IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73286

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

Plaintiff and Appellant

V.

QUALITY LOAN SERVICIE CORPORATION; and ROSE HILL, LLC

Defendant and Respondent

Appeal from a Judgment

Of the First Judicial District Court, Carson City

Hon. James T. Russell

RESPONSE TO THE SUPPLEMENTAL BRIEF RESPONDING TO THIS COURT'S ORDER TO SHOW CAUSE

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I.
INTRODUCTION

In the United States Supreme Court's most recent term in 2018, the Court issued an opinion in *Hall v. Hall*138 S.C t. 1118 (2018). In *Hall* the U.S. Supreme Court clarified that consolidation under Fed. R. Civ. Pro 42 is merely a mechanism for judicial and litigation convenience and *does not* result in a substantive consolidation of all claims and specifically, if judgment is entered in one, but not all, of the consolidated actions then a litigant may appeal from that sole singular judgment without having to wait for the remaining causes of action to reach a final judgment. This Federal ruling is directly contrary to almost 30 years of Nevada Case law. In *Mallin v. Farmers Ins. Exch* this Honorable Court held that their must be a final judgment on *all* claims in a consolidated action and only after all of the consolidated claims are resolved can a litigant appeal that judgment*106* Nev. 606 (1990).

Here Jill Sarge, in her capacity as executrix of the Estate of Thelma Ailene Sarge and Edwin John Sarge and also on behalf of the Estate (hereinafter collectively the "Sarge's"), filed a Complaint alleging *inter alia* that Quality Loan Service Corporation did not properly conduct a foreclosure sale in relation to 1636 Sonoma St. Carson City, NV 89701 ("Subject Property"). As part of this litigation, Ms. Sarge consolidated the Complaint with a Petition to Set Aside the Estate of the Sarge's without Administration with the Complaint concerning the foreclosure. On May 12, 2017; the Honorable James T. Russell dismissed the Complaint finding the notices were proper. The Sarge's opted to not finish the Petition to Set Aside Estate without Administration but instead appealed the adverse dismissal order concerning the Subject Property to this Court. Based on *Mallin* this Honorable Court

issued an Order to Show Cause regarding dismissal on November 22, 2017 as the Petitions to Set Aside were not resolved. On May 9, 2018; this Court issued a Supplemental Order requesting Supplemental Briefing in light of the U.S. Supreme Court's ruling in *Hall*.

Hall is simply not a reason to overturn *Mallin*. Whether it be in regards to a Motion to Dismiss for failure to state a claim standard or the standard for admission of experts, Nevada has at no point in its history blindly follow the rulings of the U.S. Supreme Court in regards to its procedural requirements for practice in State Court. On this basis, the Sarge's have neither met their burden to see *Mallin* overturned under the doctrine of *stare decisis* nor is an adoption of *Hall* pragmatically appropriate for Nevada State Court's. Nevada State Courts are courts of general jurisdicition, as opposed to Federal Court's whom have limited jurisdiction, and on that basis adopting *Hall* does not serve the core purpose of easing the burden on the judicial system for both judges and litigants. On this basis, this appeal should be dismissed.

II.
UNDISPUTED FACTS

1. On October 31, 2016; the Estates of Thelma Ailene and Edwin John Sarge filed a complaint alleged that Quality Loan Service Corporation ("QLS") violated the foreclosure requirements of Nevada Law in the way they conducted the foreclosure of 1636 Sonoma St. Carson City, NV 89701 ("Subject Property").

2. On November 28, 2016; QLS filed a Motion to Dismiss under Nev. R. Civ. Pro 12(b)(5) which they requested be converted into a Motion for Summary Judgment under Nev. R. Civ. Pro 56.
3. On December 6, 2016; the District Court issued an order consolidating the Complaint of the Sarge's in with the Petitions to Set Aside the Estate without Administration.
4. On May 12, 2017; the District Court dismissed the Complaint.
5. On June 14, 2017; the Sarge's appealed the dismissal to this Court despite having not completed adjudication of the Petitions to Set Aside the Estate without Administration[1] which is expressly an appealable order[2].

For the reasons discussed *infra* this appeal should be dismissed. *Mallin* continues to be good law for both pragmatic reasons as well as under the doctrine of *stare decisis*.

III.
LAW AND ARGUMENT

A. OVERVIEW OF *MALLIN V. FAMRERS INS. EXCH* AND *HALL V. HALL*

1. Overview of Nev. R. Civ. Pro and Fed. R. Civ. Pro 42

This matter comes before the Court upon a jurisdictional dispute as to whether or not an individual case/ cause is immediately appealable when multiple matters have been consolidated for the ease of judicial administration. Specifically, the proposed executrix of the Estate of Mr. and Mrs. Sarge

[1] NRS §146.070
[2] NRS §155.190

challenges the propriety of a non-judicial foreclosure under Nevada law while simultaneously attempting to complete Summary Administration of the decedent's estate. The current state of the law under *Mallin v. Farmers Ins. Exch* requires that the appellants complete the Summary Administration of Mr. and Mrs. Sarge's estate prior to appealing to this Court. *Mallin v. Farmers Ins. Exch.* 106 Nev. 606 (1990) Contrast this with recently decided case law under the Federal Rules of Civil Procedure, which now state the exact opposite as of the 2018 term of the United States Supreme Court. *Hall v. Hall* 138 S.Ct. 1118 (2018).

Nev. R. Civ. Pro 42 states in pertinent part that:

> "When action involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning proceeding therein as may tend to avoid unnecessary costs or delay."
>
> The Federal counterpart is largely identical:
>
> **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may:
> **(1)** join for hearing or trial any or all matters at issue in the actions;
> **(2)** consolidate the actions; or
> **(3)** issue any other orders to avoid unnecessary cost or delay.
>
> USCS Fed Rules Civ Proc R 42
>
> As this Court is seemingly aware at this point however, the case law on these nearly identical

rules has diverged.

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/…/…/

2. Overview of *Mallin v. Famers Ins. Exch.*

In *Malllin v. Famers Ins. Exch.* Alex Egyed purportedly killed three individuals and thereafter committed suicide. 106 Nev. 606 (1990). Mr. Egyed however had a homeowner's insurance policy as well as an excess coverage insurance policy. *Id.* The Homeowners insurance policy defended the estate of Mr. Egyed under a reservation of rights to deny coverage under exclusion for intentional acts committed by the insured. *Id.* The Homeowner's Insurance policy filed a declaratory relief action against Mr. Egyed estate claiming a lack of coverage. *Id.*The excess coverage insurance in contrast was sued for insurance bad faith and declaratory relief for failure to provide a defense. *Id.* Ultimately (and it appears concurrently) the District Court granted a Motion for Summary Judgment in favor of the Homeowners Insurance Policy on the declaratory relief action and also consolidated the two actions contemporaneously. Several appeals followed.

This Court consistently has exercised an independent duty to determine jurisdiction of matter before this Court. *Taylor Constr. Co. v. Hilton Hotels Corp* 100 Nev. 207 (1984). On this basis, the *Mallin* Court analyzed whether or not "an order of the district court disposing of one of two consolidated cases is a final appealable judgment." *Malllin v. Famers Ins. Exch*106 Nev. 606 (1990). In *Mallin* ultimately the Nevada Supreme Court acknowledged that an appeal prior to the conclusion of an entire action may very well frustrate the purpose for which the cases were originally consolidated and further acknowledged that "the district court is clearly in the best position to determine whether allowing an appeal would frustrate the purpose for which the cases were consolidated. " *Id.* On this

basis, the Nevada Supreme Court maintained this Court's long history of requiring NRCP 54(b) certification on orders which do not resolve all claims. *Id.*

3. Overview of *Hall v. Hall*

Hall v. Hall presents a somewhat different scenario. In *Hall* a Brother sued his sister for what appears to be some form of elder abuse based claims in two separate suits based on the sister's capacity as a true of a inter vivos trust as well as in her individual capacity. *Hall v. Hall* 138 S.C t. 1118 (2018). The Matter proceed to a jury trial on both consolidated claims wherein the brother prevailed on all claims however the sister prevailed on a post judgment motion for new trial in only *one* of the consolidated cases. *Id.* On this basis, The Sister appealed only one of the verdicts.

In essence, the U.S. Supreme Court analyzed the long and storied history of consolidation going back to its nexus in England jurisprudence. *Id.* The U.S. Supreme Court analyzed consolidation and the Court's treatment of consolidated cases going back many years and came to the conclusion that consolidated cases remain distinct and an adverse judgment in one cases inevitably gives rise to appeal rights regardless of the whether the other case had been resolved. *Id.*

The *Hall* ruling is directly contrary to Nevada jurisprudence. *Malllin v. Famers Ins. Exch* 106 Nev. 606 (1990). Moreover it should remain so for two reasons. As this Court is very well aware, "state courts are the ultimate expositors of state law" and absent extreme circumstances (generally related to constitutionality) Federal opinions, even from the U.S. Supreme Court, are not binding on interpretations of state law, such as the Nevada Rules of Civil Procedure. *Mullaney v. Willbur* 421

U.S. 684 (1975). As Nevadans, we are free to govern ourselves within the confines of the Constitution and cannot be told otherwise and the pragmatic realities of adopting *Hall* does not support the general jurisdiction Nevada State Courts. Second, and more importantly, the Appellant has not met the burden to overturn *Mallin* in light of this Court's *stare decisis* jurisprudence. As discussed *infra* this case should be remanded to the District Court from whence it came.

B. THE APPELANTS DO NO MEET THE HEIGHTENED BURDEN TO OVERTURN *MALLIN V. FAMRERS INS. EXCH.* UNDER THE DOCTRINE OF STARE DECISIS

The nexus of this Court's order to show cause as well as the Appellants response is that *Mallin* should be thrown after 28 years of smooth and reliable operation. This is extremely problematic in light of the doctrine of *stare decisis* which is a cornerstone of this Court's jurisprudence and cannot be lightly disregarded.

"Stare decisis—in English , the idea that today's Court should stand by yesterday's decisions- is a 'foundation stone of the rule of law." *Kimble v. Marvel Entm't LLC* 135 S.Ct. 2401 (2015). Specifically in Nevada, "if solemn judgments once made are lightly departed from, it shakes the public confidence in the law, and throws doubt and distrust on its administration." *Linn v. Minor* 4 Nev. 462 (1869). On this basis then "a decision once made upon due deliberation ought not to be disturbed by the same court except upon the most cogent reasons and upon undoubted manifestation of error." *Id.* The United States Supreme Court has summarized this matter as follows:

> "Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable

> rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (dissenting opinion). Indeed, [**472] *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief [***16] "that the precedent was wrongly decided."
>
> *Kimble v. Marvel Entm't, LLC,* 135 S. Ct. 2401, 2409 (2015)

The alternative as this Court has noted is that "the law would become the mere football of the successively changing personnel of the court" and this Court risks the certainties of law being "utterly destroyed." *Jensen v. Reno Cent Trades & Labor Council* 68 Nev. 269 (1951). Respecting the doctrine of *stare decisis* "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless re-litigation." ." *Kimble v. Marvel Entm't LLC* 135 S.Ct. 2401 (2015)

First and foremost, this Court must keep in mind that *stare decisis* carries more weight when it interprets a rule or statute such as the Nevada rules of Civil Procedure. *Kimble v. Marvel Entm't LLC* 135 S.Ct. 2401 (2015) Again under this Court's jurisprudence, absent compelling reasons, this Court will not overturn precedent. *Armenta-Carpio v. State* 306 P.3d 395 (Nev. 2013). "Mere disagreement does not suffice." *Miller v. Burk* 124 Nev. 579 (2008). Finally, if a Court has given due deliberation to a matter, as opposed to passing discussion in *dicta,* then this further bolsters the idea that the decision must stand. *Armenta-Carpio v. State* 306 P.3d 395 (Nev. 2013)

Mallin was simply not decided on dicta. *Mallin v. Farmers Ins. Exch.* 106 Nev. 606 (1990). This Court has consistently made jurisdictional determinations at the outset of the appellate process,

such as here, and the Court very clearly deliberated on the matter and came to the conclusion that consolidated cases must be appealed based on a ruling in all matters in the consolidated case. This is not an aberration.

For example, this Honorable Court declined to adopt the *Twombly/ Iqbal* doctrine on Motions to Dismiss under Nev. R. Civ. Pro 12(b)(5); the Nevada equivalent of a Nev. R. Civ. Pro 12(b)(6) motion of the same type after the U.S. Supreme Court modified the "failure to state a claim" standard. *Dezzani v. Kern & Assoc.*412 P.3d 56 (Nev. 2018)(Pickering Dissenting). This Court has never adopted the *Daubert* standard for the admission of expert witness testimony. *Hallmark v. Eldridge* 124 Nev. 492 (2008) *also Yamaha Motor Co. USA v. Arnoult* 114 Nev. 233 (1998). Nevada's appeal period begins the run from the written Notice of Entry as opposed to blanket entry of the judgment and as this Court has noted and often times Nevada vehemently preserves existing practice. *In re Estate of Herrmann* 100 Nev. 1 (1984). This Court has consistently respected our own laws and has never been compelled to blindly adopt Federal Standards.

Mallin has been the procedure for almost 30 years and pragmatically this makes sense. Federal Courts are courts of limited jurisdiction and they possess only that power authorized by Constitution and statute. *Kokken v. Guardian Life Ins. Co of Am.* 511 U.S. 375 (1994). Contrast this with Nevada State District Court judges whom are jurists of general jurisdiction and have to adjudicate a wide rainbow of disputes from which ex-spouse gets the Playstation[3], whether or not the milk man was

[3] NRS §3.0105 *also* NRS §125.150

arbitrary and capriciously denied his license[4], to whether or not someone's drone trespassed after being duly warned[5]. As outlined in greater depth *infra* the pragmatic realities of this case most certainly highlight why Nevada should continue to be proudly idiosyncratic in regards to their rules of Civil Procedure.

C. THE PRAGMATIC REALITIES OF THIS PROCEEDING FURTHER DEMONSTRATE WHY *MALLIN* SHOULD CONTINUE TO BE GOOD LAW

In this specific instance, a Final Judgment of *both* the probate proceeding as well as the related litigated mater was appropriate and illustrative as to why *Mallin* continues to be the more pragmatic procedure given the nature of Nevada's State Courts as Courts of General Jurisdiction. The District Court consolidated both the Complaint for re-entry into the unit as well as to Petition to Set Aside the Estate of the Sarge's without administration.

The Set Aside Procedure governs probate proceedings which are less than $100,000.00. NRS §146.070 governs procedures and petitions to set aside estates during probate. At the conclusion of the probate in that matter the Court's order granting the petition makes the following findings:

1. The court's finding as to the validity of any will presented;
2. The court's finding as to the value of the estate and if relevant for the purposes of subsection 5, the value of any property subject to non-probate transfer;

[4] NRS §584.180 *also* NRS §233B.130
[5] NRS §493.103

3. The court's determination of any property set aside and distributed pursuant to the distribution scheme
4. The Court's determination as to the amount of property set aside to a surviving spouse;
5. The name of each distributee and the property set aside for the benefit of that distribute NRS §146.070(14)

In this specific instance, the finding regarding the Subject Property at issue here illustrates why the probate itself should have been resolved prior to an appeal. Under NRS §146.070(8)(a) specifically requires that the District Court is to make finding concerning the entirely of the property in the decedent's estate and what is included in said estate. In this specific instance the entirety of the Appellants argument resolved around whether or not *the Estate* was noticed properly. Yet as extensively argued by QLS on the Motion to dismiss, the Estate of the Sarge's simply did not have an interest in this property due to the Sarge's executing a Deed Upon Death. QLS extensively argued that the Estate lacked standing under Nev. R. Civ. Pro 17 in light of that document. As this Court is well aware the Nevada Supreme Court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason. *Saavedra-Sandoval v. Wal Mart Stores Inc.* 126 Nev. 592 (2010). This Court is additionally aware that "the timely filing of a notice of appeal divests the district court of jurisdiction to act and vests jurisdiction" with the Nevada Supreme court. *Foster v. Dingwall* 126 Nev. 49 (2010).

On this basis it is clear, at least to this writer, that overturning *Mallin* in favour of *Hall* would grind the probate proceeding to a halt in light of the Probate Judge's mandate to determine property of the probate estate. On this basis QLS contends this is yet another example as to *why* the Federal interpretations of the Federal Rules of Civil Procedure do not necessarily comport with the General Jurisdiction Nevada State Courts.

Pursuant to NRS §111.671 "The owner of an interest in property may create a deed which conveys his or her interest in property to a beneficiary or multiple beneficiaries and which becomes effective upon the death of the owner. "NRS §111.655 *et seq* is Nevada's adoption of a uniform act entitled The Real Property Transfer on Death Act which is a uniform act adopted by the Uniform Law Commission. In interpreting uniform acts the Nevada Supreme Court has stated that "an official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction." *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.* 334 P.3d 408 (Nev. 2014). In Summarizing the Uniform Real Property Transfer on Death Act (hereinafter "URPTODA") the Uniform Law Commission has expressly stated that "URPTODA enables an owner to pass real property to a beneficiary at the owner's death simply, directly, and **without probate** by executing and recording a TOD deed. Just as importantly, URPTODA permits the owner to retain all ownership rights in the property while living, including the right to sell the

property, revoke the deed, or name a different beneficiary[6]." Expressly a Deed Upon Death "is not subject to the statute of wills and passes title directly to the named beneficiary without probate." *Id.*

NRS §146.070 is rife with mandates that in the Summary Administration proceeding the District Court, in determining the probate, would necessarily need to determine whether or not the Subject Property was part of the probate estate in the first place. Yet very clearly, the Deed Upon Death was going to become a live issue in the Complaint which was appealed. It would simply make no sense that the District Court continued to have jurisdiction to administer the nature and extent of the decedent's probate estate yet all the while this exact same issue is currently before the Nevada Supreme Court whom in this instance *should* have continuing and *exclusive* jurisdiction over the property at issue. Finally, the nature of this appeal and the time to appeal this matter was expressly governed by statute. NRS §155.190 specifically finds that an order setting aside an estate claimed not to exceed $100,000 in value is an appealable final order.

This was the order which should have been appealed from and *Hall* , which was adopted for Federal Courts of limited jurisdiction, is simply not good law when the matter is compared to both this Court's *stare decisis* precedent and the pragmatic realities of the nature of Nevada State Courts.

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[6] Available at http://uniformlaws.org/ActSummary.aspx?title=Real Property Transfer on Death Act (Last Visited November 16, 2016)

IV.
CONCLUSION

For the reasons stated above this appeal should be dismissed. *Hall* does not change the calculation before this Court in that Nevada's Rules of Civil Procedure must be tailored for the broader State Courts of General Jurisdiction and not the Courts of limited review. *Mallin* continues to be the best interpretation of Nevada's rules in light of the difference between state and Federal Courts and in the vein of *Hallmark*[7] and *Buzz Stew*[8] as well as under the doctrinue of *stare decisis* this Court should apply *Mallin* and dismiss this appeal.

Dated this 11th Day of July 2018 **McCarthy Holthus LLP**

/s/ Thomas N. Beckom, Esq
Thomas N. Beckom (NSB# 12554)

[7] *Hallmark v. Eldridge* 124 Nev. 492 (2008)
[8] *Buzz Stew LLC v. City of N. Las Vegas* 124 Nev. 224 (2008)