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.: CV 24539 **MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION**

Respondent, Susan Fallini, by and through her attorney of record, David R. Hague, hereby respectfully submits this Motion to Dismiss for Lack of Appellate Jurisdiction. Respondent is submitting this motion to dismiss pursuant to Nevada law and NRAP 14(f), which states: "If respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss." Because Appellant failed to timely appeal the August 6, 2014 order setting aside default judgment (the "60(b) Order"), that portion of the appeal must be dismissed.

I. THE COURT LACKS JURISDICTION OVER APPELLANT'S UNTIMELY APPEAL OF THE 60(B) ORDER

This Court is a court of limited appellate jurisdiction. As set forth below, the Court has jurisdiction to entertain an appeal only where an appeal is authorized by and complies with a statute or court rule. Importantly, an untimely appeal fails to vest jurisdiction in this Court to entertain the appeal.

A. The Court's Appellate Jurisdiction is Limited and it may only Consider Timely Appeals Authorized by Statute or Court Rule

It is fundamental that the Nevada Supreme Court's appellate jurisdiction is limited. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732

(1994). This Court "may only consider appeals authorized by statute or court rule." *Brown v. MHC Stagecoach*, 301 P.3d 850, 851 (Nev. 2013). The right to appeal is statutory. *KDI Sylvan Pools, Inc. v. Workman*, 107 Nev. 340, 343, 810 P.2d 1217, 1219 (1991); *see Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984). And it is well-established law that an untimely notice of appeal fails to vest jurisdiction in this Court to entertain the appeal. *In re Miller*, 111 Nev. 1, 10, 888 P.2d 433, 438 (1995).

In determining whether the court has appellate jurisdiction, the court must identify whether the appeal is authorized by a statute or court rule. If no statute or court rule provides for appeal, then the court lacks jurisdiction to hear the appeal. *See Brown,* 301 P.3d at 851 (finding "[n]o statute or court rule" applicable to the appeal). NRAP 3A(b) is the statutory rule that tells the court when an appeal may be taken from certain judgments and orders. NRAP 3A(b)(1) is the general rule regarding appeal of final judgments and NRAP3A(b)(2)–(10) provides for specific types of orders and judgments from which a party may appeal. If an order is appealable under a specific statutory grant, the general rule set forth in NRAP 3A(b)(1) does not apply—*i.e.*, a specific statute trumps a general statute.

Furthermore, even when a direct statute or rule applies to an order, the Court will still lack appellate jurisdiction if the party appealing fails to notice the appeal within the set statutory period. *Rogers v. Thatcher*, 70 Nev. 98, 100, 255 P.2d 731 (1953). Such statutory compliance is mandatory. *Id.* Specifically, a party must comply with the statutory period to file a notice of appeal or lose the right of appeal. *Rogers*, 70 Nev. at 100. "This court has on numerous occasions held that service of the notice of appeal within the prescribed statutory time is mandatory and jurisdictional." *Id.*; *Paradise Palms Community Ass'n v. Paradise Homes*, 86 Nev. 859, 861, 477 P.2d 859, 860 (1970). Thus, "[a]n untimely notice of appeal fails to vest jurisdiction in the court to entertain the appeal." *In re Miller*, 111 Nev. 1, 10, 888 P.2d 433, 438 (1995).

B. The 60(b) Order is Appealable as a Special Order Pursuant to 3A(b)(8)

Pursuant to NRAP 3A(b)(8), the 60(b) Order is "a special order entered after final judgment," as it was entered after the first final judgment dated August 18, 2010 and set aside that first final judgment. In *Lindbolm* this Court noted that "an order setting aside a default judgment is appealable as a special order after judgment." *Lindblom v. Prime Hospitality Corp.*, 120 Nev. 372, 374 n.1, 90 P.3d 1283, 1284 n.1 (2004). Thus, the 60(b) Order was immediately appealable under NRAP 3A(b)(8). Indeed, this Court properly applied *Lindbolm* and determined in its January 15, 2015 Order Denying Petition for Extraordinary Writ Relief that "the order granting relief from the judgment based on a finding of fraud **was subject to challenge by appeal**." (Order Den. Pet. Extraordinary Writ Relief 2, Jan. 15, 2015) (emphasis added).

C. Appellant Failed to Timely Appeal the 60(b) Order Pursuant NRAP 4(a)(1)

As indicated in *Lindbolm* an order granting relief from default judgment under NRCP 60(b) is appealable under NRAP 3A(b)(8) as a special order after entry of judgment. Further, the analysis of whether a notice of appeal is timely under NRAP 3A(b)(8) is also straightforward. *See Lindbolm*, 120 Nev. At 374 (conclusory statement that "Lindbolm filed this timely appeal."). The time set for appeal of the 60(b) Order is the 30-day period after notice of entry of the order, *Paradise Palms Community Ass'n v. Paradise Homes*, 86 Nev. 859, 861, 477 P.2d 859, 860 (1970), increased by 3 days as the notice was served by mail in this case. "**The 30-day period is jurisdictional**." *Id.* (emphasis added).

Additionally, this Court has already outlined the applicable statutory period for appeal of the 60(b) Order. (Order Den. Pet. Extraordinary Writ Relief 2, Jan. 15, 2015). The Court properly applied NRAP 4(a)(1) and NRAP 26(c) to determine that the statutory period for appeal was the 33-day period following service of the August 13, 2014 notice of entry. *Id.* at 2. Therefore, the May 15,

2015 notice of appeal is 242 days past the September 15, 2014 final date of the statutory, mandatory 33-day appeal period.

D. An Untimely Notice of Appeal Fails to Vest this Court with Jurisdiction to entertain an Appeal.

As this Court has held on several occasions, "[a]n untimely appeal fails to vest jurisdiction in this court." *Whitman v. Whitman,* 108 Nev. 949, 950, 840 P.2d 1232, 1233 (1992). Appellant failed to timely appeal the 60(b) Order. Accordingly, this Court does not have jurisdiction to entertain an appeal of the 60(b) Order. A party may not rely on the general appellate grant when a more specific statutory grant is applicable. In other words, Appellant may not now rely on NRAP 3A(b)(1) as grounds to appeal the 60(b) Order. The prescribed statutory time is mandatory and jurisdictional—there is no reset or second appeal right.

For example, in *Rogers*, 70 Nev. 98, 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 order denying new trial was interlocutory in so far as it was entered prior to final disposition of the case. *Id.* The order denying new trial, however, was subject to a specific statutory right of appeal. *Id.* The last day for notice of appeal for the order denying new trial was September 22, 1952 based on the applicable statute, and the notice of appeal was filed November 10, 1952. *Id.* Interestingly, the notice of appeal was filed well within the period for appeal for the final 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. . . . and the scope of this court's review on the appeal from the judgment is now so limited. . . ." *Id.* Because the order was appealable under a specific statutory grant the general rule did not apply. Despite being entered prior

to final judgment, the statutory time for appeal of the order had run leaving no question that the appeal must be dismissed.[1]

Here, Appellant failed to file a timely notice of appeal as specifically required under NRAP 3A(b)(8) and NRAP4(a)(1). The notice of appeal was not filed until May 15, 2015, some 242 days past the statutory period set for appeal of the 60(b) Order. The notice of appeal was filed within the period for appeal for the final judgment dated April 17, 2015, but 242 days after the expiration of the statutory time for appeal of the 60(b) Order. With the appeal period being mandatory and jurisdictional, there can accordingly be no question but that the appeal from the 60(b) Order must be dismissed.

Specifically, with respect to 60(b) Order, this Court has followed the exact same law as established in *Rogers*. In *Lafferty v. Price*, No. CV62732, 14-30744 (Nev. Jan. 15, 2015),[2] this Court determined properly that it did not have jurisdiction to review a 60(b) order that was untimely appealed, although the Court did have jurisdiction to entertain the appeal of the related final order. In *Lafferty*, the appellant appealed two 60(b) orders along with the underlying final judgment. *Lafferty v. Price*, No. CV62732, 2015 WL 7431519 at 1 (Nev. App. Nov. 19, 2015). The notice of appeal was timely as to the final judgment and one of the 60(b) orders. *Id.* The notice of appeal was not timely as to the first 60(b) order. *Id.* This Court reasoned that the appellant "failed to timely appeal" and refused to entertain that 60(b) order. *Lafferty v. Price*, 14-30744 at 2. Following this order, the Supreme Court transferred the appeal to the Court of Appeals, in which the

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[1] 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 Palms Community Ass'n, 86 Nev. 859. 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).

[2] Unpublished but allowed as precedent following repeal of SCR 123 that was effective January 1, 2016 (both attached as Exhibit A).

Nevada Court of Appeals applied the jurisdictional holding of the Supreme Court, reasoning that the proper and timely filing of a notice of appeal is jurisdictional. *Lafferty v. Price*, No. CV62732, 2015 WL 7431519 (Nev. App. Nov. 19, 2015).

In this instance, Appellant failed to file a timely notice of appeal as to the 60(b) Order. As in *Lafferty* and *Rogers,* the subsequent final judgment does not re-open or alter the direct and specific statutory prescribed period for appeal. Again, the right to appeal is statutory. Therefore, this Court must refuse to entertain an appeal of the 60(b) Order, having no jurisdiction.

As an additional illustrative example, interlocutory probate orders are appealable under NRS 155.190. A party must file a notice of appeal within 30-days of entry of the order or lose the right to appeal. *Matter of Estate of Miller*, 111 Nev. 1, 888 P.2d 433 (1995); *Matter of Estate of Herrmann*, 100 Nev. 1, 677 P.2d 594 (1984); *Matter of Estate of Riddle*, 99 Nev. 632, 668 P.2d 290 (1983). The Court in *Matter of Estate of Miller* reasoned that "appellants' notice of appeal was untimely filed and failed to vest jurisdiction in this court. . . ." 111 Nev. at 5. The applicable statute directs that appeal may be taken "within 30 days after its entry." *Id.*at 6. The court determined that the specific mandate of the statute applied above that of the general rules. *Id.* at 6-7. The Court reasoned that "[*t*]*hese probate orders were thus appealable* ***only*** *by virtue of NRS 155.190*. *Id.* at 7 (italics emphasis in original, bold emphasis added). In more precise language, "unless appeal is taken within 30 days, an order of the kinds mentioned in NRS 155.190 is not thereafter subject to attack." *Matter of Estate of Herrmann*, 100 Nev. at 21 (citing *Luria v. Zucker*, 87 Nev. 471, 488 P.2d 1159 (1971). Thus, an otherwise interlocutory order subject to an express statutory prescribed period—once that period has run—is not thereafter subject to attack.

Again, Appellant failed to timely file a notice of appeal. Because appeal of the 60(b) Order was not taken within the statutory and mandatory prescribed

period for appeal, the 60(b) Order is not subject to attack thereafter, even if this court deems the 60(b) Order to be interlocutory in nature.

The foregoing cases answer the jurisdictional question: The May 15, 2015 notice of appeal fails to vest jurisdiction in this Court as to the 60(b) Order. Simply, "[t]he essential prerequisite condition to give this court jurisdiction of an appeal is that the notice of appeal must be served upon the adverse party," *Pacific Live Stock Co. v. Ellison Ranching Co.*, 286 P. 120, 123 (1930 Nev.), and "a belated service is equivalent to no service at all, **for there must be an actual service within the time required by the statute**." *In re Powell's Estate*, 63 Nev. 19, 24, 158 P.2d 545, 547 (1945) (emphasis added). The 60(b) Order is a special order entered after entry of final judgment, appealable under NRAP 3A(b)(8) and subject to NRAP 4(a)(1). Appellant may not appeal the 60(b) Order except through the specific statutory grant. Namely, the Appellant had 33-days following service of notice of entry of the 60(b) Order to file a notice of appeal. The belated service of the notice of appeal is equivalent to no service at all. Thus, the May 15, 2015 notice of appeal fails to vest jurisdiction in this Court as to the 60(b) Order.

II. THE COURT ERRED IN DETERMINING THAT IT HAD JURISDICTION TO ENTERTAIN THE 60(b) ORDER

With all due respect, this Court erred in determining that it has jurisdiction to entertain an appeal of the 60(b) Order. This Court has stated, and reason supports, "[i]t would be foolish, as well as useless, for anyone to contend that the very highest courts do not make mistakes." *In re Breen*, 30 Nev. 164, 93 P. 997, 1000 (1908).

A. The Court has a Duty to Review Jurisdiction Issues Whenever and However Raised.

Any time there is doubt as to the jurisdiction of this Court, it is the duty of this Court to entertain and determine such doubt. *Gottwals v. Manske*, 99 P.2d 645, 646 (Nev. 1940). The foregoing discussion casts serious doubt as to the jurisdiction of this Court to entertain an appeal of the 60(b) Order. This Court has a duty to

entertain and determine this doubt. *Id.* ("every court is bound to know the limits of its jurisdiction and must keep within them."). Further, "since the question is jurisdictional (in a procedural sense) it is one which [the Court] must act upon **whenever** and **however** it comes to our attention." *Musso v. Triplett*, 78 Nev. 355, 257, 372 P.2d 687, 689 (1962) (emphasis added).

B. The Court's Reliance on American Ironworks is Misplaced: The 60(b) Order was Immediately Appealable, it is not Subordinate to and did not Produce the April 17, 2015 Order

This Court erred in determining that it has jurisdiction to entertain the 60(b) Order. As outlined above, the May 15, 2015 notice of appeal fails to vest jurisdiction in this Court to entertain an appeal of the 60(b) Order. Further, the Court misapplied the merger doctrine in determining that the 60(b) Order was appealable as an interlocutory order.

Specifically, this Court cited *American Ironworks & Erectors, Inc. v. North Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) for the proposition that "this court has jurisdiction to consider challenges to the order entered August 6, 2014, as an interlocutory order." (Order Reinstating Br. 1, Dec. 2, 2015). But the reasoning of *American Ironworks* leads to a contrary conclusion. Similar to the analysis outlined above, the *American Ironworks* court looked first to whether the applicable order was either interlocutory or immediately appealable. *Am. Constr. Corp.* 248 F.3d at 897. Because the court found that the order "is not immediately appealable," the court held that the order "becomes appealable when final judgment is entered." *Id.* Because the 60(b) Order was immediately appealable, *American Ironworks* supports the contrary conclusion regarding jurisdiction than what this Court determined.

Next, *American Ironworks* quotes *Munoz v. Small Business Administration*, 644 F.2d 1361, 1364 (9th Cir. 1981) in a parenthetical cite: "an appeal from the final judgment draws in question all earlier **non-final orders** and all rulings which produced the judgment." Here, the 60(b) Order is a final order, as it was

immediately appealable and no appeal was brought. Essentially, "for purposes of appeal, an interlocutory action **from which no direct appeal will lie** becomes merged into the final judgment and is open to review on appeal from the final judgment." *Atchison, T. & S. F. Ry. Co. v. Jackson*, 235 F.2d 390, 392 (9th Cir. 1956). The foregoing cases indicate that a non-final order is one in which no direct appeal will lie. As the 60(b) Order was directly appealable, it is not a non-final order following lapse of the appeal period.

Next, the reasoning of *American Ironworks* does not apply to vest jurisdiction in this court to review the 60(b) Order because that 60(b) order is not a subordinate order of the final judgment dated April 17, 2015 nor did it act to produce that final judgment. *American Ironworks*, 248 F.3d at 898 ("appeal from final judgment draws in question all earlier non-final orders and all rulings **which produced the judgment**.") *quoting Munoz*, 644 F.2d 1364. Importantly, the 60(b) Order grows out of the default judgment previously entered and set aside **and not the final judgment entered April 17, 2015**. *Peck v. Crouser*, 129 Nev. Adv. Op 12, 295 P.3d 586, 587–88 (2013) ("An appealable special order entered after final judgment is 'an order affecting the rights of some party to the action **growing out of the judgment previously entered**.'") (emphasis added).

Only orders that are subordinate to the final judgment—orders that produce the final judgment—merge into the final judgment. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012). In this instance, the 60(b) Order did not produce the second final judgment that was entered on April 17, 2015, it set aside the default judgment previously entered on August 18, 2010. And as stated by this Court, grows out of that default judgment previously entered—not the final judgment. Thus, there are two lines of final orders in this case. There are all the orders under the default judgment up to and including the final 60(b) Order, which disposed of all issues regarding the default judgment and set them aside, which 60(b) Order was a final appealable order pursuant to NRAP 3A(b)(8). Secondly,

there is the final judgment entered April 17, 2015, beginning anew; ruling upon the merits of the case; denying Appellant's motion for reconsideration, set-aside, and entry of judgment; and dismissing the case with prejudice. In fact, the 60(b) motion could have been brought as an independent action. NRCP 60(b). *Picket v. Comanche Const., Inc.*, 108 Nev. 422, 426-27, 836 P.2d 42, 45 (1992); *Nevada Indust. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). Thus, the two lines of final orders quite literally could have been two lines of independent cases. And the 60(b) Order was immediately appealable for this very reason: it relates to the prior line growing out of the default judgment dated August 18, 2010. Because the 60(b) Order is not subordinate to the April 17, 2015 order of final judgment, it does not merge into the final judgment for purposes of appeal.

CONCLUSION

This Court does not have jurisdiction to entertain an appeal of the 60(b) Order. First, the notice of appeal dated May 15, 2015, being 242 days past the specific statutory appeal period for the 60(b) Order, fails to vest jurisdiction in this Court. Next, *American Ironworks* and related case law properly applied shows that the general appellate rule of merger is not applicable to renew or reopen the appeal period, as the 60(b) Order was immediately appealable and the 60(b) Order did not produce the final judgment, instead it grows out of the previously entered default judgment. Without jurisdiction only one course of action is allowed: The Court must dismiss the appeal of the 60(b) Order.

Dated this 17th day of March, 2016.

FABIAN VANCOTT

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EXHIBIT A

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

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

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

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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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2016, I caused a true and correct copy of the foregoing **MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION** 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

Megan Filbey

An employee of Fabian VanCott