

**In the Supreme Court of Nevada**

MAX VARGAS,

Appellant,

*vs.*

J MORALES INC.,

Respondent.

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Elizabeth A. Brown  
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**OPPOSITION TO APPELLANT’S EMERGENCY MOTION FOR STAY**

Respondent, J Morales Inc. (JMI) opposes Appellant’s emergency motion under NRAP 27(e) to stay the proceedings in the district court pending the outcome of the subject appeal. The motion is procedurally improper because it ignores the requirement to first seek a stay in the district court. The motion is also meritless, as it confuses an interlocutory appeal—subject, like any appeal or writ petition, to NRAP 8—for a jurisdiction-stripping stratagem that rewards Appellant with an automatic stay just for filing a notice of appeal.

**PROCEDURAL HISTORY**

**A. Appellant Commences a Lawsuit and Seeks Default**

On February 5, 2018, Appellant sued JMI and Ortiz Family LLC d/b/a El Sellito Rojo (“Ortiz Family”). Appellant claimed to have sustained injuries at the Ortiz Family’s nightclub. At that time, JMI did

not own the property.

A default judgment was entered against both defendants on July 25, 2019.

**B. The District Court Sets Aside the Default Judgment**

In September 2020, JMI learned about the judgment after JMI's bank account was garnished. JMI promptly filed a motion to set aside judgment and stay execution of judgment.

The district court found grounds to set aside the judgment, including under the catchall "other reason that justifies relief" in NRCP 60(b)(6), a ground that can be raised at any reasonable time. The district court accordingly vacated the default judgment.

**C. Appellant Files an Interlocutory Appeal but Does Not Seek a Stay while JMI's Motion to Dismiss Is Pending**

With the judgment vacated, on December 1, 2020, JMI moved to dismiss the complaint, arguing that Appellant sued the wrong party and that JMI was not a party in interest. The district court set the hearing on the motion to dismiss for January 19, 2021.

On December 11, 2020, Appellant filed a notice of appeal from the district court's order granting the motion to set aside the default judgment. Appellant did not seek to stay the proceedings, however. Instead,

Appellant contacted the district court's chambers *ex parte* to have the hearing on the motion to dismiss vacated.

**D. The District Court Reinstates the Hearing on the Motion to Dismiss**

After learning that the hearing had been vacated, JMI moved to reinstate the hearing, observing that Appellant did not properly seek a stay pending appeal. In opposition, Appellant argued pursuant to *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987), that merely by filing the notice of appeal he divested the district court of jurisdiction over further proceedings and that NRAP 8 was inapplicable.

The district court recognized the mistake and granted the motion to reinstate the hearing on the motion to dismiss.

Appellant never moved for a stay in the district court. He now improperly seeks that relief here.

**LEGAL ARGUMENT**

**A. Appellant's Motion Is Premature**

**1. *NRAP 8 Requires an Appellant to First Seek a Stay Below***

Except in special circumstances involving a *supersedeas* bond or an appeal by the state, the rules provide no automatic stay of district-court proceedings pending appeal. *See* NRCP 62(d), (e).

To obtain a stay, an appellant must follow the procedure in NRAP 8. Specifically, a party must “ordinarily move first” in the district court for a stay of the district court proceedings pending appeal to the Supreme Court or for approval of a supersedeas bond. NRAP 8(a)(1)(a-b); *see also*, *Hansen v. District Court*, 116 Nev. 650, 658, 6 P.3d 982, 986 (“[t]his court’s rules generally require a party to seek a stay in the district court before seeking a stay in this court.”) Alternatively, a party may move for the same relief through the Supreme Court upon a showing that moving in the district court would be “impracticable,” or that the district court denied the original request. NRAP 8(a)(2)(A)(i-ii).

**2. *Appellant Failed to Move for a Stay in the District Court***

Here, Appellant never brought a motion for stay before the district court. Indeed, in his opposition to Respondent’s Motion to Reinstate the Hearing, Appellant argued the case was automatically stayed and NRAP 8 was inapplicable. The district court correctly determined that the hearing and briefing should be reinstated because Appellant never moved to stay the proceedings.

**3. *Bringing a Motion Is Not Impracticable;  
Appellant Simply Ignored the Rule 8(c) Factors***

NRAP 8(a)(2)(A)(i) provides a narrow exception that allows an appellant to skip the motion for stay in the district court upon “show[ing] that moving first in the district court would be impracticable.” Having disregarded the rules, Appellant now seeks to invoke that exception, but it does not apply.

A motion for stay might be impracticable when the district court has categorically precluded relief. But that is not the case here. The district court has not yet considered the issue of staying the case under NRAP 8(c) because Appellant never bothered even to brief those factors. Instead, Appellant leaned into the argument that the case was automatically stayed, depriving the district court of the opportunity to conduct a Rule 8(c) analysis. Appellant is not excused from the requirement to move for relief in the district court.

**B. *Even if Appellant’s Motion for Stay were Ripe,  
Appellant is Not Entitled to a Stay***

Independent of the motion’s procedural infirmity, it fails on the merits: As explained in JMI’s motion to dismiss the appeal, the notice of

appeal is defective; Appellant is not entitled to a stay of the entire district-court litigation to challenge an unappealable interlocutory order.<sup>1</sup> But even if the interlocutory appeal is valid, it does not divest the district court of jurisdiction to preside over the litigation to a final judgment—in effect rewarding Appellant with an automatic stay. Finally, the NRAP 8(c) factors demonstrate that no stay is warranted; Appellant can pursue this appeal in parallel with the district-court proceedings.

**1. *There Is No Right to a Stay Pending an Invalid Appeal***

An appealable final judgment is one that “disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court.” *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (citation omitted).

JMI’s motion to dismiss the appeal, incorporated here, demonstrates that an order vacating a default judgment by its nature reopens the whole case “for the future consideration” of the district court. So this Court recently clarified that such an order is “interlocutory in nature and, thus, may not be appealed until there has been a final judgment.” *See*

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<sup>1</sup> For this reason, JMI asks that this Court rule on JMI’s previously filed motion to dismiss before it addresses Appellant’s motion for stay.

*Estate of Adams ex rel. Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016) (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2871 (3d ed. 2016)).<sup>2</sup>

Because Appellant is challenging just such an order, the appeal is void, and Appellant has no standing to seek relief under NRAP 8(c). *See* NRAP 3A(a) (appellate standing requires a “party who is aggrieved by an ***appealable judgment or order***” (emphasis added)). The stay should be denied.

**2. *An Appeal from an Interlocutory Order Does Not Divest the District Court of Ongoing Proceedings***

Even if this Court denies JMI’s motion to dismiss, however, Appellant is not entitled to an automatic stay pending appeal. Appellant’s motion misconstrues *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987), to contend that his notice of appeal automatically divested the district court of jurisdiction over these proceedings. But this Court’s discussion of jurisdiction in *Rust* refers to a district court’s inability to alter a *final judgment*, not an interlocutory order. *See*

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<sup>2</sup> As described in the motion, *Adams* reversed the Court’s previous unpublished guidance in the same case, *Estate of Adams ex rel. Adams v. Fifth Judicial Dist. Court*, No. 66521, 131 Nev. 1276, 2015 WL 234358, at \*1 (2015) (unpublished table disposition), which in turn had relied on a footnote in *Lindblom v. Prime Hosp. Corp.*, 120 Nev. 372, 374, 90 P.3d 1283, 1284 (2004). In light of *Adams*, *Lindblom*’s footnote appears to be bad law.

*Rust v. Clark Cty. School District* (“[p]rior to the entry of a final judgment the district court remains free to reconsider and issue a written judgment different from its oral pronouncement”); accord *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring) (describing the district court’s right to reconsider interlocutory orders “any time prior to the entry of final judgment”).

It is true that the district court cannot generally disturb a final judgment after it has been appealed, but that does not oust the district court from proceedings that leave the judgment intact, such as a motion for attorney’s fees or execution on the judgment. Indeed, it would turn appellate practice on its head to say that following an adverse ruling against the appellant, the appellant gets to stop the district court in its tracks while he tries an appeal—as though the district court’s order were presumptively wrong.

And here, there is no judgment, at all. The original judgment was vacated under Rule 60(b) without an appeal, and Appellant now challenges that interlocutory ruling. The district court maintains jurisdiction to proceed with the case to a final judgment, including to resolve JMI’s motion to dismiss.



### **3.     *The Rule 8(c) Factors Militate Against a Stay***

None of the Rule 8(c) factors favors a stay here.

First, the object of the appeal is not defeated by allowing the district court to rule on the motion to dismiss. Dismissal under NRCP 12(b) does not disturb Appellant’s right to challenge the relief granted under NRCP 60(b).

Second, moving forward would not cause Appellant irreparable harm. He faces, at most, litigation expenses, which this Court has held “are neither irreparable nor serious.” *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658 6 P.3d 982, 986 (2000).

Third, JMI does face serious harm from continued delay in recouping funds improperly garnished under the now-vacated default judgment. JMI is not a proper party in interest and never should have been named as a defendant. Yet while the district court vacated the judgment, it has not yet adjudicated the issue of the prior garnishment, expressly leaving that for when the case is heard on the merits. Only by allowing the hearing on the motion to dismiss to go forward can JMI recover its improperly seized funds—funds that were earmarked to pay for essential expenses, including JMI’s payroll, rent, and utilities.

Finally, even assuming reasonable jurists could have ruled differently on JMI's motion to vacate the judgment, the district court here was well within its discretion to grant that relief and to give JMI due process and an opportunity to be heard on the merits of Appellant's claims. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018) ("The district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRC 60(b)."). Absent compelling evidence that the district court disregarded established principles in the resolution of that motion, the appeal here raises no significant issues and is not exceptionally likely to succeed.

### CONCLUSION

Appellant ignored NRC 8's requirement to move for stay in the district court, and Appellant made no showing that such a motion was impracticable. Even if Appellant's motion were proper, he is not entitled to a stay. Appellant's request should be denied.

Dated this 28th day of January, 2021.

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**CERTIFICATE OF SERVICE**

I certify that on January 28, 2021, I submitted the foregoing “*Opposition To Appellants Emergency Motion Under NRAP 27(e) For Stay Of Proceedings In District Court Pending Appeal*” for filing via the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

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