IN THE

SUPREME COURT OF THE STATE OF NEVADA

Estate of MICHAEL DAVID ADAMS, By and through his mother JUDITH ADAMS, Individually and on behalf of the Estate, Appellant, vs. SUSAN FALLINI, Respondent.	Supreme Court No.: 68033 District Court Case No.: GV 24539 **RESPONSE TO APPELLANT'S MOTION TO TRANSMIT VIDEO EXHIBIT**

Respondent, Susan Fallini, by and through her attorney of record, David R. Hague, hereby respectfully submits this Response to Appellant's Motion to Transmit Video Exhibit that was filed on February 9, 2016.

Appellant requests the video to support an argument of improper behavior of Respondent based upon the attendance of Respondent's family, friends, and supporters at a hearing held on July 28, 2014. Appellant asserts that the video is a necessary and relevant part of the trial record, but it is neither.

First, court attendance should be encouraged, as the open court system of America and its individual States is one of three pillars holding up our freedoms and rights. Courts are open to the public and judges publish their opinions for this very reason. Accusing Respondent of improper behavior because of her supporters' attendance is offensive to our open court system and the principles upon which it stands.

Second, and more importantly, the district court judge was not influenced by the attendance at the hearing, contrary to Appellant's assertion:

> Mr. Hague: . . . . Mr. Aldrich referring to all of these people here today and then somehow wants to use that to say you're up for election is so irrelevant to this case. Most of these people here are not in this district. They're here because they love Ms. Fallini, and they're here because their livelihood is affected by this decision.
>
> The Court: I'm not letting emotion interfere with the decision.
>
> Mr. Hague: Thank you.
>
> The Court: I don't care about these people. I'm just kidding. But I'm not . . . going to let emotion in.
>
> (Hr'g July 28, 2014 54:9-23).

The district court judge also did not rule from the bench at the hearing, but instead took the matter under advisement and drafted a thoughtful order based on the pleadings and arguments made at the hearing and after being far removed, in both time and distance, from the courtroom observers. The video will not refute these points.

Further, the video is irrelevant as the hearing in question is based on an order that was not timely appealed. (Order Denying Petition for Extraordinary Relief Jan. 15, 2015). As will be briefed further in the Respondent's Response Brief, but which arguments are applicable to this motion, the August 6, 2014 Order is not subject to appeal, as the statutory, mandatory time for appeal has run, making the video of the August 6, 2014 hearing irrelevant. With the video being irrelevant, the motion should be denied. NRAP 30(d).

The United States Supreme Court has held that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review," *Browder v. Director, Dept. of Corrections of Illinois*, 434 US 257, 263, n.7, especially if the time to appeal the underlying judgment has run, as allowing such action eviscerates the mandatory deadline. *See Smilanich v. Bonanza Air* Lines, 72 Nev. 10, 291 P.2d 1053 (1956) (denying appeal of the final judgment but entertaining the appeal of the

60(b) order, as only the latter was timely appealed). Similar to *Smilanich*, the Court here is faced with one timely appeal and one untimely appeal rolled into one, although the relevant items are swapped. Here, the 60(b) order was not timely appealed and the final judgment was timely appealed. Although the applicable details are swapped, the reasoning and result in *Smilanich* should govern. If the Court entertains the 60(b) Order it will undermine the appeal deadline that is applicable to special orders entered after entry of final judgment (NRAP 3A(b)(8)) and undermine NRAP 4(a)(1), just as entertaining the appeal of the judgment in *Smilanich* would have. Accordingly, this Court should follow *Smilanich* and dismiss the portion of the appeal that is untimely, and accordingly deny this motion as irrelevant.

Even more to the point is the case of *Rogers v. Thatcher*, 70 Nev. 98, 255 P.2d 731 (1953). In that case, the appellant attempted to appeal an order that denied a new trial as well as the underlying judgment in a single notice of appeal. *Id.* at 100. The last day for notice of appeal for the order denying new trial was September 22, 1952 based on the applicable rules, and the notice of appeal was filed November 10, 1952, well within the period for appeal for the judgment but "49 days after the expiration of the statutory time for appeal of the order denying the new trial." *Id.* The Court reasoned, as it had "on numerous occasions. . . that service of the notice of appeal within the prescribed statutory time is mandatory and jurisdictional." *Id.* The Court held that "[t]here can accordingly be no question but that the appeal from the order denying new trial must be dismissed." *Id.* This holding and reasoning applied even though the order denying new trial was entered prior to the entry of final judgment, making it "interlocutory" in nature based on the loose definition advanced by Appellant in an earlier motion. Despite being interlocutory, the statutory time for appeal of the order had run leaving no question that the appeal must be dismissed.

Likewise, in an unpublished order,[1] this Court determined that it did not have jurisdiction to review a 60(b) order that was untimely appealed, although it did review the underlying final order. *Lafferty v. Price*, No. CV62732, 14-30744 (Nev. Jan. 15, 2015) (Order attached as Exhibit A). The Court reasoned that the appellant "failed to timely appeal" and dismissed review of the applicable 60(b) order. Specifically, the appellant appealed two orders denying two separate 60(b) motions along with the underlying final judgment. The first 60(b) order was not timely appealed and was therefore dismissed on appeal. Following this Order, the Supreme Court transferred the appeal to the Court of Appeals, in which the Nevada Court of Appeals applied the jurisdictional holding of the Supreme Court. *Lafferty v. Price*, No. CV62732, 2015 WL 7431519 (Nev. App. Nov. 19, 2015) (attached as Exhibit B).

In a similar, albeit brief order, this Court reviewed two orders in which the district court denied a Rule 60(b) motion and then subsequently denied a Rule 59(e) motion. *Paradise Palmes Community Ass'n v. Pardis Homes*, 86 Nev. 859, 477 P.2d 859 (1970). This Court denied appeal of the 60(b) order and reasoned that "[t]he 30-day period from notice of entry or judgment denying the 60(b) motion had expired. *The 30-day period is jurisdictional.*" *Id.* (emphasis added).

The 60(b) Order is an appealable order. *Foster v. Dingwall*, 126 Nev 49, 228 P.3d 453 n.3 (2010). The statutory time for appeal is set forth in NRAP 4(a)(1) and NRAP3A(b)(8). Here, the statutory time for appeal, as calculated in the Supreme Court's Order Denying Petition for Extraordinary Relief was 33-days after August 13, 2014 or September 15, 2014. The applicable notice of Appeal was filed May 15, 2015, which is 242 days after the expiration of the statutory time set for appeal of the August 6, 2014 60(b) Order. Similar to *Rogers*, *Lafferty*, and *Paradise Palmes Community Association*, and under the same reasoning as in *Smilanich*, the Court

[1] Allowed as precedent following repeal of SCR 123 that was effective January 1, 2106.

should dismiss the portion of the appeal that deals with the 60(b) Order, as the service of the notice of appeal was not within the prescribed statutory time for appeal. The mandatory, statutory time for appeal has run. In fact, the appeal of the August 6, 2014 Order must be dismissed as "the 30-day period is jurisdictional." *Id.* With respect to this motion, therefore, the Court should not grant the motion as the requested video exhibit is irrelevant.

The video of the July 28, 2014 hearing will not provide any more clarity into the purported reality and gravity of the situation at the hearing than the district court judge's own pronouncement that the observers did not impact the proceedings or the judge's ability to make a sound judgement. The judge's order came weeks after the hearing and was drafted in his chamber far removed from Respondent's supporters. As such, the motion fails to show how or why "the Supreme Court's review of the original exhibit is necessary to the determination of the issues," NRAP 30(d), and should be denied. Further, the request is for irrelevant information, as the applicable hearing was that of the August 6, 2014 Order, which was not timely appealed. Thus, the motion fails to request an exhibit "relevant to the issues," and should not be allowed under NRAP 30(d).

Dated this 19th day of February, 2016.

FABIAN VANCOTT

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2016, I caused a true and correct copy of the foregoing **RESPONSE TO APPELLANT'S MOTION TO TRANSMIT VIDEO EXHIBIT** to be served via U.S. mail, postage prepaid as follows:

John P. Aldrich, Esq.
Aldrich Law Firm, Ltd.
1601 S. Rainbow Blvd., Ste. 160
Las Vegas, NV 89146

/s/ Megan Fletcher
An employee of Fabian VanCott

EXHIBIT A

Lafferty v. Price, No. CV62732, 14-30744 (Nev. Jan. 15, 2015)

ORDER DISMISSING APPEAL IN PART, DENYING REQUESTS FOR FEES AND SANCTIONS, AND REINSTATING AND EXPEDITING BRIEFING

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS J. LAFFERTY,
Appellant,
vs.
ELIZABETH ANN PRICE,
Respondent.

No. 62732

FILED

SEP 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL IN PART, DENYING REQUESTS FOR FEES AND SANCTIONS, AND REINSTATING AND EXPEDITING BRIEFING

On May 30, 2014, respondent filed a motion to dismiss this appeal on the basis that appellant failed to timely file the docketing statement. Respondent also argues that this court does not have jurisdiction to consider this appeal. In that motion, respondent requests attorney fees under NRAP 38 for appellant having pursued a frivolous appeal. Appellant has filed an opposition and a motion to file a late docketing statement.[1] In the interim, we entered an order to show cause why appellant's appeal from the district court's June 13, 2012, order should not be dismissed for lack of jurisdiction. As directed, appellant has filed a response to that order, and respondent has filed a reply to that

[1]We construe appellant's motion to file a late docketing statement as a motion for an extension of time to file his docketing statement and grant the motion. Accordingly, we direct the clerk of this court to file the docketing statement provisionally received in this court on June 9, 2014.

Further, we grant respondent's motion to file a late reply in support of the motion to dismiss and direct the clerk of this court to file the reply provisionally received in this court on August 6, 2014.

response, in which she seeks sanctions against appellant for lack of candor with the tribunal.

Having considered the parties' arguments and reviewed the docketing statement and attached documents, we dismiss this appeal in part. In particular, appellant failed to timely appeal from the June 13, 2012, order. *See* NRAP 4(a)(1) (requiring a notice of appeal to be filed within 30 days of the written notice of entry of the appealed from order). While appellant asserts that he could not appeal from the June 2012 order until the district court certified that order as final in its February 19, 2013, order, such certification was unnecessary. *See Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376, 1379 (1987) (stating that an order denying an NRCP 60(b) motion is appealable). Thus, we dismiss this appeal as to the district court's June 13, 2012, order.

In regard to appellant's appeal from the district court's February 19, 2013, order, we deny respondent's motion to dismiss. After respondent filed her motion, this court received the docketing statement and it appears that appellant is appealing from an order denying NRCP 60(b) relief. *Holiday Inn*, 103 Nev. at 63, 732 P.2d at 1379. Although the district court construed appellant's NRCP 60(b) motion as a motion for reconsideration, we construe appellant's motion as an NRCP 60(b) motion because he titled his motion an NRCP 60(b) motion, cited to NRCP 60(b) in his motion, and did not file his motion within the time required for a motion for reconsideration. Thus, we conclude that we have jurisdiction to consider the appeal from the district court's February 19, 2013, order. Further, as there is no evidence that this is a frivolous appeal, we also deny respondent's request for an award of attorney fees under NRAP 38. We also deny respondent's request for sanctions against appellant.

We reinstate briefing and set the following expedited briefing schedule. Appellant shall have 11 days from the date of this order to file and serve a transcript request form or certificate of no transcript request. NRAP 9(a). Appellant shall have 60 days from the date of this order to file and serve the opening brief and appendix. Respondent's answering brief shall be filed and served no later than 20 days from the date that appellant's opening brief is served. Appellant's reply brief, if any, shall be filed and served no later than 5 days after respondent's answering brief is served. Further, in their briefs the parties shall address, in addition to any issues raised on appeal, the issue of whether NRCP 60(b) relief was available when the party seeking such relief concedes that he participated in committing fraud upon the court.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
Michael H. Schwarz
F. Peter James
Eighth District Court Clerk

EXHIBIT B

Lafferty v. Price, No. CV62732, 2015 WL 7431519 (Nev. App. Nov. 19, 2015)

2015 WL 7431519
Only the Westlaw citation is currently available.

Court of Appeals of Nevada.

Thomas J. LAFFERTY, Appellant,
v.
Elizabeth Ann PRICE, Respondent.

No. 62732.
|
Nov. 19, 2015.

Attorneys and Law Firms

Law Office of Michael H. Schwarz.

F. Peter James.

Before GIBBONS, C.J., TAO and SILVER, JJ.

ORDER OF AFFIRMANCE

***1** This is an appeal from a district court order denying NRCP 60(b) relief in a post-divorce proceeding. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

The parties were divorced in a summary proceeding in July 2010. The stipulated divorce decree required appellant Thomas J. Lafferty to pay respondent Elizabeth Ann Price $620 per month in spousal support for five and one-half years. In April 2012, Price filed a motion for an order to show cause, alleging that Lafferty had failed to make a number of his spousal support payments. She sought to have the arrearages reduced to judgment and requested sanctions for the failure to make the payments.

Lafferty opposed the motion and filed a countermotion under NRCP 60(b) to set aside the spousal support provision of the divorce decree. In his countermotion, Lafferty alleged that the spousal support provision was procured by fraud. He also asserted that Price committed various other improper acts towards him, including taking money from him, but he did not request any relief with regard to these other actions. Price opposed the motion. Ultimately, the district court denied Lafferty's NRCP 60(b) motion and set a hearing date with regard to Price's motion for an order to show cause. [1]

1 The district court proceedings relating to the show cause order are separate from the denial of Lafferty's NRCP 60(b) motions and are not before this court on appeal.

Lafferty did not appeal the district court's denial of his NRCP 60(b) motion. Instead, just under six months later, he filed a second NRCP 60(b) motion, seeking relief from the order denying his first NRCP 60(b) motion. Price filed another opposition, and the district court denied the second motion for NRCP 60(b) relief.

Thereafter, Lafferty filed a notice of appeal, designating both orders denying NRCP 60(b) relief to be challenged on appeal. But because Lafferty's notice of appeal was not timely as to the denial of the first NRCP 60(b) motion, the Nevada Supreme Court determined that appellate jurisdiction was lacking as to that order and dismissed the appeal to the extent that it challenged the denial of the first NRCP 60(b) motion. Thus, our review of this appeal is limited to the order denying the second NRCP 60(b) motion. *See* NRAP 4(a)(1) (requiring a notice of appeal to be filed within 30 days of the written notice of entry of the order appealed from); *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) ("[T]he proper and timely filing of a notice of appeal is jurisdictional.").

Despite the Nevada Supreme Court's limitation of this appeal to the denial of the second NRCP 60(b) motion, Lafferty's arguments in his opening brief largely relate to setting aside the divorce decree. Lafferty apparently raises these arguments based on his contention that they are not barred by claim or issue preclusion. But Lafferty's arguments regarding preclusion are not on point.

As discussed above, the only order properly before this court is the order denying Lafferty's second motion for NRCP 60(b) relief, which sought to set aside the first order denying NRCP 60(b) relief. Thus, in order to succeed on appeal, Lafferty must demonstrate that the first order denying NRCP 60(b) relief was due to be set aside based on one of the enumerated grounds set forth in NRCP 60(b), such as by showing that the second order was the result of a mistake or was procured by fraud. *See* NRCP 60(b)(1), (3). But Lafferty's NRCP 60(b)-based appellate arguments relate only to setting aside the divorce decree, not to setting aside the first order denying NRCP 60(b) relief. As a result, we conclude that he has

waived any such arguments for setting aside that order.[2] *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) (explaining that an issue not raised on appeal is deemed waived). Accordingly, we necessarily

2 Lafferty also raises arguments on appeal relating to a protective order granted to Price in the underlying proceedings, but that order is not properly before this court on appeal. Moreover, even assuming that the protective order was relevant to the order before us on appeal, Lafferty has not provided this court with any portion of the district court record relating to that motion, such as the motion for a protective order, any response to the motion, or any order resolving the motion. Thus, insofar as this motion was relevant to the denial of Lafferty's second NRCP 60(b) motion, we presume that it supported the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

***2** ORDER the judgment of the district court AFFIRMED.

All Citations

Slip Copy, 2015 WL 7431519

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