IN THE SUPREME COURT OF THE STATE OF NEVADA

SHARI KASSEBAUM,

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS,

Respondents.

Supreme Court No. 84008
District Court Case No. A810424

REPLY IN SUPPORT OF MOTION TO DISMISS

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COMES NOW, NEVADA DEPARTMENT OF CORRECTIONS, by and through its counsel, Aaron D. Ford, Attorney General, by Kevin A. Pick, Senior Deputy Attorney General, and hereby submits its Reply in Support of Motion to Dismiss. This Reply is made and based on the Memorandum of Points and Authorities set forth below and all papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ANALYSIS

A. THE MARCH 2, 2021, ORDER IS NOT AN APPEALABLE FINAL JUDGMENT.

For more than 35 years, this Court has enforced the following basic rule of appellate jurisdiction: "a district court order remanding a matter to an administrative agency is not an appealable order, unless the order constitutes a final judgment on the merits and remands merely for collateral tasks, such as calculating benefits found due." *Wells Fargo Bank, N.A. v. O'Brien*, 129 Nev. 679, 680, 310 P.3d 581, 583 (2013); *see also State Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 424 (1993); *Clark County Liquor v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986); *Brunson v. Dep't of Bus. & Indus., Real Est. Div*, 485 P.3d 766 (May 7, 2021) (Unpublished). This basic rule aligns with the Court's other rulings on the finality of judgments. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

Here, this case must be dismissed for lack of jurisdiction, because Ms. Kassebaum has done exactly what this Court disallowed in *O'Brien*, *Clark*, *Greenspun*, and *Brunson*. Ms. Kassebaum has appealed a non-final, interlocutory district court order that granted judicial review to Kassebaum and remanded the entire case back to the administrative hearing officer to decide whether the case should be dismissed as a matter of law or proceed to a hearing on the merits. *See*

Motion, Exhibit No. 1. By its clear text, the March 2, 2021, Order did not dispose of "all the issues presented in the case." *Lee*, 116 Nev. at 426 (defining "final judgment"). Nor did it leave "nothing for the future consideration of the court." *Id*. Nor did the district court reach a decision on the merits in its March 2, 2021, Order. Nor did the district court remand this matter for mere "collateral tasks," such as calculating benefits. Accordingly, the March 2, 2021, Order is not a final judgment under NRAP 3A(b)(1) and this Court lacks jurisdiction to review this appeal.

In her Response, Kassebaum rallies to the case of *Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 1488, 929 P.2d 936, 937 (1996), and argues that this Court takes a "functional view of finality" and that the mere use of the term "remand" is not automatically determinative on whether an order is final. *See* Response, at 2–3. However, Kassebaum's reliance on *Reeves* is misplaced.

In *Reeves*, an industrial employer denied coverage for a workers' compensation claim; however, on judicial review, the district court reversed the denial of coverage and remanded to the self-insurer for the calculation of benefits owed. *Reeves*, 112 Nev. at 1489. The Court in *Reeves* held that the district court order for remand was final and appealable, because it decided the primary issue of coverage and merely remanded for a collateral issue (the calculation of benefits). *Id*.

Here, the March 2, 2021, Order did not merely remand for a collateral issue, such as calculating benefits owed. Rather, the March 2, 2021, Order remanded this case to the administrative hearing officer to determinate whether Kassebaum's case should be dismissed as a matter of law or proceed to hearing. *See* Motion, Exhibit No. 1. Put in the language of *Reeves*, the March 2, 2021, Order is synonymous to an order remanding for a new determination on the primary issue of coverage, rather

than merely calculating benefits owed. As such, even if this Court takes a "functional view of finality," the March 2, 2021, Order is not a final and appealable judgment under NRAP 3A(b)(1) and *Reeves* actually supports NDOC's legal arguments.

Next, Kassebaum argues that the interlocutory March 2, 2021, Order somehow retroactively became a final order once administrative Hearing Officer Zentz issued his subsequent Decision on Remand. *See* Response, at 3. However, Kassebaum fails to cite a single case, statute, or rule that supports her retroactivity argument. *Id*. Kassebaum's argument also finds no support in *O'Brien*, *Clark*, *Greenspun*, *Brunson*, or *Reeves.* Moreover, *O'Brien* actually belies Kassebaum's argument and confirms that Hearing Officer Zentz's Decision on Remand should have gone back through the judicial review process. *O'Brien*, 129 Nev. at 681 ("the second mediation will readdress the merits of the foreclosure matter, and, if appropriate, any party will then be able to petition for judicial review of that mediation.") Kassebaum's retroactivity argument would also undermine the very basis for the rulings in *O'Brien*, *Clark*, *Greenspun*, and *Brunson*, and invite piecemeal litigation where a party can simultaneously appeal a district court's order for remand and seek judicial review of the administrative decision on remand. In short, not only is Kassebaum's argument unsupported and contrary to binding precedent, but it would defeat the sound reasoning upon which that binding precedent is based. As such, NDOC urges the Court to dismiss this appeal for lack of jurisdiction, pursuant to *O'Brien*, *Clark*, *Greenspun*, and *Brunson*.[1]

[1] The Response also discusses *Rocha v. DHHS* (Docket No. 82485), which Kassebaum claims has a procedural history similar to the matter at bar. *See* Response, at 3–4. Kassebaum suggests that *O'Brien*, *Clark*, *Greenspun*, and *Brunson* no longer apply, because this Court permitted *Rocha* to proceed to briefing without dismissing that case for lack of jurisdiction. *Id*. However, no motion to

B. THERE IS NO APPEALABLE FINAL JUDGMENT UNDER NRS 233B.150.

The Response fails to address NDOC's legal argument that the March 2, 2021, Order is not a "final judgment" under NRS 233B.150, which is therefore undisputed.

C. KASSEBAUM IS NOT AN "AGGRIEVED PARTY" AND THIS APPEAL IS MOOT.

Kassebaum initially argues that she is an "aggrieved party" under NRS 233B.150, because the district court remanded this case back to the administrative hearing officer to consider the new legal arguments raised by Kassebaum on judicial review. *See* Response, at 4. However, the March 2, 2021, Order did not "adversely and substantially" affect Kassebaum, such as to render her an "aggrieved party." *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013) (defining "aggrieved party"). Kassebaum was not "adversely and substantially affected" by the March 2, 2021, Order, because the district court made no actual findings but remanded this entire case for further consideration of the parties' dispositive legal arguments. As such, Kassebaum was not an "aggrieved party" with respect to the March 2, 2021, Order and cannot invoke NRS 233B.150.

Kassebaum also argues that her appeal of the March 2, 2021, Order is not moot, because it presents a substantial issue of first impression, i.e. whether Kassebaum's administrative appeal was jurisdictionally defective. *See* Response, at 4–5. However, the March 2, 2021, Order did not even rule on the appellate issues identified by Kassebaum. Therefore, this appeal is moot, since the March 2, 2021, Order presents no live controversy as to the legal issues now on appeal.

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dismiss was filed in *Rocha* and *Rocha* is still pending a final decision by this Court. Therefore, *Rocha* is utterly immaterial to NDOC's legal arguments herein.

D. JUDICIAL REVIEW IS KASSEBAUM'S EXCLUSIVE REMEDY.

The true purpose of Kassebaum's appeal is to circumvent the APA and avoid having to take Hearing Officer Zentz's Decision on Remand back through the judicial review process. However, judicial review is the "exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case . . ." NRS 233B.130(6). As such, Kassebaum's exclusive remedy to challenge the Decision on Remand was through judicial review and not via this direct appeal of the district court's earlier interlocutory March 2, 2021, Order.

Kassebaum argues that judicial review of Hearing Officer Zentz's Decision on Remand would merely place the same legal issues back before the district court. *See* Response, at 5. However, the district court never previously ruled on these legal issues, so judicial review of the Decision on Remand was required. To hold otherwise would violate the exclusive remedy language of NRS 233B.130(6) and this Court would thereby be exercising inherent appellate authority over an administrative agency, which is contrary to established precedent. *See Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012).

II. CONCLUSION

Based on the foregoing, Respondent NDOC respectfully requests the Court to dismiss this appeal for lack of jurisdiction.

DATED this 2nd day of February 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This Reply has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font in Times New Roman*; or*

[ ] This brief has been prepared in a monospaced typeface using Microsoft Word 2013 with 12 pt. font in Times New Roman.

2. I further certify that this Reply complies with the page- or type- volume limitations of NRAP 27(d)(2), excluding the parts of the brief exemption by NRAP 32(a)(7)(C), it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or __ lines of text; or

[X] Does not exceed 5 pages.

3. Finally, I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying Reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of February 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***REPLY IN SUPPORT OF MOTION TO DISMISS*** in accordance with this Court's electronic filing system and consistent with NEFCR 9 on February 2, 2022.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that any of the participants in the case that are not registered as electronic users will be mailed the foregoing document by First-Class Mail, postage prepaid.

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