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IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC.,)	
)	
Appellant,)	
)	
v.)	No. 75197
)	
ZITTING BROTHERS)	
CONSTRUCTION, INC.,)	
)	
Respondent.)	

**RESPONDENT ZITTING BROTHERS CONSTRUCTION, INC.'S
REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE**

Based on this Court's September 19, 2018 Order to Show Cause (the "OSC"), Zitting Brothers Construction, Inc. ("Zitting"), the respondent, respectfully submits this reply to APCO Construction, Inc.'s response to this Court's order to show cause.

I. Zitting's summary judgment against APCO Construction, Inc. is an appealable order.

From on the OSC, it appears that this Court has concluded that the district court below resolved all of Zitting's claims against APCO Construction, Inc.

(“APCO”) in Zitting’s constituent case. OSC at 1-2. APCO has argued in its response to the OSC that there are no other claims pending in that constituent case. Response to OSC at 3, 7. Assuming *arguendo* that this Court disagrees with APCO’s argument, Zitting’s summary judgment against APCO is still an appealable order under the principles discussed in *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105 (2018).

Matter of Estate of Sarge, 134 Nev. Adv. Op. 105, at 2, has “overrule[d] the consolidation rule announced in *Mallin [v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990)].” The consolidation rule provides that “cases consolidated by the district court become a single case for all appellate purposes.” *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, at 2. “By extension, ... an order that resolves fewer than all claims in a consolidated action is not appealable as a final judgment, even if the order resolves all of the claims in one of the consolidated cases.” *Id.* With the consolidation rule no longer in effect, each consolidated case retains its separate identity. *Id.* at 8. This means that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under Nev. R. App. P. 3A(b)(1). *Id.* But this Court in *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, at 8-9, has not expressly addressed whether the district court may properly certify a judgment as final under Nev. R. Civ. P. 54(b) if the judgment resolves all of the claims involving a party in one of the consolidated cases.

Nevertheless, based on *Hall v. Hall*, 584 U.S. ___, 138 S.Ct. 1118 (2018), the district court may do so.

In *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, at 8, this Court adopted the United States Supreme Court’s decision in *Hall* due to its “‘strong persuasive authority’ regarding the interpretation of [Nev. R. Civ. P.] 42(a).” *Hall*, 138 S.Ct. at 1128, held that “the constituent cases” in a consolidated action remain “separate, independent action[s].” The United States Supreme Court in that case repeatedly explained that “consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” *Hall*, 138 S.Ct. at 1127. “[C]onsolidation [therefore] could not prejudice rights to which the parties would have been due had consolidation never occurred. Forcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a ‘matter of right[]’ ... to which he was ‘entitled....’” *Id.* at 1128 (citations omitted). In other words, consolidation should not affect a party’s right to certify a judgment as final in a consolidated case under Nev. R. Civ. P. 54(b). *See id.* Courts must consider each consolidated case “separately to determine whether or not [the appellate court] has jurisdiction to consider its merits.” *Id.* at 1130-31.

Based on *Hall*, the determination of whether Zitting’s summary judgment against APCO is appealable must take place as if the district court never consolidated the cases. The district court—absent consolidation—may certify the summary judgment as final under Nev. R. Civ. P. 54(b). As this Court acknowledged in the OSC, Nev. R. Civ. P. “54(b) allows an order to be certified as final where the order completely removes a party from the action.” OSC at 1. The summary judgment removing APCO from Zitting’s constituent case by resolving all of the claims against APCO. AA 1812-22. Therefore, the district court properly certified the summary judgment as final under Nev. R. Civ. P. 54(b), and the judgment is appealable under Nev. R. App. P. 3A(b)(1).

Respectfully submitted on January 9, 2019,

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 9th day of January, 2019, I have electronically filed and served Respondent Zitting Brothers Construction, Inc.'s Reply to Appellant's Response to Order to Show Cause. Electronic service of the foregoing document is made in accordance with the Master Service List as follows:

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