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IN THE SUPREME COURT OF THE STATE OF NEVADA

LYNITA SUE NELSON,
INDIVIDUALLY, AND IN HER
CAPACITY AS INVESTMENT
TRUSTEE OF THE LYNITA S. NELSON
NEVADA TRUST, DATED MAY 30,
2001,

Appellant,

vs.

ERIC L. NELSON, INDIVIDUALLY,
AND IN HIS CAPACITY AS
INVESTMENT TRUSTEE OF THE ERIC
L. NELSON NEVADA TRUST, DATED
MAY 30, 2001, and MATT KLABACKA,
AS DISTRIBUTION TRUSTEE OF THE
ERIC L. NELSON NEVADA TRUST,
DATED MAY 30, 2001,

Respondents.

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Jun 06 2019 03:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**Supreme Court Case No. 77473
District Court Case No. D411537**

MOTION TO DISMISS APPEAL

MARK A. SOLOMON, ESQ.
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*Attorneys for Respondent, Matt Klabacka
Distribution Trustee of the Eric L. Nelson
Nevada Trust dated May30, 2001*

1 Respondent MATT KLABACKA, Distribution Trustee of the ERIC L.
2 NELSON NEVADA TRUST dated May 30, 2001, hereby moves for dismissal of this
3 appeal on the basis that: (1) it was untimely filed; and (2) this Court lacks subject
4 matter jurisdiction.

5 This Motion is brought pursuant to Nev. R. App. P. 14(f).¹

6 **I. INTRODUCTION**

7 The ELN Trust respectfully requests that the instant appeal be dismissed
8 because this Court is without jurisdiction for two separate reasons: (1) the appeal was
9 untimely; and (2) the District Court's October 16, 2018 Order is not an appealable
10 order.

11 **II. PROCEDURAL BACKGROUND**

12 Eric and Lynita Nelson were married on September 7, 1983, and divorced by
13 the Decree of Divorce ("decree") entered by the District Court on June 3, 2013.
14 AAPP V19:4691-4742.²

15 _____
16 ¹ The rule provides in part "[i]f respondent believes there is a jurisdictional
defect, respondent should file a motion to dismiss."

17 ² NRAP 30(b) provides as follows: "Except as otherwise required by this Rule,
18 all matters not essential to the decision of issues presented by the appeal shall be
omitted. Brevity is required; the court may impose costs upon parties or attorneys who
unnecessarily enlarge the appendix." Given that this matter has previously been the
19 subject of a number of appeals that were heard by this Court (Case No. 66772,
consolidated with Case No. 68292). In the interest of brevity, documents referenced
20 in this Opening Brief which were included in the prior appendices have been cited in
the same manner to which they were cited in the prior appeal (i.e., AAPP or RAPP).
21 Citations to Lynita's appendix will be cited to as "SRAPP"). In the event this Court

1 Following the entry of the decree, the decree and other orders were appealed to
2 this Court. AAPP V23:5576-5578, AAPP V25:6249-6250, and SRAPP V1:5-8.

3 On May 25, 2017, this Court rendered its decision in *Klabacka v. Nelson*, 133
4 Nev. 164, 394 P.3d 940, 949 (2017), which decision “[a]ffirmed in part, vacated in
5 part” the decree, and “remand[ed] this matter for further proceedings consistent with
6 this opinion.”

7 On July 31, 2017, after this matter had been remanded to the district court,
8 Lynita filed a countermotion requesting, *inter alia*, that the district court “expressly
9 affirm the Joint Preliminary Injunction previously entered...EDCR 5.517.” SRAPP
10 V1: 146:18-22.

11 At the August 8, 2017 hearing on the countermotion for Joint Preliminary
12 Injunction the district court stated, in part:

13 “I’m really not inclined to freeze everything and start all over again,”
14 SRAPP V1:201-241.

15 To be honest, I’m really not inclined to reissue the JPI and freeze all
16 that. I did the same thing when you guys had argued about our
17 transferring all the property to her. You guys opposed that, I said we can
18 always transfer it back, which I did, just told them that they wouldn’t be
19 able to see anything on that so that we could preserve that. So, I’m
20 really not inclined to put a stay on everything. SRAPP V1:201-241.

21 At the January 31, 2018 hearing the District Court stated, in part:

As far as the instituting a joint preliminary injunction, that’s all that

desires the ELN Trust to include the additional documents required by NRAP
30(b)(2) (which documents were already included in the appendices filed in Case No.
66772) it will immediately do so.

1 these trusts do is buy and sell property. So when you say they should
2 conduct business as usual, by putting in – that in place and not allowing
3 them to sell things, that’s what they do. So that would be – it’s a severe
4 burden that I think when – the fact that the Supreme Court has already
5 ruled what needs to go back to the ELN Trust and I don’t think we
6 should be encumbering a business running and moving forward. These
7 – that’s how both sides function. So I think that we can’t lose sight of
8 that. SRAPP V2:270-335.

9 On April 19, 2018, the district court entered its Order, however, said order did not
10 address the request for a JPI.

11 On May 5, 2018, Lynita filed her Motion for Reconsideration and Clarification
12 of the Court’s Decision Entered on April 19, 2018, wherein she again requested the
13 imposition of a JPI against Eric and/or the ELN Trust.

14 On May 22, 2018, without oral argument, the district court entered its Order
15 entitled Decision Affirming the Date of Tracing; Denying a Separate Blocked
16 Account for \$720,000; and Granting a JPI for the Banone, LLC and Lindell
17 Properties, which provides, in part:

18 “A Joint Preliminary Injunction for the Banone, LLC and Lindell
19 Properties is Appropriate Because Both Properties Are Involved In A
20 Claim of Community Property

21 In its April 19, 2018 Order, this Court did not address the request for a
Joint Preliminary Injunction for the Banone, LLC. and Lindell
Properties. Eighth Judicial District Court Rule 5.517 states that “[u]pon
the request of any party at any time prior to the entry of...final
judgment, a preliminary injunction will be issued by the clerk against the
parties to the action enjoining them and their officers, agents, servant,
employees, or a person in active concert or participating with them from:
transferring, encumbering, concealing, selling or otherwise disposing
of...any property that is the subject of a claim of community interest...”
Both the Banone, LLC. and Lindell Properties are subject to a claim of

1 community interest. As such, both properties are entitled to a Joint
2 Preliminary Injunction to ensure that the properties remain intact prior to
3 the completion of tracing and the final judgment of this Court.
4 However, while this Court is aware that multiple Notices of Lis Pendens
5 regarding both properties have been filed, a Joint Preliminary Injunction
6 on the properties is appropriate and will be granted...” SRAPP V2:441-
7 449.

8 Lynita never appealed the May 22, 2018 Order.

9 Contrary to the contention in her Opening Brief that the district court’s “May
10 22, 2018 Order failed to address the remainder of Lynita’s request (*i.e.*, that the JPI
11 apply to all other properties as well),” the district court implicitly denied said request
12 by limiting the JPI to the Banone, LLC and Lindell Properties.

13 Unhappy with the May 22, 2018 Order, on June 5, 2018, Lynita filed a Motion
14 for Reconsideration and Clarification of the Court’s Decision Entered on May 22,
15 2018, wherein she requested **for the third time** that the district court reconsider said
16 Order and expand the JPI to all assets titled in the name of the ELN Trust. SRAPP
17 V2:450-457 (“Based on the foregoing, Lynita respectfully requests that the Court
18 reconsider its Decision entered May 22, 2018, and order that the JPI issued is not
19 limited to the Banone, LLC and Lindell Properties.”).

20 On October 16, 2018, the district court entered its Decision on the Motion for
21 Reconsideration and Clarification of the Court’s Decision Entered on May 22, 2018,
22 confirming that a JPI “shall only be placed on the Banone, LLC and Lindell
23 Properties.” SRAPP V2: 614-625.

24 On November 7, 2018, Lynita filed the instant appeal. Although Lynita had

1 previously acquiesced to having the JPI limited to the property awarded to her in the
2 decree, SRAPP V2:299-300, the appeal demands that the JPI be expanded to “all
3 property which is subject to a claim of community property interest.”

4 **III. LEGAL ARGUMENT**

5 A. Lynita’s appeal is untimely.

6 Lynita’s appeal should be dismissed because it is untimely. *Whitman v.*
7 *Whitman*, 108 Nev. 949, 950, 840 P.2d 1232, 1233 (1992) (“An untimely notice of
8 appeal fails to vest jurisdiction in this court.”); *Zugel by Zugel v. Miller*, 99 Nev. 100,
9 101, 659 P.2d 296, 297 (1983) (“Filing a timely notice of appeal is jurisdictional and
10 an untimely appeal may not be considered.”).

11 An appeal must be filed “no later than 30 days after the date that written notice
12 of entry of the judgment or order appealed from is served.” Nev. R. App. P. 4(a)(1).
13 Here, the district court denied Lynita’s request to impose a JPI over all of the ELN
14 Trust’s assets on May 22, 2018. Consequently, Lynita had thirty days from that day,
15 on or before June 21, 2018, to file an appeal. Notwithstanding, Lynita filed a Motion
16 for Reconsideration and Clarification of the Court’s Decision Entered May 22, 2018,
17 which does not toll the period for filing a notice of appeal. *See* EDCR 5.512(a) (“A
18 party seeking reconsideration and/or rehearing of a ruling (other than an order that
19 may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60), must file a
20 motion for such relief within 14 calendar days after service of notice of entry of the
21 order unless the time is shortened or enlarged by order. A motion for reconsideration

1 does not toll the period for filing a notice of appeal.”). (Emphasis Added)

2 Although the June 5, 2018 Motion for Reconsideration quotes NRCP 60(a) and
3 vaguely references NRCP 59(e), said motion makes it clear that Lynita is seeking
4 reconsideration pursuant to EDCR 5.512(a) as opposed to affirmative relief under
5 NRCP 60(a) or NRCP 59(e). Indeed, the Motion for Reconsideration does not
6 address how the district court made a clerical error pursuant to NRCP 60(a) or any
7 analysis under NRCP 59(e). To the contrary, the title, legal analysis, and conclusion
8 in the June 5, 2018 Motion for Reconsideration make it clear that Lynita was seeking
9 reconsideration pursuant to EDCR 5.512(a). As such, it appears that Lynita’s citation
10 to NRCP 60(a) and NRCP 59(e) was based upon the false premise that it would toll
11 the timeframe to appeal the District Court denial of the JPI, which is inappropriate as
12 Nevada law requires a party to “state with particularity the grounds for seeking” and
13 order. *See* NRCP 7(b).

14 In light of the foregoing, Lynita was required to appeal the May 22, 2018
15 Order on or before June 21, 2018, as opposed to awaiting the district court’s
16 disposition of the June 5, 2018 Motion for Reconsideration.

17 B. The District Court’s October 16, 2018 Order is Not an Appealable Order

18 Assuming *arguendo* that the appeal was timely filed, the District Court’s
19 October 16, 2018 Order is not an appealable order. This Court has jurisdiction to
20 entertain an appeal only where an appeal is authorized by statute or court rule. *See,*
21 *Valley Bank of Nev. v. Ginsburg*, 100 Nev. 440, 444, 874 P.2d 729, 732 (1994).

1 Where there is no authority for a party to appeal, there exists no right to appeal. *See,*
2 *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153
3 (1984).

4 Here, there is no statute or court rule that grants this Court jurisdiction to hear
5 an appeal from the denial of a joint preliminary injunction pursuant to EDCR 5.517.
6 While NRAP 3(A)(b)(3) grants this Court jurisdiction over “[a]n order granting or
7 refusing to grant an injunction or dissolving or refusing to dissolve an injunction,”
8 there is no precedent that said rule applies to the imposition of a joint preliminary
9 injunction pursuant to EDCR 5.517. To the contrary, it appears that NRAP 3(A)(b)(3)
10 pertains to injunctions that were denied and/or granted pursuant to NRCP 65, which
11 requires “[e]vidence that goes beyond the unverified allegations of the pleadings and
12 motion papers...” *See, Hospitality International Group v. Gratitude Group, LLC*, 387
13 P.3d 208 at * 2 (2016). The moving party must also show that “there is a likelihood
14 of success on the merits and that the nonmoving party’s conduct, should it continue,
15 would cause irreparable harm for which there is no adequate remedy at law.” *Id.*
16 citing *Dep’t of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77,
17 80, 109 P.3d 760, 762 (2005).


18 Lynita’s request for a JPI was based upon EDCR 5.517, and as such, was
19 devoid of any evidence or analysis as to her likelihood of success on the merits, *etc.*
20 As such, it is not the type of injunction that can be appealed pursuant to NRAP
21 3(A)(b)(3).

1 **IV. CONCLUSION**

2 In light of the foregoing, the ELN Trust respectfully requests that its Motion to
3 Dismiss Lynita's appeal be granted because the appeal was untimely and the District
4 Court's October 16, 2018 Order is not an appealable order.

5 DATED this 6th day of June, 2019.

6 SOLOMON DWIGGINS & FREER, LTD.

7 By: 

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16 *Nevada Trust dated May30, 2001*

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 10th day of June, 2019, I filed a true and correct
3 copy of the foregoing **MOTION TO DISMISS APPEAL** with the Clerk of the
4 Court via the Court's E-flex electronic filing system and notice shall be sent
5 electronically by the Court to the following:

6
7 Josef Karacsonyi, Esq.
8 DICKERSON KARACSONYI LAW GROUP
9 *Attorneys for Appellant, LYNITA SUE NELSON*

10 Dawn R. Throne, Esq.
11 THRONE & HAUSER
12 *Attorneys for Respondent ERIC L. NELSON*

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An Employee of Solomon Dwiggin & Freer, Ltd.

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