Case No. 70164

In the Supreme Court of Nevada

FIRST TRANSIT, INC.; AND JAY FARRALES,
Appellants,
vs.
JACK CHERNIKOFF; AND ELAINE CHERNIKOFF,
Respondents.

OPPOSITION TO "MOTION TO TERMINATE APPELLATE PROCEEDINGS AND ISSUE REMITTITUR FORTHWITH"

Appellants First Transit, Inc. and Jay Farrales oppose respondent-plaintiffs' motion to terminate the appellate proceedings and issue remittitur.

I. The Anticipated Petition for Rehearing Goes to Issues Arising from the New September 11, 2020 Decision

Plaintiffs argue the rules of appellate procedure do not provide for a "second round of rehearing." (Mot. at 3.) While it is true the rules do not address subsequent petitions for rehearing expressly, appropriate construction of NRAP 40, as well as basic fairness, dictate the non-prevailing party be afforded a right to petition for rehearing "of the appellate court's decision under Rule 36." NRAP 40(a)(1). Here, the Court's decision is the Order of Affirmance, entered September 11,

2020. (Doc. 20-33470.) In contrast, the Court's original August 1, 2019 opinion is not the "decision under Rule 36" (NRAP 40(a)) that "constitutes entry of the judgment" (NRAP 36(b)) because the Court vacated it. (Doc. 20-08976.) That vacatur nullified and voided the prior order. BLACK'S LAW DICTIONARY 1548 (9th ed. 2009)); *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (a "vacated opinion" is "officially gone," has "no legal effect whatever[,]" is "void" and "[n]one of the statements made [therein] has any remaining force"). Put simply, it is irrelevant whether the rules allow for successive petitions to rehear a decision because, here, appellant's anticipated petition will be the only one relating to the Court's operative "decision under Rule 36." NRAP 40(a).

This is consistent, moreover, with the way appellate courts in other jurisdictions treat a petition for rehearing of a decision that resulted from a prior petition for rehearing. Federal appellate courts will entertain a second petition for rehearing if it addresses a superseding opinion. *Amado v. Gonzalez*, 758 F.3d 1119, 1125 (9th Cir. 2014); *Meders v. Warden, Georgia Diagnostic Prison*, 911 F.3d 1335, 1337 (11th Cir. 2019) (parties granted 21 days to file new rehearing

petition after opinion revised); *Schell v. OXY USA Inc.*, 814 F.3d 1107 (10th Cir. 2016) (party may seek second rehearing after court revises opinion in response to first rehearing). Other state appellate courts do likewise, often as express exceptions to rules that generally preclude "successive" petitions. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458 (Tex. 1992) ("we hold that a party may file a further motion for rehearing as a matter of right if the court of appeals alters in any way its opinion or judgment in conjunction with the overruling of a prior motion for rehearing."); *3299 N. Fed. Highway, Inc. v. Bd. of Cty. Comm'rs of Broward Cty.*, 646 So. 2d 215, 228–29 (Fla. Ct. App. 1994), *opinion clarified* (Nov. 29, 1994) ("An exception to the rule has been recognized where on the first motion for rehearing, the court changes its previous ruling."); *see also* ALA. R. APP. P. 40(a)(3) ("No second application for rehearing will be considered unless in response to the first application the court reversed or substantially modified the original decision of the court."); OKLA. SUP. CT. R. 1.13(e) ("No motion or application for rehearing or review will be accepted for filing after the *denial* of a petition for rehearing.").

In other words, where a new decision misapprehends questions of

fact or law, appellate courts do not shirk from correcting those new mistakes—especially where that is prudent to prevent the precedential impact of erroneous law. If respondents were correct, this Court could never fix even glaring errors that appear for the first time in a new disposition after rehearing. That position is especially absurd where, as here, the decision on rehearing comes to the opposite result on grounds absent from the original disposition.

The anticipated petition for rehearing will address issues arising from the Court's new September 11 decision. It will include, for instance, a misapprehended point of law concerning the verdict form that was not even mentioned in the now-vacated, original opinion or in plaintiffs' petition for rehearing. Another issue, which relates to the jury instructions and overlaps with previous briefing, still relates to a distinct misapprehension of fact in the new September 11 decision. The issues are not identical, as plaintiffs presume.

II. There is No Good Cause to Issue Remittitur

The Court should not relinquish jurisdiction until the appeal has run its course—including the right of First Transit to petition for rehearing from the new decision that is completely different from the

original opinion. While the Court may shorten the time to issue remittitur under NRAP 41(a), there is no good cause here to remand prematurely. As the Ninth Circuit explains, "only in exceptional circumstances" should the court "order the issuance of mandate forthwith upon the filing of a disposition." NINTH CIRCUIT GENERAL ORDER 4.6(a). Such exceptional circumstances may include:

> instances where it appears from the record that a petition for rehearing . . . or petition for writ of certiorari would be legally *frivolous*, where the losing litigant is attempting to defeat a just result by interposing *delaying tactics*, or where an *emergency* situation requires that, to effectuate a just result, the action of the Court should become final, and mandate issue, at once.

NINTH CIRCUIT GENERAL ORDER 4.6(b) (emphasis added).

Neither First Transit nor their counsel take pleasure in prolonging this appeal. They believe in good faith, however, that the Court has "overlooked or misapprehended" important points of law and fact. *See* NRAP 40(a). And, in fairness both themselves and to parties in future cases that will be affected by the precedent of the Court's decision, they would like to bring those points to the Court's attention while this Court retains jurisdiction to entertain them. There is no intention to delay.

III. The Demand for Supplemental Security is Misplaced

When this Court directs plaintiffs to answer the anticipated petition for rehearing, supplementation of the supersedeas bond securing the stay pursuant to 62(d) might become appropriate. But, even in that event, plaintiffs should address any purported insufficiency of the current bond to the district court. NRAP 8(a)(1).

Dated this 8th day of October, 2020.

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CERTIFICATE OF SERVICE

I certify that on October 8, 2020, I submitted the foregoing OPPOSITION TO "MOTION TO TERMINATE APPELLATE PROCEEDINGS AND ISSUE THE REMITTITUR FORTHWITH" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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