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IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation,

Appellants,

v.

WILLIAM A. LEONARD, TRUSTEE FOR THE BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO,

Respondent.

Case No.: 80214

**REPLY IN SUPPORT OF MOTION
TO CONFIRM APPELLATE
JURISDICTION AND MOTION TO
CONSOLIDATE APPEALS**

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Appellants, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc. (“Appellants”), through their attorneys, Claggett & Sykes Law Firm, hereby file this reply in support of their motion to confirm the Court’s appellate jurisdiction over this appeal, and to consolidate this appeal with Case No. 79355. Appellants also reiterate their alternative request for this Court to allow Appellants to either convert this appellate proceeding into an original proceeding or allow Appellants to file a writ petition to be consolidated into Case No. 79355.

In Appellants’ motion, they expressed uncertainty as to this Court’s appellate jurisdiction over the appealed orders. They identified several procedural grounds justifying the timing of the filing of their notice of appeal, including NRCP 52(b) and NRCP 59(e) having a tolling effect upon the time to appeal the two orders denying the claims of exemption. *See* NRAP 4(a)(4) (listing tolling motions); *AA Primo Builders, Ltd. Liab. Co. v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1194 (2010) (construing reconsideration as a tolling motion, and allowing the resulting order to be reviewed in an appeal from a final judgment); *Lytle v. Rosemere Estates Prop. Owners Ass’n*, 129 Nev. 923, 927, 314 P.3d 946, 949 (2013) (applying a tolling effect to any appealable order upon the filing of a tolling motion).

Appellants also outlined the substantive grounds for this Court’s appellate jurisdiction, including NRS 31.460 (authorizing appeals from orders in garnishment proceedings); *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1214, 197 P.3d 1051, 1057–1058 (2008) (confirming the language of NRS 31.460); NRAP 3A(b)(8) (authorizing appeals from certain post-judgment motions); and *Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002) (outlining the parameters for appealable orders under NRAP 3A(b)(8)).

Not surprisingly, Respondent/Plaintiff (the “Trustee”), argues that this Court has no appellate jurisdiction over this appeal. However, the Trustee asserts that this Court’s appellate jurisdiction is limited to only those orders listed in NRAP 3A(b)(8). Opp. at 4–5. As such, the Trustee consciously avoids *Frank Settelmeyer & Sons* and NRS 31.460. Instead, the Trustee focuses his arguments on *Gumm*, claiming that the post-judgment orders denying the claims of exemption have nothing to do with the underlying judgment appealed in Case No. 79355. But, the Trustee fails to support his argument for the allegedly dissimilar orders. Opp. at 5. In reality, if Appellants are successful in challenging either the final judgment or the orders appealed in this case, the other set of orders will become moot (as discussed in more detail below to support consolidation). Appellants will not belabor the jurisdictional arguments since this Court must determine its own appellate

jurisdiction over the appealed orders in this case. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). Ultimately, the Trustee fails to appreciate that a writ petition cannot substitute for an untimely notice of appeal, such that Appellants ask for this Court to make a structural determination on how this case should proceed. *See Pan v. Dist. Ct.*, 120 Nev. 222, 88 P.3d 840 (2004). Indeed, a decision on appellate jurisdiction is not an “advisory opinion” but rather goes to this Court’s power to act. *See Nev. Const.*, Art. 6, § 4(1).

Instead of working toward judicial efficiency, the Trustee suggests that this Court is powerless to consolidate an original proceeding (if that is the proper vehicle) for this case with Case No. 79355. However, NRAP 2 and NRAP 3(b) give the Court the discretion to consolidate two proceedings, or to covert this proceeding into an original proceeding, if necessary. Moreover, the Trustee does not disagree that both appeals arise from the same District Court case, involve the same parties, and involve the same factual record. Appellants’ preference is to prepare one record, one set of briefs, and have one consolidated appeal. The Trustee claims that the legal issues in both appeals must be identical for consolidation. But, such restrictive parameters for consolidation do not exist in Nevada. For example, this Court routinely consolidates an appeal from a final judgment with an appeal from a post-judgment order resolving attorney fees and costs, even though the legal analysis for

the challenge to the judgment differs from the challenge to the attorney fees and costs order.

In this case, the Trustee attempts to reframe the issues that Appellants will present. Even though Appellants have identified issues regarding the District Court's lack of subject matter jurisdiction, the Trustee suggests that these issues were not timely raised. Opp. at 7–8. However, “[t]here can be no dispute that lack of subject matter jurisdiction renders a judgment void.” *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). Additionally, a “court’s lack of subject matter jurisdiction can be raised for the first time on appeal.” *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). Moreover, “subject matter jurisdiction is not waivable.” *Id.* Thus, the issues of the District Court’s lack of subject matter jurisdiction transcend both appeals and can be raised at any time. In that regard, this entire second appeal will become moot upon the Court’s determination that the District Court was without subject matter jurisdiction to enter judgment against Appellants. Likewise, if the Trustee is prohibited from collecting on the judgment, due to the spendthrift trust provisions of NRS Chapter 166, as raised in this second appeal, the validity of the judgment itself becomes a moot issue.

Upon these grounds, Appellants respectfully request that this Court either confirm its appellate jurisdiction over the appealed orders, or alternatively, allow

Appellants to present the arguments in an original proceeding. Under either scenario, the Court should consolidate this case with Case No. 79355.

DATED this 26th day of February, 2020.

CLAGGETT & SYKES LAW FIRM

/s/ Micah Echols

By _____

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CERTIFICATE OF SERVICE

I certify that on the 26th day of February, 2020, I served a copy of this **REPLY
IN SUPPORT OF MOTION TO CONFIRM APPELLATE JURISDICTION
AND MOTION TO CONSOLIDATE APPEALS** upon all counsel of record:

By electronic service in accordance with this Court's Master Service List

Gabrielle Hamm, Esq.
Jeffrey Hartman, Esq.
Erika Pike Turner, Esq.
Stephen A. Davis, Esq.
Gerald M. Gordon, Esq.
Teresa M. Pilatowicz, Esq.

By mailing it by first class mail with sufficient postage prepaid to the
following address(es):

N/A

/s/ Jocelyn Abrego

Jocelyn Abrego, an employee of
Claggett & Sykes Law Firm