

Supreme Court No. 84015  
District Court Ref. No. A787989  
Electronically Filed  
Feb 08 2022 11:32 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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## ORDER DISMISSING APPEAL

Respondents urge that the appeal should be dismissed since the appeal was premature due to a pending motion for modification. **Resp., p. 1.** However, the rules of appellate procedure clearly address the result when an appeal is premature. Pursuant to NRAP 4(a)(6) “A premature notice of appeal does not divest the district court of jurisdiction. The court may dismiss as premature a notice of appeal filed after the oral pronouncement of a decision or order but before entry of the written judgment or order, or before entry of the written disposition of the last-remaining timely motion listed in Rule 4(a)(4). If, however, a written order or judgment, or a written disposition of the last-remaining timely motion listed in Rule 4(a)(4), is entered before dismissal of the premature appeal, the notice of appeal shall be considered filed on the date of and after entry of the order, judgment or written

disposition of the last-remaining timely motion.” If necessary due to a substantive amendment, an amended notice of appeal may be filed. NRAP 4(a)(7).

Here, the appeal should be reinstated with the notice of appeal treated as though it were filed on the date the last tolling motion is resolved. If necessary, Appellant will promptly file an amended notice of appeal.

In the unlikely event that this Court in its discretion elects to dismiss the appeal as premature, it should do so without prejudice and with a finding that the Respondents are estopped from later arguing that the motion for reconsideration failed to toll the deadline. If necessary, Appellant would then be able to file a notice of appeal when the tolling motion is fully resolved.

## **II. There is no support for the claim that a failure to pay the filing fee creates a jurisdictional issue.**

In the alternative, the Respondents urge that the failure to timely pay the filing fee should be treated as a jurisdictional defect. **Resp., p. 2.** However, there is no support for this contention.

While Respondents reference a litany of cases, none of them are apropos. *McDowell v. Drake* dismissed the appeal based on a delay of nearly 3 and half months of filing the record on appeal. 77 Nev. 136, 137 (1961). The failure to provide the record to be used on appeal also likely prejudiced the opposing party. That is in stark contrast to the situation here where Appellant believed that the

requirements were met and acted immediately to rectify the situation upon learning that there had been a procedural error. Notably, here the Respondents do not and cannot reasonably allege that there was any prejudice by the minor procedural error which was made in good faith. Notably, this Court has previously distinguished *McDowell v. Drake* and found an appeal should not be dismissed when an appellant was slightly delayed in complying with a procedural requirement in good faith when there was no prejudice. *In re Estate of McLean*, 77 Nev. 331, 333-34, 364 P.2d 407, 408 (1961).

*Dreyer v. Dreyer* is similar to *McDowell* in that it involved a failure to file the record on appeal for an extended period of time, but here the lapse seems even more extreme than in *McDowell* and nothing in the opinion suggests that the record on appeal was ever filed. 74 Nev. 167 (1958). Instead, counsel merely offered excuses which contradicted each other. *Id.* This stands in stark contrast to the instant case where Appellant acknowledges making a minor error in submitting the payment but did so only caused by confusion in using the electronic system. Here, Appellant acted immediately upon learning of the issue to correct it and stands ready to move forward.

In *Cole v. Cole*, the Appellant failed to take any action to move her appeal forward for a period of nine months and did not seem to be ready to move forward when the motion to dismiss was filed. 70 Nev. 486, 487 (1954). Here, Appellant

acted immediately upon learning there was a problem and is ready to move forward promptly.

*Doolittle v. Doolittle* dealt with an extended delay to file the record on appeal where no satisfactory reason for the delay was provided. 70 Nev 163, 165 (1953). Notably, while the Court did dismiss that appeal based upon the lack of justification and extensive delay, part of the authority quoted in that decision expressly notes that other than the requirement to timely file the notice of appeal the remaining requirements are not jurisdictional. *Id.* at 166 (citing *In re Gammill*, 129 F.2d 501, 502 (7th Cir. 1942)). This undercuts rather than supports the Respondent's argument. Much like *McDowell*, the decision in *Doolittle* was expressly distinguished by this Court *In re Estate of McLean* when the lapse of time was more minor, made in good faith, and did not prejudice the other side. 77 Nev. 331, 333-34, 364 P.2d 407, 408 (1961).<sup>1</sup>

Despite the Respondent's attempt to cite a number of cases, none of them support the Respondent's argument. A brief lapse in paying the filing fee does not create a jurisdictional question. Here, the brief lapse was caused by a minor error in using a technological system and was corrected immediately after appellant learned of the problem.

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<sup>1</sup> *Doolittle* was also expressly distinguished in *Gaudin Motor Co. v. Prieth*, 74 Nev. 301, 302, 329 P.2d 1069, 1070 (1958) for similar reasons.

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

Dated: \_\_8 February 2022\_\_\_\_\_

MAINOR WIRTH, LLP

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Mainor Wirth, LLP and that on this 8<sup>th</sup> day of February, 2022, I served a true and correct copy of the foregoing **REPLY TO RESPONSE TO 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 \_\_\_\_\_