

Supreme Court No. 84015
District Court Ref. No. A-787989
Electronically Filed
Jan 28 2022 01:37 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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APPEAL

The Clerk of The Supreme Court issued an order filed on January 25, 2022 dismissing the appeal for failure to pay the requisite filing fee. However, Appellant had believed that the filing fee had been paid. **Ex. 1.** But for a minor clerical error, the filing fee would have been timely paid. *Id.*; **Ex. 2.** Appellant immediately paid the filing fee. **Ex. 1.** Appellant now respectfully moves this Court pursuant to NRAP 27(c)(3)(A) to vacate the prior order or else modify the prior order to reinstate the appeal. Doing so will prevent the Appellant from being prejudiced by excusable neglect caused by a mistake made in good faith and will allow the matter to be decided on its merits.

II. Brief factual and procedural background.

This case centers on injuries sustained by Appellant Ms. McMillin when Respondent Mr. Tyron Henderson collided with her in a business owned and operated by Respondent Mr. Robert Thompson. Ms. McMillin was severely injured and ultimately required surgery.

The District Court dismissed Ms. McMillin's entire case based upon review of a surveillance video while considering Defendant Tyron Henderson's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment and Defendant Robert Thompson's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Partial Summary Judgment. Ms. McMillin respectfully asserts that the District Court erred by, among other things, considering matters beyond the motion before it, denying leave to amend to correct minor defects in Ms. McMillin's complaint, and incorrectly dismissing the case when questions of fact remained.

Ms. McMillin timely filed a Notice of Appeal on 12/22/2021. On 01/04/2022, this Court issued a Notice to Pay Supreme Court Filing Fee. **Doc. 22-0221**. Ms. McMillin's counsel promptly made an attempt to make the payment. **Ex. 1; Ex. 2**. Ms. McMillin's counsel believed that the payment had been properly made on 01/10/2022. **Ex. 1**. However, due to a minor clerical error while attempting to submit the payment, the payment was not properly sent. **Ex. 2**. Ms. McMillin's counsel did

not realize that it had not been processed and proceeded with the belief that it had been processed until the Clerk of the Supreme Court filed the Order Dismissing Appeal on January 25, 2022. **Ex. 1; Doc. 22-02485**. Ms. McMillin's counsel acted immediately to correct the situation by submitting the filing fee on 01/26/2022. *Id.* Ms. McMillin now respectfully requests that this Court vacate or otherwise modify the Order Dismissing Appeal to allow the appeal to be reinstated.

III. Argument

This appeal was dismissed because Appellant's counsel made a minor error while attempting to submit the payment of the filing fee and then acted under the belief that the filing fee had been properly received. **Doc. 22-02485; Ex. 1**. Under these circumstances, the order should be vacated or modified to allow the appeal to proceed forward. NRAP 27(c)(3)(A). Allowing the appeal to move forward would uphold Nevada's policy of deciding cases on their merits. *Stoecklein v. Johnson Elec.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993).

While not directly on point, this Court has previously considered analogous motions under NRCp 60 and stated that a court should consider four factors: "(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith." *Rodriguez v. Fiesta Palms, Ltd. Liab. Co.*, 134 Nev. 654, 657, 428 P.3d 255,

257 (2018).¹ Here, factors 1, 2, and 4 all support vacating or modifying the order and factor 3 is neutral. Appellant acted immediately upon learning that the payment had not gone through to first make the payment and ensure it was processed and to then file this motion seeking to have the order of dismissal vacated, so the first factor favors vacating the order.. **Ex. 1.** Appellant had no intent to delay the proceedings and merely made a minor clerical error. *Id.* Appellant is ready to move forward with the proceedings expeditiously. *Id.* Thus, the second factor favors vacating the order. Appellant was aware of the procedural requirement; however, Appellant believed that the requirement had been satisfied. *Id.* Thus the third factor is neutral. Appellant has acted in good faith by first attempting to make the required payment and then by making the payment as soon as Appellant was informed it had not been processed. Accordingly, the fourth factor favors vacating the order.

Thus, as a matter of policy, Appellant respectfully requests that the order be vacated and the appeal allowed to proceed.

IV. Conclusion

Appellant respectfully requests that this Court vacate the Order Dismissing Appeal filed on January 25, 2022 or otherwise modify the order to reinstate the

¹ Internal citations and quotation marks omitted. Quoting *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982).

appeal. This will best serve the interests of justice by allowing the matter to be decided on the merits.

Dated: __27 January 2022_____

MAINOR WORTH, LLP

By: /s/ Ash Marie Blackburn_____

ASH MARIE BLACKBURN, ESQ.

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EXHIBIT 1

Declaration of ASH MARIE BLACKBURN, ESQ.

I, Ash Marie Blackburn, under penalty of perjury, declare as follows:

1. I am a licensed attorney and can testify to the following matters if called upon to do so.
2. I directed my staff to make payment of the filing fee. I was informed that the filing fee had been paid on January 10, 2022.
3. I believed that the filing fee had been properly paid until I received the Order Dismissing Appeal which was filed on January 25, 2022.
4. Upon learning the fee had not been properly paid, I immediately took steps to investigate the cause of the problem. After investigating, I personally made payment on January 26, 2022.
5. At all times, my client and I have acted in good faith and without intent to delay. I stand ready to promptly move forward with this case.
6. Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

Dated: __27 January 2022_____

By: /s/ Ash Marie Blackburn_____

EXHIBIT 2

Declaration of Lindsay Hayes.

I, Lindsay Hayes, under penalty of perjury, declare as follows:

1. I am over the age of 18 and can testify to these matters if called upon to do so.

At all relevant times, I was an employee of Mainor Wirth, LLP

2. I attempted to pay the relevant filing fee on January 10, 2022. At that time, I believe that I had succeeded and informed Attorney Ash Blackburn that it had been paid.

3. Upon further investigation, I believe I may not have clicked on the final confirmation in the online interface which would have submitted the payment.

4. Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

Dated: 27 January 2022

By: /s/ Lindsay Hayes

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Mainor Wirth, LLP and that on this 27th day of January, 2022, I served a true and correct copy of the foregoing MOTION TO VACATE OR MODIFY ORDER DISMISSING APPEAL as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be sent via facsimile (as a courtesy only); and/or
- ☐ to be hand-delivered to the attorneys at the address listed below:
- ☒ to be submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Cindie D. Hernandez (Hall Jaffe & Clayton, LLP)
Steven T. Jaffe (Hall Jaffe & Clayton, LLP)

By :/s/ Ash Marie Blackburn