Case No. 76422

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

GAVIN COX AND MINH-HAHN COX, husband and wife,

Appellants,

vs.

DAVID COPPERFIELD a/k/a DAVID S. KOTKIN; MGM GRAND HOTEL, LLC; BACKSTAGE EMPLOYMENT AND REFERRAL, INC.; DAVID COPPERFIELD'S DISAPPEARING, INC.; and TEAM CONSTRUCTION MANAGEMENT, INC.,

Respondents.

OPPOSITION TO APPELLANTS' INFORMAL MOTION TO VACATE THE JUDGMENT UNDER NRCP 60(d)(3)

Appellants, in now their fourth effort to vacate this Court's opinion, disregard the rules governing rehearing. The prior motions and petitions were all denied. This fourth one, purportedly based on NRCP 60(d)(3), is equally meritless. The misuse of the appellate process and the resources of respondents, their counsel, and this Court, must stop. NRAP 38.

Docket 76422 Document 2022-20148

A. Different Rules Govern Vacating District-Court versus Appellate Judgments

The Rules of Civil Procedure govern proceedings in district court. NRCP 1. The Rules of Appellate Procedure govern proceedings in this court. NRAP 1(a).

These rules prescribe different definitions of "judgments." In district court, "judgment" means "a decree and any order from which an appeal lies." NRCP 54(a). In this Court, appellate judgment is entered with "[t]he filing of the [appellate] court's decision or order," including a published opinion, as in this case. NRAP 36(a), (c)(1).

Correspondingly, the rules prescribe different ways to challenge their respective judgments. In district court, a *district-court* judgment may be challenged through timely post-judgment motions under NRCP 50(b), 52(b), 59(a), or 59(e), and in more limited circumstances, a timely motion under NRCP 60. In contrast, an *appellate* judgment in this Court or the Court of Appeals is reviewable only through a petition that complies with NRAP 40, 40A, or 40B.

B. Appellants Have Exhausted their Petitions with this Court

Here, because the opinion was issued by this Court *en banc* in the first instance, the only avenue for "vacating" the opinion was a timely petition for rehearing under NRAP 40. Appellants filed such a petition, and this Court denied it. Appellants have exhausted their remedies here.

C. The New NRCP 60(d)(3) Motion Is Improper

1. Relief Is Not Available in this Court

Appellants' further motion to vacate the opinion under NRCP 60(d)(3) is improper.

"A motion for fraud upon the court motion must be brought in the court which rendered the original judgment." *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 809 (7th Cir. 1969) (citing 7 MOORE, FEDERAL PRACTICE ¶ 60.33 at 504-05 (2d ed. 1968)).

And in *Foster v. Dingwall*, this Court described the proper procedure for using Rule 60 to challenge a judgment that is on appeal:

> [P]rior to filing a motion for remand in this court, a party seeking to alter, vacate, or otherwise change or modify an order or judgment challenged on appeal should file a motion for relief from the order or judgment *in the district court*.[]

126 Nev. 49, 52, 228 P.3d 453, 455 (2010) (emphasis added). Although the district court lacks jurisdiction to grant the motion, it can deny the motion or certify to this Court its intent to grant the motion once jurisdiction returns. *Id.* at 52–53, 228 P.3d at 455–56.

Any factual contentions must be aired in the district court. *See Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 635 P.2d 276 (1981) (this Court is limited to considering only the record before the district court). And those contentions must be proved, after a hearing, by clear and convincing evidence. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 657, 218 P.3d 853, 860–61 (2009) (citing *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946)). "Even then, the motion is addressed to the sound discretion of the *trial court*." *Id.* (internal quotation marks omitted) (emphasis added).

Here, the motion slurs counsel for their allegedly fraudulent acts on the *district* court, even going so far as to accuse the district court of disregarding it:

> It is our inherent belief that fraud upon the court has occurred, there is unquestionable overwhelming evidence including sub rosa video, all on file and evidence in court transcripts in the lower district court, which *the lower district court, although acknowledged, refused to investigate* . . . .

(Mot. 2 (emphasis added).) This Court is not the forum for resolving the fact-specific contentions of fraud in appellants' motion.[1]

2. The Motion Is an Improper Further Petition for Rehearing

Instead, this motion is transparently another petition for rehearing—now their fourth petition or motion attacking this Court's opinion—which is prohibited by the appellate rules. A losing party is entitled to one petition filed within 18 days of the appellate judgment, unless the time is extended. NRAP 40(a)(1). An untimely petition must be rejected unfiled. NRAP 40(f). And noncompliance with NRAP 40—including the filing fee and formatting requirements of NRAP 40(b)—invites sanctions.

The current petition, styled as a motion, violates all of these requirements. It is improper and should be stricken.

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[1] There is some suggestion that "[i]f the fraud was on an appellate court, that court, rather than the trial court, should consider the matter." 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2870 (3d ed. updated 2022). But as just discussed, appellants' motion appears to address allegations of fraud on the *district* court that appellants want *this* Court to resolve.

D. The Motion Does Not State Fraud on the Court

Fraud on the Court requires a subversion of "the integrity of the court itself," or "a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 654, 218 P.3d 853, 858 (2009) (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994). In *NC-DSH*, for example, the plaintiffs' attorney forged his clients' signatures on a settlement, then disappeared with the funds. *Id.* In *Estate of Adams v. Fallini*, Fallini's counsel abandoned him, and the estate's counsel "seized on that abandonment as an opportunity to create a false record and present that record to the district court as the basis for judgment." 132 Nev. 814, 819–20, 386 P.3d 621, 625 (2016). In both cases, the district court had been deceived—or defrauded—into entering a judgment that, unbeknownst to the court, was based on a false premise.

Here, in contrast, the allegedly improper actions were not concealed from the district court before it entered judgment; indeed, appellants concede that the court "acknowledged" but "refused to investigate" the alleged fraud. That is not subversion of the court's integrity or sand

in the judicial machinery. It simply reflects that appellants, though fully capable of exposing the supposed misconduct, were unable to persuade the district court that a fraud occurred. This is not "fraud upon the court" for which the extraordinary remedies of NRCP 60(d)(3) are reserved.

E. The Motion Would Be Procedurally Improper, Even If It Had Been Filed in the District Court

Even if this were a proper NRCP 60 motion brought in the proper forum, the Court would have to deny the motion.

1. This Is Really a Rule 60(b)(3) Motion

As discussed, the allegations here, do not reflect a fraud upon the court, unexposed by the normal adversary process before judgment. Rather, the allegations, even if believed, implicate the more run-of-the-mill fraud "of an adverse party" under NRCP 60(b)(3). *See NC-DSH, Inc.*, 125 Nev. at 652, 218 P.3d at 857 (distinguishing the two kinds of fraud).

2. The Motion Is More than Three Years Late

Properly understood as Rule 60(b)(3) motion, the motion is untimely. Such a motion must be made no later than six months after the

judgment. NRCP 60(c)(1).[2] This deadline is not tolled by a pending appeal. *Foster*, 126 Nev. at 55, 228 P.3d at 457.

Here, the district court's judgment was entered in 2018; the motion arrived in 2022, more than three years too late. Although the motion is difficult to follow, it appears to be based on the same arguments that were considered and rejected both in the district court and on appeal. The evidence of the so-called "fraud upon the court" consists in excerpts from the joint appendix and exhibits at trial. (Mot. 5.) This evidence was plainly available to appellants in the six months following the judgment.

As a timely motion under NRCP 60(b)(3) could have been brought, appellants cannot seek an exception to raise or reargue this evidence at this late date. *See Vargas v. J Morales Inc.*, 138 Nev., Adv. Op. 38, ___ P.3d. ___, ___ (June 2, 2022) (reversing district court's grant of Rule 60(b)(6) relief where "grounds for seeking relief were available" but not pursued within six months).

[2] This is true both under the new rule and under the rule as it existed in 2018. *See* Advisory Committee Note—2019 Amendment to NRCP 60.

CONCLUSION

Appellants' serial "motions" and "petitions" to vacate this Court's opinion have vexatiously multiplied these proceedings, now to the point of forcing respondents to incur substantial attorney's fees to respond to appellants' frivolous motion. *See* NRAP 38.

This Court should deny the motion and admonish appellants that future such abuses will merit sanctions.

Dated this 24th day of June, 2022.

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CERTIFICATE OF SERVICE

I certify that I submitted the forgoing "*Opposition to Appellants' Informal Motion to Vacate the Judgment Under NRCP 60(d)(3)*" for filing via the Court's eFlex electronic filing system on June 24, 2022. Electronic notification will be sent to the following:

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I further certify that on June 24, 2022, I served the foregoing *"Opposition to Appellants' Informal Motion to Vacate the Judgment Un-der NRCP 60(d)(3)" via* United States mail, postage prepaid, at Las Vegas, Nevada, and by electronic mail, to the following:

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