IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF REBECCA POWELL, THROUGH BRIAN POWELL, AS SPECIAL ADMINISTRATOR; DARCI CREECY, INDIVIDUALLY AND AS HEIR; TARYN CREECY, INDIVIDUALLY AND AS HEIR; ISAIAH KHOSROF, INDIVIDUALLY AND AS HEIR; AND LLOYD CREECY, INDIVIDUALLY,
Appellants,
vs.
VALLEY HEALTH SYSTEM, LLC, D/B/A CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, A FOREIGN LIMITED LIABILITY COMPANY,
Respondent.

No. 84861

FILED
NOV 30 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a special order after a final judgment awarding respondent attorney fees and costs in a medical malpractice action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Appellants (Powell Estate) brought this medical malpractice action after Rebecca Powell died while being treated at Centennial Hills Hospital, owned by respondent Valley Health System, LLC (VHS). VHS filed a motion to dismiss arguing that the complaint was time-barred and the district court denied VHS's motion. VHS made an offer of judgment under NRCP 68, providing that VHS would "waive any presently or potentially recoverable attorney's fees and costs." Powell Estate rejected VHS's NRCP 68 offer of judgment.

VHS filed a motion for summary judgment raising the same statute of limitations argument as before, which the district court denied

except as to one doctor. VHS subsequently filed a petition for a writ of mandamus in this court. This court granted the petition, concluding that the underlying action was time-barred. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, No. 82250, 2021 WL 4860728, at *2 (Nev. Oct. 18, 2021) (Order Granting Petition). In issuing its writ, this court directed the district court to vacate its prior order and grant summary judgment in favor of VHS. *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, Docket No. 82250 (Writ of Mandamus, Oct. 19, 2021).

Following remand, the district court granted summary judgment and VHS moved for post-offer attorney fees and its full costs. The district court initially denied VHS's motion because it failed to include sufficient documentation. VHS moved for reconsideration, attaching additional supporting documentation. Before briefing was complete on its reconsideration motion, VHS also appealed the district court's order denying its original fee request. The district court subsequently entered an order concluding that it lacked jurisdiction to grant the motion for reconsideration while the appeal was pending but indicated it would award VHS the specific amounts of $110,849.85 in attorney fees and $8,056.93 in costs if it did have jurisdiction ("*Huneycutt* order"). The *Huneycutt* order also directed VHS to convey the order to this court pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), and *Foster v. Dingwall*, 126 Nev. 49, 228 P.3d 453 (2010).

Meanwhile, this court entered an order to show cause, observing that the notice of appeal was prematurely filed under NRAP 4(a) because it was filed after a timely motion for reconsideration, but before that motion was resolved. This notice alerted the parties to the jurisdictional defect at issue. Thereafter, while VHS did not notify this

court of the *Huneycutt* order, it did file a notice to voluntarily withdraw its appeal. This court dismissed the appeal, *see Valley Health Sys., LLC v. Estate of Powell*, No. 84402, 2022 WL 1548732 (Nev. May 16, 2022) (Order Dismissing Appeal), and VHS submitted a proposed judgment to the district court. The district court signed the judgment awarding VHS the specific amount of attorney fees and costs as it had previously indicated it would award if it had jurisdiction.

Powell Estate's appeal is timely

Preliminarily, we address VHS's assertion that we lack jurisdiction to consider Powell Estate's arguments concerning the *Huneycutt* order because it failed to timely appeal from that order. In response, Powell Estate asserts that the *Huneycutt* order was not appealable because it did not finally resolve the attorney fees and costs issues. Powell Estate is correct.

While the *Huneycutt* order contains the district court's analysis and anticipated order on the fees and costs issues, the court did not actually award anything to VHS at that time. Instead, the court merely certified its intent to do so if and when it obtained jurisdiction. Thus, the *Huneycutt* order did not resolve the post-judgment attorney fees and costs issues and was not appealable as a special order after final judgment. *See Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002) (recognizing that a special order after final judgment appealable under NRAP 3A(b)(8) must affect the rights of a party growing out of the final judgment). Instead, Powell Estate properly appealed from the later judgment awarding VHS attorney fees and costs. *Winston Prod. Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006) ("An order awarding attorney fees and costs is substantively appealable as a special order after final judgment."). The judgment awarding attorney fees to VHS is an appealable order pursuant

to NRAP 3A(b)(8). Therefore, Powell Estate may raise relevant arguments concerning the *Huneycutt* order in the context of its appeal from the attorney fees and costs judgment.

Powell Estate filed its notice of appeal the same day the district court issued the judgment awarding fees and costs to VHS. Since Powell Estate filed its notice of appeal after the motion for reconsideration was resolved and less than thirty days after the judgment resolving the motion was entered, we conclude that Powell Estate's appeal was timely filed. *See* NRAP 4(a)(5) ("notice of appeal must be filed after entry of a written order disposing of the last such remaining timely motion and no later than 30 days from the date of service of written notice of entry of that order").

The district court had jurisdiction to enter its judgment

Generally, "a timely notice of appeal divests the district court of jurisdiction to act." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). However, "[a] premature notice of appeal does not divest the district court of jurisdiction." NRAP 4(a)(6). Where the notice of appeal is filed "before entry of the written disposition of the last-remaining timely [tolling] motion," this court may dismiss the appeal as premature. *Id.* However, "unless the premature appeal has already been dismissed," it "shall be considered filed on the date of . . . [the] written disposition of the last-remaining [tolling] motion.'" *AA Primo Builders, LLC*, 126 Nev. 578, 584 n.2, 245 P.3d 1190, 1194 n.2 (2010) (second alteration in original) (quoting NRAP 4(a)(6)).

We conclude that VHS's previous notice of appeal was prematurely filed. *See* NRAP 4(a)(6) (explaining that an appeal is premature if it is filed before a tolling motion is resolved). VHS filed its motion for reconsideration in district court on February 23, 2022. While the motion for reconsideration was pending, VHS filed its notice of appeal.

Since VHS's tolling motion was pending when it filed its notice of appeal, the appeal was premature, and the district court retained jurisdiction.

We further conclude that the district court retained jurisdiction of this matter throughout VHS's appeal. The district court's jurisdiction did not depend on this court dismissing VHS's appeal. *See* NRAP 4(a)(6) (providing that while "[t]he court *may* dismiss as premature" appeals filed before the district court resolves a tolling motion, "[a] premature notice of appeal does not divest the district court of jurisdiction") (emphasis added). This court entered an order to show cause why the appeal should not be dismissed for lack of jurisdiction, noting that "[a] timely tolling motion terminates the 30-day appeal period, and a notice of appeal is of no effect if it is filed after such a tolling motion is filed and before the district court enters a written order finally resolving the motion." *Valley Health Sys., LLC v. Estate of Powell*, Docket No. 84402, at *1-2 (Order to Show Cause, Apr. 29, 2022). Without ruling on the timeliness of the appeal, this court entered an order dismissing the appeal following VHS's notice of voluntary withdrawal. *See Valley Health Sys., LLC v. Estate of Powell*, No. 84402, 2022 WL 1548732 (Nev. May 16, 2022) (Order Dismissing Appeal).

VHS's premature appeal was dismissed before the district court resolved the motion for reconsideration. *See* NRAP 4(a)(6); *see also AA Primo Builders*, 126 Nev. at 584 n.2, 245 P.3d at 1194 n.2. The district court certified in the *Huneycutt* order that it would award attorney fees and costs to VHS *if it had jurisdiction*. However, as noted above, the *Huneycutt* order did not actually award attorney fees and costs because the district court believed it lacked jurisdiction to do so at that time. After VHS's appeal had been voluntarily dismissed, the district court entered its judgment actually awarding attorney fees and costs to VHS, referencing and

attaching its *Huneycutt* order. Thus, while the district court alluded to resolving the motion for reconsideration in its *Huneycutt* order, it did not finally resolve the motion for reconsideration until after the appeal had been dismissed.

This court has outlined specific procedures to be followed where a party seeks to have the district court alter, vacate, or otherwise modify an order *after* also challenging that order on appeal. *See Foster v. Dingwall*, 126 Nev. 49, 52-53, 228 P.3d 453, 455-56 (2010); *contra Huneycutt v. Huneycutt*, 94 Nev. 79, 80-81, 575 P.2d 585, 586 (1978). Under such circumstances, this court "retains jurisdiction *unless it expressly dismisses the appeal*," NRAP 12A(b) (emphasis added); *see also* NRCP 62.1 (concerning "Indicative Ruling[s] on a Motion for Relief That Is Barred by a Pending Appeal"), and the moving party must seek a remand with this court before the district court may modify its order. *Foster*, 126 Nev. at 53, 228 P.3d at 455-56. However, the "procedure is not necessary when seeking relief through a motion . . . filed in the district court *prior* to the filing of the notice of appeal." *Id.* at 52 n.1, 228 P.3d at 455 n.1 (emphasis added). Since VHS's motion was filed before its appeal, we conclude that the *Huneycutt/Foster* procedure is inapplicable here.

Accordingly, because the district court was not divested of jurisdiction to rule on VHS's motion for reconsideration, we conclude that the district court erred when it found it did not have jurisdiction to grant VHS's motion. *See Chapman Industries v. United Ins. Co. of America*, 110 Nev. 454, 457-58, 874 P.2d 739, 741 (1994) (holding the district court erred in concluding that it lacked jurisdiction to entertain certain motions when it actually retained jurisdiction). Nonetheless, the district court's error was harmless. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010)

(providing that an error is prejudicial and warrants a reversal where "the movant . . . show[s] that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"). The district court entered an award of attorney fees and costs upon learning there was no longer an appeal pending before this court. The final judgment by the district court awarded the exact amount it previously indicated it would award if it had jurisdiction, thus it is clear that the court came to the same result after the court's jurisdiction was clarified. Therefore, its mistaken belief, as expressed in the *Huneycutt* order, that it originally lacked jurisdiction did not violate Powell Estate's substantial rights. *See id.*

The district court did not abuse its discretion in awarding attorney fees and costs

Generally, "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Moreover, arguments raised for the first time on appeal are generally not considered. *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008).

We conclude that Powell Estate waived any challenge to VHS's claimed costs because it did not file a motion to retax pursuant to NRS 18.110(4). *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005) (providing that appellate review of costs is waived where the challenging party does not submit a motion to retax and settle costs in the district court). VHS filed its memorandum of costs and motion for attorney fees on November 22, 2021. While Powell Estate opposed VHS's motion for attorney fees, it did not file a motion to retax costs. Nor did it file a motion to retax costs in response to VHS's motion for

reconsideration on the attorney fees and costs issue. Thus, Powell Estate waived any arguments challenging the district court's cost award.

We further conclude that Powell Estate waived its argument challenging the attorney fee award as an abuse of discretion because Powell Estate attempts to raise it for the first time on appeal. *See Barta*, 124 Nev. at 621, 188 P.3d at 1098. In their motion for reconsideration, VHS provided the district court with the necessary documentation for the court to engage in a substantive analysis of their fees and costs request. Powell Estate failed to raise any challenge on the merits of the fees request in its opposition to VHS's motion for reconsideration, instead citing only procedural grounds for denial. Specifically, Powell Estate argued in its opposition to VHS's motion for reconsideration that (1) VHS could not seek reconsideration based on evidence they could have relied on previously, and (2) the district court could not reconsider its prior order because it was not clearly erroneous. Thus, Powell Estate waived its right to challenge the attorney fees decision on appeal, because the decision arose from the district court's reconsideration.

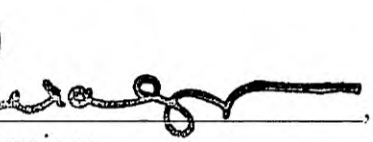
Powell Estate now argues that the district court abused its discretion by (1) departing from its original analysis in its order denying attorney fees and costs, and (2) failing to separately reiterate the *Beattie* factor analysis in its judgment. Nevertheless, on the merits, the fees award was proper. The district court has the discretion to reconsider a previous denial of attorney fees and did not abuse its discretion in doing so here. When the district court addressed the motion for reconsideration, it engaged in an appropriate *Beattie* analysis and evaluated the *Brunzell* factors before concluding that attorney fees were warranted for VHS. *See Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983); *See also Brunzell v.*

Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The court also identified the specific amount of attorney fees and costs it would award when it believed it had jurisdiction. Further, the district court's judgment was in conformity with the specific decision it indicated it would make when it addressed VHS's motion for reconsideration, and we conclude that the district court did not abuse its discretion in awarding attorney fees. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

cc: Hon. Jerry A. Wiese, Chief Judge
Stephen E. Haberfeld, Settlement Judge
Paul Padda Law, PLLC
Quintairos, Prieto, Wood & Boyer, P.A./Henderson
Eighth District Court Clerk