IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 11 2018 02:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 ROSEHILL, LLC,

Respondents.

No.: 73286

District Court No. 16 RP 000091B

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RESPONDENT ROSEHILL, LLC'S SUPPLEMENTAL BRIEF

TO ORDER TO SHOW CAUSE

Respondent, Rosehill, LLC, by and through its counsel, James M. Walsh, Esq. and Anthony J. Walsh, Esq. of Walsh, Baker and Rosevear, respond to the court's order, file May 9, 2018, to file a supplemental brief to discuss the impact of *Hall v. Hall*, 138 S.Ct. 1118 (2018) on the court's interpretation of NRCP 42(a).

A. Federal Cases Interpreting Federal Rules Are Strong Persuasive Authority.

Appellants and this court correctly state that Federal cases interpreting the Federal Rule of Civil Procedure ("FRCP") are strong persuasive authority when this court interprets its rules – the Nevada Rules of Civil Procedure ("NRCP"). *Exec. Mgmt., Ltd v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). However, Federal cases interpreting the Federal Rules are thus not mandatory or binding on this court. *Mullaney v. Willbur* 421 U.S. 684 (1975).

B. *Hall* Does Not Impact *Mallin v. Farmers Insurance Exchange.*

The United States Supreme Court in *Hall v. Hall* (cited supra), held that "constituent cases retain their separate identities **at least to the extent that a final decision in one is immediately appealable by the losing party**. That is, after all, the point at which, by definition, a 'district court disassociates itself from a case.'" *Hall*, 138 S.Ct. 1118 at 1131 citing *Swint v. Chambers County Comm'n*, 514 U.S.

35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). (Emphasis added) At its core, *Hall* rejects the argument that the term "consolidate" took on a new meaning under Rule 42(a), namely that it permitted consolidation for either limited or all purposes. The Court explained that the Federal Rules Advisory Committee would not have quietly changed the meaning of a term that had been in use pursuant to a settled understanding. *Id.* At 1131

However, the Court concluded by stating that it was not creating a rule that a district court could not consolidate a group of cases for all purposes, but it reiterated that in context, cases retain their individual identities to the extent that final judgments in any specific case are immediately appealable. *Id.*

Importantly, however, *Hall* was not decided in the context of FRCP 54(b). Indeed, there is no mention of FRCP 54(b) in the *Hall* opinion and therefore *Hall* explicitly has no application to consolidated cases involving multiple parties or claims to the extent that final judgement is not appealable absent an express 54(b) certification. That is, under *Hall,* final judgements in consolidated cased pursuant to FRCP 42(a) are immediately appealable, but *Hall* does not abridge, modify or even run the risk of otherwise vitiating FRCP 54(b).

FRCP 54(b) states:

> Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a

> claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities

By allowing a district court to enter a final judgment on an order adjudicating only a portion of the matters pending before it in multi-party or multi-claim litigation and thus allowing an immediate appeal, Rule 54(b) "attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." *Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012) *citing Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 363 (3d Cir. 1975).

The Nevada Supreme Court has held similarly in *Mallin v. Farmers Ins. Exchange*, 797 P.2d 978, 106 Nev. 606 (1990) "that when cases are consolidated by the district court, they become one for all appellate purposes. Thus, an order which resolves less than all of the claims in a consolidated action is not appealable as a final judgement **absent NRCP 54(b) certification from the district court**." 106 Nev. 606, 609, 797 P.2d 978, 980. (emphasis added)

Even though the above holding in *Mallin* seems at first glance to be at odds with the holding of *Hall*, the last section of the *Mallin* holding incorporating NRCP 54(b) is the crucial distinction that obviates any potential application of *Hall* to consolidated Nevada state cases of even federal cases involving multiple parties or claims absent NRCP 54(b) or FRCP(b) certification.

Mallin is a completely different case than *Hall* because in *Mallin* this court expressly based its decision on both NRCP 42(a) and recognized the importance of NRCP 54(b) to forward the public policy purpose of avoiding multiple identical appeals arising out of a consolidated action. "[A]n appeal prior to the conclusion of the entire action could well frustrate the purpose for which the cases were originally consolidated. Not only could it complicate matters in the district court but it could also cause unnecessary duplication of efforts in the appellate court." *Id.* at 980 *citing Huene v. United States*, 743 F.2d 703, 704 (9th Cir.1984). Importantly, *Hall* did not overrule *Huene*, as Appellant here argues, as *Hall* is a pure FRCP 42(a) case and *Huene* clarifies both FRCP 54(b) and FRCP 42(a).

NRCP 54(b) states, nearly identically to its federal counterpart:

> Judgment Involving Multiple Parties. When multiple parties are involved, **the court may direct the entry of a final judgment as to one or more but fewer than all of the parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order** or other form of

> decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties **shall not terminate the action as to any of the parties**, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the rights and liabilities of all the parties.

In this case, the Order appealed does not contain any such certification and does not purport to resolves the two other cases consolidated into the action, specifically 16 PBT 00107 1B and 16 PBT 00108 1B. As such, parties and claims remain in the consolidated action. Had Appellant requested and been granted NRCP 54(b) certification, then the Order appealed would have been immediately appealable as a final order consistent with both the holdings of *Mallin* and *Hall.*

On the contrary, Appellant in this case requests that this Court roll back its own rules and ignore NRCP 54(b) in order to apply *Hall*, a case which is not entirely on point in this matter – *Hall* would only apply in the presence of a final judgement and may still be very important to this Court in other types of consolidated cases. *See Lee v. GNLV Corp*., 996 P.2d 416, 116 Nev. 424 (2000) (defining a final judgment). Applying *Hall* to this case, however, would allow for the generation of duplicitous appeals on Appellant's part and would undermine the importance of NRCP 54(b).

This Court's original Order to Show Cause and the Order for Supplemental Briefing in this case, as well as several orders dismissing appeals before this Court

in 2018 alone hinge not just on NRCP 42(a), but on NRCP 54(b). *See e.g. US Bank National Association v. Borgert*, No. 73487 (Nev. Apr. 30, 2018) (unpublished); *Beierschmitt v. Smith*, No. 74732 (Nev. Mar. 14, 2018) (unpublished); *The Bank Of New York Mellon v. MEO Enterprises, LLC*, No. 74296 (Nev. Apr. 20, 2018)(unpublished); *Select Portfolio Servicing, Inc. v. Panda LLC*, No. 73828 (Nev. Apr. 20, 2018) (unpublished). In such cases, *Hall* provides no guidance.

CONCLUSION

When construing statutes and rules together, this court will, if possible, "interpret a rule or statute in harmony with other rules and statutes... such that no part of the statute is rendered nugatory or turned to mere surplusage." *Hefetz v. Beavor*, 397 P.3d 472, 133 Nev. Adv. Op. 46 (2017) citing *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *see also Orion Portfolio Servs. 2 LLC v. Cty. of Clark*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe conflicting statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized.").

Because *Mallin* recognizes the importance of NRCP 54(b) and requires such a certification for a final judgement involving multiple parties or claims in consolidated cased where less than all claims are resolved or parties removed, it is

not impacted by the United States Supreme Court's decision in *Hall*. If *Hall* is found to impact *Mallin*, it is hard to imagine what the importance of NRCP 54(b) and its federal counterpart would be left with.

Respectfully submitted this 11th day of July, 2018.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE FOR RESPONDENT ROSEHILL, LLC'S SUPPLEMENTAL BRIEF

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and type style Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 1,530 words.

I hereby certify that I have read this Supplemental Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

AFFIRMATION PURSUANT TO NRS 239B.030

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

Respectfully submitted this 11th day of July, 2018.

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CERTIFICATE OF MAILING

I hereby certify that on the 11th day of June, 2018, I served a true and correct copy of **RESPONDENT ROSEHILL, LLC'S SUPPLEMENTAL BRIEF** upon all counsel of record by:

☒ Electronic filing with the Clerk of the Court by using the E-Flex system which will send a notice of electronic filing to the following individuals at the email addresses set forth below.

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