Case No. 82218

In the Supreme Court of Nevada

MAX VARGAS,

Appellant,

vs.

J MORALES INC.,

Respondent.

Electronically Filed
Feb 02 2021 12:46 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

REPLY BRIEF ON RESPONDENT'S MOTION TO DISMISS APPEAL

OGONNA M. BROWN (SBN 7589)
ADRIENNE BRANTLEY-LOMELI (SBN 14486)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Respondent

REPLY BRIEF ON RESPONDENT'S MOTION TO DISMISS APPEAL

Appellant begins with a mischaracterization of the order on appeal, then ends with a policy argument that would muddy this Court's appellate jurisdiction and entrap those who reasonably forwent an appeal in reliance on this Court's previous guidance.

A. This Court's Interpretation of NRAP 3A(b)(8) Has Evolved

No question, this Court's appealability jurisprudence has changed. In *NC-DSH, Inc. v. Garner*, this Court entertained an appeal from an order vacating a judgment "under NRCP 60(b) for fraud on the court." 125 Nev. 647, 649–50, 218 P.3d 853, 855–56 (2009). Seven years later, in *Estate of Adams v. Fallini*, this Court labeled that precise kind of order "interlocutory and not appealable." 132 Nev. 814, 822, 386 P.3d 621, 626–27 (2016). The estate had awaited a new final judgment to appeal the earlier 60(b) ruling; the new, clear rule saved the estate's appeal. *See id.* at 817, 386 P.3d at 623.

As recently as two weeks ago, this Court reiterated: "No statute or court rule permits an appeal from an order granting a motion to set aside a default judgment." *Bonham v. State*, No. 82313, 2021 WL 237213, at *1 (Nev. Jan. 22, 2021). So "[a]n order granting a motion to set aside a default judgment is not an independently appealable order."

Id. (citing *Adams*, 132 Nev. at 818, 386 P.3d at 624).

B. The Federal Authority Adopted in *Adams* Is Not Limited to Particular Kinds of Rule 60(b) Relief

Adams is clear and easy to apply because it adopts the federal rule as articulated in Wright & Miller: "An order granting a motion under Rule 60(b) and ordering a new trial is purely interlocutory and not appealable . . . ." 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2871 & n.10 (3d ed. 2016).

In this context, a "new trial" does not require there to have been an original trial, as Appellant seems to think. The cases cited in Wright & Miller, for example, involve a default judgment, *Parks ex rel. Parks v. Collins*, 761 F.2d 1101 (5th Cir. 1985); *Fisher v. Bush*, 377 So. 2d 968 (Ala. 1979), an accepted offer of judgment, *Stubblefield v. Windsor Capital Grp.*, 74 F.3d 990 (10th Cir. 1996), and a dismissal as a discovery sanction, *Haney v. City of Cumming*, 69 F.3d 1098, 1100 (11th Cir. 1995). In fact, this Court rejected a similar argument in *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 106 P.3d 134 (2005), a case relied on by Appellant: There, the appellant argued that a case disallowing interlocutory appeals from new trial orders was distinguishable because "the motion in that case was not really for a 'new trial' since no trial at all

had occurred." *Id.* at 4–5, 106 P.3d at 136. This Court disagreed, holding that the basis for rejecting appellate jurisdiction "was not based on the fact that there had been no actual trial." *Id.*

Nor is the federal rule limited to particular paragraphs of Rule 60(b). Appellant argues that footnote 24 in *Lindblom v. Prime Hosp. Corp.*, 120 Nev. 372, 90 P.3d 1283 (2004) controls because that case involved a motion under Rule 60(b)(1), whereas *Adams* was based supposedly on paragraph (b)(3)'s provision for fraud. (Opp. 4–5.) But *Adams* does not say that: it was a motion for "fraud upon the court," which this Court has stated is not limited (as would a motion under Rule 60(b)(3)) by the deadlines in Rule 60(c). *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 651, 218 P.3d 853, 856 (2009). Regardless, the Wright & Miller rule mentions no such limitation, and cases cited there confirm the nonappealability of orders granting relief under Rule 60(b)(1). *See, e.g.*, *Stubblefield*, 74 F.3d at 992–93.

C. The "Unwise" Exception for District Courts Acting without Jurisdiction Does Not Apply and Should Not Be Adopted

1. District Courts' Jurisdictional Errors Should Be Corrected with a Writ of Prohibition

The Wright & Miller treatise admits that in some courts, "an appeal will lie from the grant of the motion if the contention is that the

court lacked power to grant it and not merely that it erred in granting the motion." WRIGHT & MILLER, *supra*, § 2871. But this doctrine is "unwise," since it "multiplies interlocutory appeals and requires the appellate courts to pass on the claim of lack of power." *Id.* In "flagrant cases," an extraordinary writ provides the appropriate correction. *Id.*

This Court has a robust writ practice and should allow the writ of prohibition designed especially for this purpose, NRS 34.320, to arrest courts who proceed in excess of their jurisdiction.

2. The District Court Had Jurisdiction to Grant Relief under Rule 60(b)(6)

The exception is also irrelevant here. Appellant fixates on the requirement in NRCP 60(c) that a motion to set aside judgment under paragraph (b)(1) must be brought within six months. Appellant ignores that the district set aside the judgment under NRCP 60(b)(6), a ground that can be raised at any reasonable time. NRCP 60(c)(1); *Payne v. Tri-State Careflight, LLC*, 322 F.R.D. 647, 671 (D.N.M. 2017). Appellant may challenge the district court's exercise of *discretion*, but he cannot seriously challenge the district court's *jurisdiction* to enter relief.

D. Appellants' Proposed Rule Is Bad Policy

Appellant invokes the "compelling public policy grounds" that supposedly require "finality" for the specific "fact pattern at issue here" (Opp. 6), as though this Court had a policy of opening the floodgates to interlocutory appeals.

Yet from a policy perspective, Appellant's narrow interpretation of *Adams* is extremely problematic. This Court has long favored rules of appellate jurisdiction that "avoid confusion" and "prevent harsh results for unwary parties." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584–85, 245 P.3d 1190, 1194–95 (2010). *Adams* sent a clear, broad message that litigants should not immediately appeal the grant of Rule 60(b) relief. To now limit that holding to a very narrow set of 60(b)(3) orders—essentially limiting *Adams* to its facts, as Appellant perceives them—would not just sow confusion and set a new "technical trap for the unwary," *A.A. Primo*, 126 Nev. at 585, 245 P.3d at 1195, but seriously harm those who did not appeal in reliance on *Adams*'s promise of an appeal after the final judgment.

Because there is no final judgment, the district court's order is interlocutory and not appealable. The appeal should be dismissed, and the district court should maintain its jurisdiction over this matter.

Dated this 2nd day of February, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Ogonna M. Brown*
OGONNA M. BROWN (SBN 7589)
ADRIENNE BRANTLEY-LOMELI (SBN 14486)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Respondent J Morales, Inc. ("JMI") is a corporation. No publicly traded company owns more than 10% of its stock.

JMI is represented by Ogonna M. Brown, Esq. and Adrienne Brantley-Lomeli, Esq. at Lewis Roca Rothgerber Christie LLP.

Dated this 2nd day of February, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Ogonna M. Brown*
OGONNA M. BROWN (SBN 7589)
ADRIENNE BRANTLEY-LOMELI (SBN 14486)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on February 2, 2021, I submitted the foregoing "Reply In Support of Respondents Motion to Dismiss Appeal" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Oscar Peralta
oscar@peraltalawgroup.com
Alexandria Guzman
alex@peraltalawgroup.com
Attorneys for Appellant

/s/ Kennya Jackson
An Employee of Lewis Roca Rothgerber Christie LLP