

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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
Electronically Filed
Mar 31 2016 03:34 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

**REPLY TO APPELLANT'S
RESPONSE TO MOTION TO
STAY BRIEFING SCHEDULE**

Respondent, Susan Fallini, by and through her attorney of record, David R. Hague, hereby respectfully submits this Reply to Appellant's Response to Motion to Stay Briefing Schedule. On March 18, 2016, Respondent filed with this Court a Motion to Dismiss for Lack of Appellate Jurisdiction (the "**Motion to Dismiss**"). Respondent also filed a Motion to Stay Briefing Schedule in light of the considerations outlined therein.

The Motion to Dismiss was filed pursuant to N.R.A.P. 27 and in accordance with the admonition in N.R.A.P. 14(f), judicial precedence and binding case law, and the mandatory provisions of the Nevada Rules of Appellate Procedure. Appellant asserts, without any cited support, that a motion to dismiss for lack of appellate jurisdiction must be brought within 7 days after service of the docketing statement. This proposition fails.

Appellate jurisdiction is subject matter jurisdiction over an appeal and cannot be waived by the parties; therefore, a motion to dismiss for lack of appellate jurisdiction cannot be subject to N.R.A.P. 14(f). *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011); *Bergenfield v. BAC Home Loans Servicing*, 131

1 Nev. Adv. Op. 68, 354 P.3d 1282, 1283 (2015). For instance, the *Bergenfield* court
2 in reviewing its appellate jurisdiction sua sponte cited to *Landreth* in reasoning that
3 “[w]hether a court lacks subject matter jurisdiction can be raised by the parties at
4 any time, or *sua sponte* by a court of review....” *Id.*

5 “[A] challenge to a court’s subject matter jurisdiction is not waivable . . . and
6 can be raised at any time, or reviewed sua sponte by an appellate court.”
7 *Holdaway-Foster v. Brunell*, 130 Nev. Adv. Op. 51, 330 P.3d 471, 474 (2014). A
8 time limit implies, if not expressly sets out, a condition of waiver. Appellate
9 jurisdiction, being a court’s jurisdiction over the subject matter of an appeal, can be
10 challenged at any time, and lack of subject matter jurisdiction makes a court’s
11 determination void. *Landreth*, 251 P.3d at 166; *United States v. Houser*, 804 F.2d
12 565 (9th Cir. 1986). Thus, the 7-day time limitation in N.R.A.P. 14(f) cannot apply
13 to a motion to dismiss for lack of appellate jurisdiction, being incongruous with the
14 nature of, and ability to challenge at any time, subject matter jurisdiction.

15 Accordingly, N.R.A.P. 14(f) deals solely with the deadline for filing a
16 response to the docketing statement. The fair and reasonable reading of N.R.A.P.
17 14(f) also supports this position. Respondent’s purposeful decision not to quote the
18 entirety of N.R.A.P. 14(f) was proper: the portion of the rule regarding the
19 docketing statement response deadline is not relevant to the Motion to Dismiss.

20 Respondent’s reference to N.R.A.P. 14(f) is merely instructional. The
21 Motion to Dismiss was filed pursuant to N.R.A.P. 27 and Nevada case law, as
22 noted above. The admonition in N.R.A.P. 14(f) did influence Respondent’s
23 determination as to the proper course of action: “If respondent believes there is a
24 jurisdictional defect, respondent should file a motion to dismiss.” Here, because
25 respondent believes there is a jurisdictional defect, Respondent followed the
26 suggested course and filed the Motion to Dismiss. Again, challenge to a court’s
27 subject matter jurisdiction is not waivable, and can always be revisited either by
28 motion or sua sponte. *Id.*; *Houser*, 804 F.2d 565; *see Bejarano v. State*, 122 Nev.

1 1066, 1074, 146 P.3d 265, 271 (2006) (“we [the Justices of Nevada Supreme
2 Court] have the discretion to revisit the wisdom of our legal conclusions if we
3 determine that such action is warranted.”)

4 Next, Respondent avers that the motion to dismiss and motion to stay
5 briefing schedule is not a delay tactic. In fact, Respondent wants a speedy
6 resolution. Similar to Appellant, Respondent is an elderly woman who has been
7 dealing with the stresses of this case since 2007. Contrary to Appellant,
8 Respondent is dealing directly with the defense costs. Respondent wants a quick
9 resolution.

10 At the cost of unwanted delay, the substantive arguments regarding appellate
11 jurisdiction, as outlined in the Motion to Dismiss, were too overpowering to let
12 rest. Further, the impact on the scope of briefing should the Court determine
13 appellate jurisdiction is lacking is profound. In fact, Respondent expects that the
14 Court would re-open the briefing schedule to allow Appellant an opportunity to
15 amend Appellant’s Opening Brief, which Respondent would certainly understand
16 and not object to, given the impact of properly narrowing the scope of appeal,
17 despite Respondent’s strong desire to reach a quick resolution.

18 This Court did make a determination as to the jurisdiction to entertain an
19 appeal of the 60(b) Order. (Order Reinstating Briefing 1 Dec. 2, 2015). But, as
20 outlined in the Motion to Dismiss, including the related Reply, Respondent asserts,
21 with binding legal support, that this determination was made in error. (Mot.
22 Dismiss Lack Appellate Jurisdiction, March 18, 2016). Therefore, Respondent
23 filed the Motion to Dismiss and explained that this Court has the power to revisit
24 its earlier decision. *Id.* at 7-10; *see Bejarano*, 122 Nev. at 1074.¹

25
26
27 ¹ That law of the case doctrine is not applicable is further discussed in
28 Respondent’s Reply to Appellant’s Response to Motion to Dismiss for Lack of
Appellate Jurisdiction at 1-2, which arguments are incorporated herein.

1 Appellant’s counsel asserts that he granted a “professional courtesy” in
2 stipulating to Respondent’s requested extension. (Resp. to Resp’t Mot. To Stay
3 Briefing Sched. 3 March 25, 2016, 16-09495). Although that may be his
4 perspective, counsel for Respondent has a different point of view. Appellant’s
5 counsel did not simply allow for an extension, but instead negotiated terms in
6 exchange. Appellant’s counsel exploited Respondent’s request to extend briefing
7 deadline to obtain an agreement to stay any collection efforts of Respondent if the
8 district court were to award attorneys’ fees. (Declaration of David R. Hague and E-
9 mail from John P. Aldrich, Esq. dated March 4, 2016, attached as Exhibit 1). The
10 stipulation, therefore, was no courtesy at all but a negotiated agreement.

11 Further, Respondent’s counsel had not determined to file a motion to dismiss
12 at the time Respondent request an extension. (Exhibit 1 at 1). Counsel was in the
13 midst of researching and drafting the jurisdictional statement for Respondent’s
14 Answering Brief, and given the complexity of that issue along with the other issues
15 on appeal, found an extension necessary.

16 Finally, Appellant’s counsel could have asked why the extension was being
17 sought, but did not. Thus, arguendo, even if Respondent intended to file the motion
18 to dismiss at the time the extension was discussed, neither law nor equity demands
19 disclosure of this fact. And given that Appellant’s counsel did not inquire, but
20 instead sought to further his other interests, there can be no assertion that
21 Respondent’s counsel did anything to mislead or deceive Appellant’s counsel nor
22 that Respondent’s counsel behaved improperly. If the reasons behind the requested
23 extension were so vital such that extension was conditional thereon, it makes no
24 sense as to why Appellant’s counsel failed to ask a single question even remotely
25 related to that issue. To conclude this point, the construed designation of the
26 stipulation as a “professional courtesy” is misleading, and the failure to disclose
27 the negotiated terms of the stipulation can be nothing else but an improper attempt
28 to put Respondent’s counsel in poor light.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2016, I caused a true and correct copy of the foregoing **REPLY TO APPELLANT'S RESPONSE TO MOTION TO STAY BRIEFING SCHEDULE** 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



An employee of Fabian VanCott

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF DAVID R. HAGUE

State of Nevada)
)ss:
County of Clark)

Pursuant to NRS 53.045, Declarant hereby declares and states the following:

- 1. Declarant is an attorney licensed to practice in the State of Nevada.
- 2. Declarant's office address is 215 S. State Street, Suite 1200, Salt Lake City, Utah 84111.

3. I, David R. Hague, have personal knowledge of the contents of this document and I am competent to testify to the facts set forth herein.

4. On March 3, 2016, I requested of Appellant's counsel an extension to the due date for Respondent's Answering Brief.


5. On March 4, 2016, Appellant's counsel sent an email setting forth the terms upon which he would grant an extension to the filing deadline of Respondent's Answering Brief.

6. A true and correct copy of the March 4, 2016 email from Appellant's counsel is attached.

7. At the time that I requested a stipulated extension from John P. Aldrich, esq., I had not determined to file a separate motion to dismiss, and the arguments regarding jurisdictional defects were incorporated directly into my working draft of the Answering Brief.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 30 day of March, 2016



David R. Hague, Esq.

From: John Aldrich <jaldrich@johnaldrichlawfirm.com>
Sent: Friday, March 4, 2016 12:13 PM
To: David R. Hague
Cc: James C. Waddoups; Andy Sellers; 'Eleanor Engebretson'
Subject: RE: Fallini--Appeal Extension

David,

This e-mail will confirm our conversation today. As I explained, I am generally not opposed to granting such a courtesy. In this instance, I have a concern. If Judge Lane were to grant an attorney fee award against me or my client, the extension could then become a problem. I explained that I would agree to the 30-day extension so long as you will agree not to execute on an attorney fee award, should one be entered, until after the decision on the appeal. You and I have agreed to those terms.

I will watch for the stipulation. I am out this afternoon and I have an arbitration hearing on Monday, but I will return it as soon as possible.

Thanks.

John P. Aldrich, Esq.
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
702.853.5490 Telephone
702.227.1975 Fax

The information contained in this transmission may contain privileged and confidential information. It is intended only for the use of the person(s) named above. If you are not the intended recipient, you are hereby notified that any review, dissemination, distribution or duplication of this communication is strictly prohibited. If you are not the intended recipient, please contact the sender immediately and destroy all copies of the original message.

From: David R. Hague [mailto:dhague@fabianvancott.com]
Sent: Thursday, March 03, 2016 9:49 AM
To: John P. Aldrich
Cc: James C. Waddoups; Andy Sellers
Subject: Fallini--Appeal Extension

John:

Will you please grant us a 30-day extension to respond to your opening brief? If so, I will prepare a stipulation for your review.

Thanks,

Dave

DAVID R. HAGUE
FabianVanCott
Mobile: 801.558.2822

No virus found in this message.

Checked by AVG - www.avg.com

Version: 2015.0.6189 / Virus Database: 4537/11741 - Release Date: 03/03/16