

IN THE SUPREME COURT OF THE STATE OF NEVADA

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MARIA MCMILLIN , an individual,
Appellant,

v.

ROBERT THOMPSON; Individually
and as Franchisee; TYRON
HENDERSON, Individually;
Respondents.

Supreme Court No. 84015
District Court Case No. A-19-78799
Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENTS ROBERT THOMPSON AND TYRON[E] HENDERSON'S
RESPONSE TO PETITIONER MARIA MCMILLIN'S MOTION TO
VACATE OR MODIFY ORDER DISMISSING APPEAL**

Respondents, Robert Thompson and Tyron[e] Henderson, respond to Appellant, Maria McMillin's, Motion to Vacate or Modify Order Dismissing Appeal, pursuant to NRAP 27(a)(3)(A). (See, Doc. 22-02485.) This Court should affirm its Order Dismissing Appeal pursuant to NRAP 4(a)(4)(C), finding that Appellant's appeal is premature, and that this court does not have jurisdiction to hear her motion, because any motion brought pursuant to NRCP 59(e) tolls the thirty-day appeal period. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1192-93 (2010); *Lytle v. Rosemere Estates Prop. Owners Ass'n*, 129 Nev. 923, 924-25, 314 P.3d 946, 947 (2013); *Panicaro v. Storey County*, -- Nev. --, --, 484 P.3d 283 *1, *1 No. 80264-COA (Mar. 30, 2021)(unpublished).

Pending before the Honorable Eighth Judicial District Court Judge, Bita Yeager, is Appellant's Motion to Modify or Alter Judgment of Defendants' (Respondents) Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment Pursuant to NRCP 59(e). That timely filed motion is set for hearing on February 2, 2022. Once Judge Yeager resolves Appellant's NRCP 59(e) motion, the Appellant, if still aggrieved, may then appeal to this court. Until such time, Appellant's motion is moot.

If Appellant's motion is nevertheless entertained, Appellant provides no support for her contention that her failure to pay the requisite docketing fee is a procedural error under NRAP 27(b), rather than a jurisdictional error.

The absence of what constitutes a "procedural order" under that rule does not create an ambiguity that leans in the Appellant's favor. To the contrary, this court has often found that a failure to comply with threshold requirements to perfect an appeal is a jurisdictional error, supporting the reasonable conclusion that in this instance, delay and neglect to accomplish payment are not excusable. See, e.g., *McDowell v. Drake*, 77 Nev. 136, 137, 360 P.2d 257, 257 (1961), citing *Hartstone v. Hartstone*, 75 Nev. 107, 335 P.2d 431 (1959); *Dreyer v. Dreyer*, 74 Nev. 167, 325 P.2d 705 (1958); *Cole v. Cole*, 70 Nev. 486, 274 P.2d 358 (1954); *Doolittle v. Doolittle*, 70 Nev. 163, 262 P.2d 955 (1953); see also, *Varnum v. Grady*, 90 Nev. 374, 376, 528 P.2d 1027, 1028 (1974).

Considering the above precedent, Appellant's actions cannot be reasonably construed to show that delay was not dilatory or excusable. Her appeal was filed on December 22, 2021. NRAP 3(e) required that an appeal fee must be paid with the filing of her appeal. Neither Appellant's counsel, nor her paralegal, explain in their respective affidavits why compliance was not had with NRAP 3(e) when the appeal was filed, or why the Appellant was unable to comply with that rule.

Notwithstanding, separate notice was issued by this court's clerk separately notifying Appellant on January 4, 2022, that payment was due no later than January 11, 2022 (Doc. 22-00221). Appellant was gratuitously given almost another two weeks to pay her filing fee prior to this court's dismissal on January 25, 2022 (Doc. 22-02485), without requesting leave for that additional extension.

In total, our solvent Appellant was given over 30 days to pay the appeal fee. Irrespective of what Appellant's good faith belief may have been about satisfaction of that obligation, payment was not accomplished.

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As such, dismissal is the proper remedy. *Weddell v. Stewart*, 127 Nev. 645, 652, 261 P.3d 1080, 1085 (2011); NRAP 3(a)(2).

DATED this 1st day of February, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point; or

☐ This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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

☒ Proportionately spaced, has a typeface of 14 points or more and contains 558 words; or


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☐ Does not exceed ____ pages.

3. Finally, I hereby certify that I have read this appellate response, 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 response 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of **HALL JAFFE & CLAYTON, LLP**, and on this 1st day of February 2022, I served a copy of the foregoing **RESPONDENTS ROBERT THOMPSON AND TYRON[E] HENDERSON'S RESPONSE TO PETITIONER MARIA MCMILLIN'S MOTION TO VACATE OR MODIFY ORDER DISMISSING APPEAL** as follows:

- ☐ **U.S. MAIL** — By depositing a true copy thereof in the U.S. Mail, first class postage prepaid and addressed as listed below; and/or
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