Case No. 81689

In the Supreme Court of Nevada

TRUDI LEE LYTLE; and JOHN ALLEN LYTLE, as trustees of THE LYTLE TRUST,

Appellants,

vs.

SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST AND JOLIN G. ZOBRIST, as trustees of the GERRY R. ZOBRIST AND JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL AND JULIE MARIE SANDOVAL GEGEN, as Trustees of the RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MAY 27, 1992; DENNIS A. GEGEN AND JULIE S. GEGEN, Husband and wife, as joint tenants,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable TIMOTHY C. WILLIAMS, District Judge
District Court Case Nos. A-16-747800-C and A-17-765372-C

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

A. There Is No Substantive Disagreement

The sole issue presented is simple—*to wit*, the portion of the subject award of fees and costs attributable to procurement of the Contempt Order under review in case no. 84538 cannot stand if that Contempt Order is vacated. (See Opening Brief at 9.) Nowhere in the answering brief do respondents dispute that. They provide no justification to keep that award if the underlying Contempt Order is vacated.

B. Respondents' Mistaken Procedural Contentions

Instead of either acknowledging the straightforward point above or disputing it (which they cannot), respondents waste the Court's time with sophistry about ripeness and availability of alternative Rule 60(b) relief.

1. An Award of Fees Is Immediately Appealable Even when the Underlying Order on the Merits is Itself Subject to Reversal on Appeal

Respondents do not dispute the jurisdictional statement in the Lytles' opening brief, which explained the award of fees is appealable under NRAP 3A(b)(8). Yet, with no authority on point, they claim this

direct appeal from the fee award somehow is procedurally improper and not ripe. They are incorrect.

A "district court's order awarding supplemental attorney fees qualifies as a special order after final judgment, and is therefore an appealable order" under NRAP 3A(b)(8). *Lytle v. Rosemere Ests. Prop. Owners*, 129 Nev. 923, 925–26, 314 P.3d 946, 948 (2013); *see also Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006). As such, under NRAP 4(a)(1), any appeal of the fee award must be taken within 30 days after service of notice of its entry.

An appeal from a fee award generally is considered along with the appeal from the underlying judgment on which it is predicated and addressed in the same opinion or other order resolving the appeal. *See, e.g.*, *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 579–80, 427 P.3d 104, 112 (2018) (concluding an award of attorney fees and costs must necessarily be reversed when the underlying decision upon which the award was based is reversed); *Bower v. Harrah's Laughlin, Inc.*, 124 Nev. 470, 495–96,

215 P.3d 709, 726 (2009).[1] In other words, the direct appeal from the award of fees is not only permissible, it is normal.

The opening brief also was necessary to formally present the issue of the fee award's contingent relationship to the underlying Contempt Order that is pending review. *See Yount v. Criswell Radovan, LLC*, 136 Nev. 409, 421 n. 10, 469 P.3d 167, 176 n. 10 (2020) (affirming an award of attorney fees despite reversal of most of the underlying judgment because the contingent necessity of reversing the fee award had not been raised as a formal issue in an opening brief); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). The approach might appear formalistic; but this Court's rules and precedents require it.

[1] Per its prerogative, this Court chooses to docket independently appealable orders under separate case numbers even when they arise from the same district court action. It then combines and coordinates the related appeals without formal consolidation per se.

2. Timely Appeals Are Preferred to NRCP 60(b) Motions

Respondents argue this appeal is "unnecessary and procedurally improper" because Rule 60(b)(5) provides a potential mechanism to move the district court to vacate the fee award later if the writ petition is granted. (Answering Brief at 5.) And if the district court were to refuse, the Lytles could then appeal from the denial of that Rule 60(b) motion.

Here, again, respondents cite no precedent from this Court (or any other) encouraging such a staggered piecemeal approach, much less requiring it. That is not surprising. As federal courts repeatedly explain, Rule 60(b) "is not a substitute for a timely filed appeal; the ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal." *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000); *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002) (holding Rule 60(b) motion could not be used as a substitute for a direct appeal). Even assuming it would be permissible to rely on Rule 60(b)(5) to seek vacation of a fee award following reversal of an underlying merits judgment that could have been challenged previously by a direct appeal,

it is risky and a poor practice. *See Lowry Dev., L.L.C. v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382, 388 (5th Cir. 2012) (interpreting analogous previous version of FRCP 60(b), recognizing the feasibility of a motion under Rule 60(b) motion to set aside a judgement following the reversal of another on which it was predicated "after the argument has 'ripened'," but commenting that it is the "riskier" course and not preferred to a direct appeal).

Put simply, the availability of Rule 60(b) relief as a remedial measure of last resort certainly does not preclude the more efficient and reliable method of contesting a judgment by direct and timely appeal.

C. The Spurious Allegation of Improper Purpose is Consistent with Respondents' Modus Operandi

The answering brief concludes with a bizarre flourish of feigned indignation, accusing the Lytles and undersigned counsel of filing this appeal with an "improper purpose" and seeking sanctions. First, they reprise the criticism that the appellate relief the Lytles are entitled to seek now under NRAP 3A(b)(8) might be sought instead with a Rule 60(b) motion in the district court later, and therefore ought to be. Under normal circumstances, that silly argument might be attributed

to innocent ignorance of appellate procedure and misguided enthusiasm. In this case, however, the theatrical posturing and vitriol has been respondents' constant tactic. They employed such inflammatory rhetoric to procure the erroneous Contempt Order under review in case no. 84538, as well.

Respondents also argue "the appeal is wholly frivolous" because the amended opening brief contests only the portion of the fee award relating to the Contempt Order under appellate review, as opposed to the other aspects of the award. That is disturbing. First, respondents never moved to dismiss this appeal as procedurally improper, which would be expected if their contention were intellectually genuine. Second, they do not dispute the jurisdictional statement in the Lytles' opening brief. Third, they moved jointly with the Lytles to stay the briefing in this appeal pending appellate review of the Contempt Order (see doc. 2021-26479), recognizing the legitimacy of this appeal as the route to contest the award of fees predicated on the Contempt Order and the effect that reversing the Contempt Order would have. Finally, after the parties reached a settlement regarding the other aspects of the

fee award, respondents stipulated to a release of most of the funds deposited in the district court pursuant to NRCP 62(d) but that

> The balance of the Cash Deposit—i.e., $20,928.36—will remain on deposit with the Clerk of the Court as the cash bond to secure the Contempt Proceeding Fees, pending resolution of the appeal/writ petition from the Contempt Order and the April 2021 Amended Fee Order.

(8 App. 1538.) Finally, after the parties accepted disbursement of funds from the court clerk's office, respondents moved jointly with the Lytles in this Court "to amend the issues presented in the Appellant's Opening Brief." (Doc. 2022-17707.) The joint motion expressly stated:

> The alteration reduces the scope of this appeal to the technical point that the portion of the subject award of fees and costs that relates to work performed procuring a contempt order will have to be reversed if this Court orders the district court to vacate that underlying contempt order in the pending writ proceeding *Lytle v. Eighth Judicial District Court* (case no. 84538).

(*Id.*) And it cited to authorities demonstrating the necessity of that result, *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. at 579–80, 427 P.3d at 112, and *Bower v. Harrah's Laughlin, Inc.*, 124 Nev. at 495–96, 215 P.3d at 726.

Needless to say, respondents' accusation that this is a frivolous appeal filed for an improper purpose is surprising. But, sadly, it is also typical.

CONCLUSION

For the forgoing reasons, the portion of the district court's order awarding fees and costs for time and expenditures to procure the Contempt Order must be reversed when this Court grants the Lytle's writ petition in case no. 84538. The substance of that is not even disputed.

Dated this 1st day of September, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a) because it contains 1,469 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 1st day of September, 2022.

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CERTIFICATE OF SERVICE

I certify that on September 1, 2022, I submitted the foregoing "Appellants' Reply Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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Attorneys for Respondents September Trust, dated March 23, 1972, Gerry R. Zobrist and Jolin G. Zobrist, as trustees of the Gerry R. Zobrist and Jolin G. Zobrist Family Trust, Raynaldo G. Sandoval and Julie Marie Sandoval Gegen, as trustees of the Raynaldo G. and Evelyn A. Sandoval Joint Living and Devolution Trust dated May 27, 1992, and Dennis A. Gegen and Julie S. Gegen, husband and wife, as joint tenants

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