1]

If a settling defendant has to wait for a plaintiff to conclude its litigation

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[1] Also, note that the time begins to run on a judgment or order, when "written notice of entry of the judgment or order was served." This language is not at all consistent with a "Notice of Dismissal" under NRCP 41(a)(i), since no "written notice of entry of the judgment or order" is used in connection with such a dismissal. Again, this supports Petitioners' argument that NRCP 60(b) does not extend to NRCP 41(a)(i).

with all remaining defendants in order to trigger the running of the time limit, the result would be to greatly discourage settlements, because the ability to have finality at the time of the settlement is essentially gone. This case is a perfect example of that, where the motion is filed some 3 years and 9 months after the settlement was reached, the agreement was signed, the money was paid, and the dismissal was filed.

D. There Was No Fraud Upon The Court To Trigger The Savings Clause Under NRCP 60(b)

The July 17, 2013 Order for Evidentiary Hearing on Plaintiffs' Motion to Set Aside Rescinded Settlement Agreement states that it is being considered under NRCP 60 (b)(1) and (2). See Vol IV, PA at 917-921. No mention is made of the savings clause for fraud upon the court.

The so called "fraud upon the court" in this case can be summarized as follows. Respondents filed suit, seeking damages, including damages for misappropriation of company assets, and for an accounting. After 9 months of negotiations and investigation wherein Respondents were represented by two different law firms, a settlement agreement was reached, $60,000 was paid, and the Petitioners were dismissed. The settlement agreement specifically provided that "this document is signed and executed voluntarily without reliance upon any statement or representation of or by any party..." See Vol. IV PA at 491.

After taking the money, Respondents hired an expert to do the accounting they originally sought in their complaint, and he concluded/assumed that a

misappropriation of funds had occurred that was greater than $500,000. Based thereon, Petitioners contend there was "fraud upon the court." Petitioners assert that this is a misuse of the term.

The classic case of fraud upon the court is NC-DSH, Inc. v. Garner, 218 P.3d 853 (2009). This is one of the cases where Nevada attorney Davidson settled the case without his client's knowledge and kept the money. In finding that Davidson's conduct was a fraud upon the court, this Court held:

> "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."

There is nothing about this case that would be considered fraud upon the court. It is a rarely used term used for only the most egregious cases, and involves actions taken in front of the court itself, while this settlement agreement was negotiated completely outside of the court, with no court involvement whatsoever.

E. It Was Error To Conclude There Was A Waiver Of Jurisdiction

At the time this complaint was filed, Petitioners had many defenses on the merits themselves, while also having the right to contest personal jurisdiction and venue based on forum non conveniens. Also, all Plaintiffs were diverse from all defendants, so the case could have been removed to Federal Court. Rather than

engage in all of this, the parties settled prior to filing a response to the complaint.

Thus, the lack of personal jurisdiction was first raised in Petitioners' opposition to the motion that sought to bring them back into the case. Note that, even as of today, Petitioners have not had to file a pleading in response to the Complaint, and a response is not yet due.

The filing of a motion to compel arbitration of the third party claims is not a waiver of jurisdiction, and this issue was adequately briefed in the Petition. The lower court's determination that the motion to compel arbitration waived any jurisdictional arguments was erroneous.

As an aside, these issues illustrate yet another difficulty that comes up if an NRCP 60(b) motion can be used to attack a pre-answer dismissal under NRCP 41(a). The procedural difficulties are enormous. In response to the motion to set aside, must a party assert jurisdictional objections then, as was done here? What about venue? What about the ability to remove the case to Federal Court? The existence of these difficult and expensive questions presents one more reason why NRCP 60(b) should not be used in this manner.

F. If The Case Is Remanded, It Should Be Assigned To A Different Judge

Petitioners believe they have already adequately addressed the disqualification issue. However, they also want to address this Court's recent

decision in Fiesta Palms, LLC v. Rodriguez, 130 Nev. Adv. Op. 46 (2014), which is currently on rehearing.

In Fiesta Palms, this Court entered a reversal and remand on an appeal from a bench trial in a tort action. As part of the ruling, this Court determined that the lower court had heard evidence that should have been excluded and, also, had expressed an opinion on the ultimate merits of the case. Thus, for the remand, this Court directed that the case be assigned to a different department upon remand, stating:

> "As the Palms notes, the district court judge in this case has heard the evidence that should have been excluded and formed and expressed an opinion on the ultimate merits. We therefore grant the Palms' request to have this case reassigned if remanded. *See Leven v. Wheatherstone Condo. Corp., Inc.*, 106 Nev. 307, 310, 791 P.2d 450, 451(1990)."

In the case at bar, the lower court heard all of the evidence presented, with no opportunity for Petitioners to object, cross examine, or present contrary evidence. Furthermore, there are specific problems raised by the lower court's having heard the testimony of Rodney Conant, which is the primary basis for the Respondents' fraud allegation. His report expresses his objectionable opinion, which is really an assumption and not an opinion at all, that because a ledger sheet had a column labelled "due LH," that means that Lew Helfstein absconded with all

of the money shown in that column.

Petitioners were not parties at the time of trial, so they had no ability to object to this evidence, cross examine the witness, or present contrary evidence. Now, however, Mr. Conant has passed away, and will not be available to testify, as explained in the Plaintiff's Status Report Per Court's Order Scheduling Status Check, dated July 16, 2013, Vol. II, PSA at 067-079.

Thus, in the event of a remand, a reassignment to a different judge is necessary and proper, due to the lower court's having expressed an opinion and having heard evidence that will not be admissible, in the event of further litigation between Respondents and Petitioners. This result would be entirely consistent with the Fiesta Palms decision, and the case referenced therein, i.e., Leven v. Wheatherstone Condo. Corp., Inc., 106 Nev. 307, 310, 791 P.2d 450, 451(1990)."

Dated this 29th day of August, 2014.

FOLEY & OAKES, PC

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt font and using Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 4,420 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 29th day of August, 2014.

FOLEY & OAKES, PC

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I hereby certify that I am an employee of Foley & Oakes, PC, and that on the 29th day of August, 2014, I served the following document(s):

PETITIONER'S REPLY TO ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

I served the above-named document(s) by the following means to the persons as listed below: [ ] **By Electronic Transmission through the Wiznet:** [X] **By United States Mail**, postage fully prepaid to person(s) and addresses as follows:

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I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Elizabeth Lee Gould
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