

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE
OF THOMAS JOSEPH HARRIS,
DECEASED,

Supreme Court Case No.
86096 Electronically Filed
Sep 05 2023 04:30 PM
Elizabeth A. Brown
District Court Clerk of Supreme Court
2022-PB-00119

TODD ROBBEN,

Appellant,

vs.

THE ESTATE OF THOMAS JOSEPH
HARRIS, AND THOMAS J. HARRIS
TRUST,

Respondents.

OPPOSITION TO MOTION TO STRIKE RESPONDENTS

NOTICE OF INTENT TO OPPOSE MOTION FOR SANCTIONS

IF ORDERED; APPELLANT REQUESTS

FURTHER SANCTIONS

Respondents, Estate of Thomas J. Harris, by and through its Personal Representative, the Honorable Tara M. Flanagan (the "Estate"), and the Thomas J. Harris Trust, by and through its Successor Trustee, Ms. Flanagan, (the "Trust") jointly present this Opposition to Appellant's "Motion to Strike Respondents Notice of Intent to Oppose Motion for Sanctions if Ordered, Appellant Requests Further Sanctions"

(hereinafter referred to as Appellant’s “Motion to Strike”) filed on August 29, 2023.

INTRODUCTION

On August 24, 2023, Respondents filed their Notice of Intent to Oppose the Appellant’s Second for Sanctions if Ordered (the “Notice”). The Respondents filed their Notice, in an abundance of caution, recognizing no response to the Appellant’s Second Request for Sanctions was required by the governing NRAP. *See* NRAP 27(a)(3)(A). Moreover, Respondents filed their Notice to demonstrate their diligence in abiding the most conservative procedure was made clear to this honorable Court amid the flurry of filings by the Appellant. Sadly, this matter has taken on a life outside of the case itself, which is of concern to the Respondents and their Counsel. In navigating this circumstance, the Respondents and their Counsel are avoiding unnecessary filings, and in doing so being respectful of incurring unnecessary attorney’s fees and costs which impact the Trust beneficiaries.

The Respondents’ Notice presents a relevant factual and procedural history supportive of this Opposition. To work toward judicial economy, the Respondents adopt and incorporate by reference the content of their Notice into this Opposition. As of the date of filing this Opposition, the

Court has not requested Respondents oppose or otherwise respond to Appellant's First Amended Verified Request for Sanctions Against Respondent and Counsel Fred M. Wallace filed on August 16, 2023 (also referred to herein as Appellant's "Second Request for Sanctions"). However, the Respondents remain ready and prepared to file such papers if instructed to do so by the Court.

More recently, on August 29, 2023, Mr. Robben filed Appellant's Motion to Strike Respondents Notice of Intent to Oppose Motion for Sanctions if Ordered; Appellant Requests Further Sanctions, and also filed Appellant's Reply in Support of Verified Request for Sanctions Against Respondent and Respondent's Counsel. Respondents now respond to and oppose Appellant's Motion to Strike as well as address and oppose the contents of the Appellant's Reply.

ARGUMENT

I. APPELLANT'S MOTION TO STRIKE IS WITHOUT MERIT

The gravamen of Appellant's Motion to Strike is erroneously premised on perceived violations of NRAP 28.2. Specifically, Appellant moves to strike the Notice because:

“The factual allegations made by Mr. Wallace are not made under penalty of perjury, no affidavit was provided, and once again Mr. Wallace did not add the NRAP 28.2 verification.” See pg. 2 of Motion to Strike.

NRAP 28.2 is inapplicable to a “notice”, such as Respondents’ Notice. Appellant now moves to strike. NRAP 28.2 applies to briefs. Briefs are enumerated as an opening brief, an answering brief and a reply brief. A notice is not a brief. No NRAP 28.2 certification was required. In addition, there is nothing in the Nevada Rules of Appellate Procedure that requires the contents of a notice be made under penalty of perjury or be supported by an affidavit.

Additionally, Appellant cites NRCP 12(f) for his argument the Court should strike Respondents’ Notice. The procedural rules of the District Courts do not apply before this Honorable Court. Because matters before the Court are governed by NRAP, NRCP 12(f) does not apply here. Even if NRCP 12(f) did apply, the Rule applies to the Court’s authority to strike a pleading. See NRCP 12(f). A “notice” is not a pleading. Moreover, even if the Court were to consider Respondent’s Notice as being a pleading, which it is not, Appellant’s argument fails.

NRCP 12(f) provides that a Court may strike from a pleading an insufficient defense, or any “redundant, immaterial, impertinent, or

scandalous matter.” *See* NRCP 12(f). Motions to strike are generally disfavored by the Court, and to strike material from a pleading, the Court must rely on at least one of the specific grounds identified in NRCP 12(f). *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973-74 (9th Cir. 2010).

A “redundant” matter is that which “consists of allegations that constitute repetition of other averments.” *See Germaine Music v. Universal Songs of Polygram*, 275 F. Supp. 2d 1288, 1299-1300 (D. Nev. 2003), *aff’d in part*, 130 F. App’x 153 (9th Cir. 2005) (citation omitted). A matter which is “immaterial” is that which has no essential or important relationship to the claim for relief or the defenses being pleaded.” *Id.*, at 1300, citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994). An “impertinent” matter consists of statements that do not pertain to or are not necessary to the issues in question. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 711 (1990). “Scandalous” typically refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court. *See Armed Forces Bank, N.D. v. FSG-4, LLC*, 2011 U.S. Dist. Lexis 130636 (D. Nev. (unreported)).

Here, no part of the Respondents' Notice meets any of the criteria set forth in NRCP 12(f). Specifically, the direct and limited information in the Notice is material and pertinent as it preserves the Respondents ability to file an opposition and/or response to the Appellant's Second Request to Sanctions if directed by the Court. Moreover, the content of the Notice is uniquely pertinent to this matter given the papers filed by the Appellant. Finally, the content of the Notice is not scandalous as it does nothing more than provide a limited and relevant notice to the Court – the Notice does not reflect on the moral character of any individual nor state any repulsive language. Thus, even if NRCP 12(f) could be applied to this Notice, which it cannot, there is no legal basis to strike the Notice under NRCP 12(f). Therefore, this Court should deny Appellant's Motion to Strike.

Additionally, Mr. Robben's reliance on District Court Rules ("DCR") and the findings in *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010), is misplaced. DCR governs procedures in Nevada's District Courts, not in the Nevada Supreme Court where Nevada Rules of Appellate Procedure ("NRAP") govern. While DCR 13 states that "the opposing party shall serve and file a written opposition ...," NRAP 27 has

no such requirement. Specifically, NRAP 27(a)(3)(A) which governs this matter states:

“Any party **may** file a response to a motion.”

See NRAP 27(a)(3)(A), emphasis added.

Accordingly, NRAP 27(a)(3)(A) allows a party to file a response to a motion but does not require it.

Despite Appellant’s assertions in his Reply in Support of Verified Request for Sanctions Against Respondent and Respondent’s Counsel, DCR 13 is inapplicable to the procedure of this Court, and the Respondents were not required to file a response to Mr. Robben’s Second Request for Sanctions. *See* NRAP 27(A)(3). The Supreme Court is tasked with deciding matters on their merits and on the record produced at the District Court as well as developed before this Court. In that vein, this Court retains jurisdiction to request a response from Respondents if the Court determines that a response will assist it in making a decision on the merits of Mr. Robben’s Second Request for Sanctions – the contents of which are denied in full by the Respondents and their Counsel.

II. APPELLANT’S REQUEST FOR SANCTIONS IS WITHOUT MERIT

Appellant again inappropriately cites to NRAP 28.2 for his argument that pursuant to NRAP 28.2(c) “The Supreme Court or Court

of Appeals may impose sanctions against an attorney whose certificate is incomplete or inaccurate.” As stated above, NRAP 28.2 applies only to briefs, and does not apply to notices. Thus, no certification by Counsel was required.

In accordance with the NRAP, and in an attempt to conserve the resources of the Trust, Counsel for Respondents are using restraint whenever possible to not respond to each and every motion/paper filed by Mr. Robben. This undertaking is balanced with the Respondents desire to follow the rules of appellate procedure, abide by the instructions of this Court, as well as provide this honorable Court a record of the happenings in this case. Being mindful of these efforts, Respondents placed a record of Counsel’s conversations with the office of the clerk in their Notice. This was done to provide a recitation of their efforts to abide the governing procedural rules of appellate procedure, while not engaging in repetitive, unnecessary filings which only serve to cloud the docket and incur fees.

The Respondents firmly disagree with the Appellant’s characterization of the content of the Notice, in particular that Counsel is claiming the Court Clerk provided incorrect legal advice. The Notice was intended merely to demonstrate the Respondents’ due diligence in abiding both the applicable procedural rules while navigating the unique

and difficult circumstances brought on by this case. As set forth above, NRAP 27 makes clear no response to a motion/request is required before this honorable Court. Again, the Respondents, by and through Counsel, placed their communications with the office of the clerk into the Notice to ensure transparency, and in support of their request for leave to oppose the Appellant's Second Request for Sanctions if it is not summarily disposed of by this Court, and if so directed by this Court.

CONCLUSION

Based on the above, Respondents respectfully request Appellant's Motion to Strike be denied in full.

DATED this 5th day of September 2023.

By: /s/ F. McClure Wallace.
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Personal Representative for the
Estate of Thomas J. Harris, and
as Successor Trustee of the
Thomas J. Harris Trust

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am an employee of *WALLACE & MILLSAP* that I am over the age of eighteen (18) years, and that I am not a party to, nor interested in this action. On this date, I caused to be served a true and correct copy of the foregoing document on all parties to this action by placing an original or true copy thereof in a sealed envelope placed for collection and mailing by the United States Postal Service, at Reno, Nevada postage paid, following the ordinary course of business practices as follows:

Todd Robben
P.O. Box 4251
Sonora, California 95370

DATED this 5th day of September 2023.

By: /s/ Caroline Carter.

Employee of Wallace & Millsap