IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Estates of Thelma Ailene Sarge and Edwin John Sarge.

ESTATE OF THELMA AILENE SARGE; ESTATE OF EDWIN JOHN SARGE; AND BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE,

Appellants,

vs.

QUALITY LOAN SERVICE CORPORATION; and ROSE HILL, LLC,

Respondents.

NO. 73286

DISTRICT COURT NO. 16 RP 000091B

SUPPLEMENTAL BRIEF TO ORDER TO SHOW CAUSE

Appellants, by and through their undersigned counsel, Tory M. Pankopf respond to the court's order, filed May 9, 2018, to file a supplemental brief to discuss the impact of Hall v. Hall, 138 S.Ct. 1118 on the court's interpretation of NRCP 42(a).

A. Federal Cases Interpreting Federal Rules Are Strongly Persuasive.

NRCP 42(a) is identical to FRCP 42(1) save for the formatting. It is modeled after its federal counterpart, and thus, cases interpreting the federal rule are strongly persuasive. Rock Bay, LLC v. Eighth Judicial Dist. Court of Nev., 298

P.3d 441, 445 n.3 (Nev. 2013) citing Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) ("Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" (quoting Las Vegas Novelty v. Fernandez, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990))).

B. Hall Holds Consolidated Cases Remain Independent of Each Other and Are Immediately Appealable When Finally Decided.

There is no ambiguity in Hall's holding. The history against which FRCP 42(a) was adopted resolved any ambiguity regarding the meaning of "consolidate" in FRCP 42(a)(2) and made clear that one of multiple cases consolidated under FRCP 42 retained its independent character, at least to the extent it was appealable when finally resolved, regardless of any ongoing proceedings in the other cases. So, when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals. Hall at 1131.

1. The Enactment of FRCP 41 Did Not Alter the Meaning of Consolidation After 125 years.

FRCP 41(a) did not purport to alter the settled understanding of the consequences of consolidation. Id. Under the consolidation statute—which was in force for 125 years, until its replacement by [FRCP] 42(a)—consolidation was

understood not as completely merging the constituent cases into one, but as enabling more efficient case management while preserving the distinct identities of the cases and rights of the separate parties in them. Id. at 1121. Just five years before [FRCP] 42(a) became law, the Court reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. Id. citing Johnson v. Manhattan R. Co., 289 U. S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331.[1] This body of law supports the inference that, prior to [FRCP] 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. Id. at 1121.

2. Treatises Conclude Consolidated Cases Remain Distinct.

Treatises summarizing federal precedent applying the consolidation statute also concluded that consolidated cases "remain distinct." Id. at 1128 citing 1 Rose §823(c), at 758. They recognized that consolidated cases should "remain separate as to parties, pleadings, and judgment," W. Simkins, Federal Practice 63 (rev. ed. 1923), and that "[t]here must be separate verdicts, judgments or decrees, even although the consolidating party wished for one verdict," Id. citing 1 Rose §823(c), at 758; see also G. Virden, Consolidation Under Rule 42 of the Federal Rules of

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1 Judge Learned Hand, writing for the Second Circuit on appeal, would have none of it: "consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before." Ibid. Hall at 1127.

Civil Procedure, in 141 F. R. D. 169, 173-174 (1992) (Virden) ("as of 1933 and the Johnson case of that year, it was well settled that consolidation in the federal courts did not merge the separate cases into a single action").

3. Federal Rules Advisory Committee Discussion.

Two years after Johnson, the Rules Advisory Committee began discussion of what was to become [FRCP] 42(a). Hall at 1128. The Rule, which became effective in 1938, was expressly modeled on its statutory predecessor, the Act of July 22, 1813. Id. citing Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., p. 887. The Rule contained no definition of "consolidate," so the term presumably carried forward the same meaning the Court had ascribed to it under the consolidation statute for 125 years, and had just recently reaffirmed in Johnson. Id.; See also Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it"); cf. Class v. United States, 583 U. S. ___, ___, 138 S. Ct. 798, 200 L. Ed. 2d 37 (2018) (slip op., at 10) (Federal Rule of Criminal Procedure 11(a)(2) did not silently alter existing doctrine established by this Court's past decisions). Id. at 1128-29.

Moreover, the Court reasoned that if [FRCP] 42(a) were meant to transform consolidation into something sharply contrary to what it had been, the Court would

have heard about it. Id. at 1129. The Court has held Congress "does not alter the fundamental details" of an existing scheme with "vague terms" and "subtle device[s]." Id.

Similarly, the Court noted that nothing in the pertinent proceedings of the Rules Advisory Committee supports the notion that [FRCP] 42(a) was meant to overturn the settled understanding of consolidation. Id. citing United States v. Vonn, 535 U. S. 55, 64, n. 6, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002) (Advisory Committee Notes are "a reliable source of insight into the meaning of a rule"). In this instance, the Committee simply commented that [FRCP] 42(a) "is based upon" its statutory predecessor, "but insofar as the statute differs from this rule, it is modified." Id. citing Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., at 887. The Committee did not identify any specific instance in which [FRCP] 42(a) changed the statute. Id. This is significant because when the Committee intended a new rule to change existing federal practice, it typically explained the departure. Id.; See e.g., Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 4, 28 U. S. C. App., p. 747 (a predecessor statute "is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded").

C. Mallin v. Farmers Is Wrongly Decided.

This court's decision in Mallin v. Farmers Ins. Exch., 106 Nev. 606, 609, was based upon its reliance on the erroneous holding in Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984). Given the holding in Hall, the Huene holding is now overturned and no longer supports this court's holding in Mallin. Based thereon, the Mallin holding must be corrected.

D. The Order on the Case on Appeal is a Final Order.

As previously argued, the order granting the motions to dismiss the complaint consolidated with the two petitions to set aside the estates was a final order. Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). The order resolved all the claims/issues in the consolidated complaint and left nothing for the future consideration of the district court. Lee. As Hall holds when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals. Hall at 1131.

Based thereon, the challenged order is appealable as a final judgment and the appeal should not be dismissed. Id.

AFFIRMATION Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

Dated: June 14, 2018

By: s/Tory M. Pankopf
Tory M. Pankopf Ltd
748 S Meadows Pkwy, Ste. 244
Reno, Nevada 89521
(775) 384-6956
Attorney for Appellants