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IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, individually, Appellant, vs. DAVID E. LUJAN, individually; and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company, Respondents.	Supreme Court No. 77753 District Court No. A-15-718679-C **RESPONDENT HARVEST MANAGEMENT SUB LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS PREMATURE; AND RESPONSE TO APPELLANT'S CONDITIONAL COUNTER-MOTION TO POSTPONE OR EXTEND TIME FOR CONSIDERATION OF MOTION TO DISMISS**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS PREMATURE; AND RESPONSE TO APPELLANT'S CONDITIONAL COUNTER-MOTION TO POSTPONE OR EXTEND TIME FOR CONSIDERATION OF MOTION TO DISMISS

I. INTRODUCTION

Respondent Harvest Management Sub LLC ("Harvest") submits this Reply in support of its Motion to Dismiss Appeal as Premature. It is indisputable that Appellant Aaron M. Morgan's ("Mr. Morgan") claim against Harvest was not resolved by the jury's verdict and is currently the subject of a Motion for Entry of Judgment pending in the district court. As such, Mr. Morgan's appeal is premature.

There is no good cause to deny this Motion, without prejudice, or to delay decision of this Motion (while also granting Mr. Morgan a thirty-day extension of time to substantively respond to the Motion) merely because the appeal has been assigned to the Settlement Program. It would be a waste of judicial resources, and Harvest's resources, to force the parties to mediate a case for which this Court lacks jurisdiction.

Therefore, Harvest respectfully requests that Mr. Morgan's Counter-Motion be denied in its entirety and that this appeal be dismissed.

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II. ARGUMENT

A. Mr. Morgan Misrepresents the Facts of the Underlying Case.

First, Mr. Morgan states that the jury "ultimately found ***Defendants*** negligent and 100% at fault for the accident." (Response at 2 (emphasis added).) However, the jury's verdict was rendered *solely* against a single defendant, Respondent David E. Lujan. (Mot. at Ex. 2.) This was confirmed when the district court denied Mr. Morgan's Motion for Entry of Judgment, seeking to apply the jury's verdict to Harvest. (Mot. at Ex. 5, Ex. 6, at 9:8-18.)

Second, Mr. Morgan misrepresents that his current appeal "implicates *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 191, 772 P.2d 1284, 1286 (1989), because Judge Gonzalez rejected Mr. Morgan's argument that Judge Bell, the jurist who presided over every aspect of the case, including both trials, is better equipped to address purported irregularities in the verdict form." (Response, at 3.) Mr. Morgan never moved (or even argued) that his Motion for Entry of Judgment should be heard by the trial judge, Judge Bell, versus the current presiding judge in the underlying action, Judge Gonzalez. This issue was not raised by Mr. Morgan until his opposition to Harvest's

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pending Motion for Entry of Judgment. Therefore, this is not an issue currently on appeal.

B. <u>Assignment to the Settlement Program Does Not Warrant Denial of the Motion or Constitute Good Cause for a Delay.</u>

Mr. Morgan contends that this Court should deny Harvest's Motion without prejudice, or stay the decision of this Motion (while granting him a 30-day extension of time in which to respond to the Motion) merely because this appeal has been assigned to the Settlement Program.[1] (Response, at 4-5.) However, Mr. Morgan has failed to cite to any legal authorities to demonstrate that the denial or stay of a Motion to Dismiss for lack of jurisdiction is warranted when an appeal has been assigned to the Settlement Program. The three orders upon which Mr. Morgan relies are inapposite as they concern the *merits* of the appeal and/or an in-depth analysis of the underlying case to determine the timeliness of an appeal. (*See* Response at Ex. 3, at 3 (denying Motion to Dismiss in Case No. 61320 where a "Motion for Summary

[1] Mr. Morgan asserts that Harvest's Motion is untimely because it was filed after the appeal was assigned to the Settlement Program. (Response at 1.) However, no rule of appellate procedure provides a deadline for filing a motion to dismiss on jurisdictional grounds – likely because subject matter jurisdiction is not waivable. To the extent that NRAP 14(f) provides a deadline, by requiring that jurisdictional defects be addressed by a motion to dismiss rather than a response to a docketing statement, Harvest's Motion was filed before the expiration of the NRAP 14(f) deadline.

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Affirmance," asserted that the appellant's arguments were "devoid of merit"); *see also* Ex. 1,[2] at 2 (assertion by appellant's counsel that motion to dismiss in Case No. 70154 should be denied because the motion concerned the merits of the appeal); Ex 2[3] (asserting that appeal in Case No. 57152 was untimely because appellant's NRCP 59 Motion was really just a motion for reconsideration).) Here, Harvest does not seek a dismissal based on the merits of the appeal, nor does Harvest's Motion require an in-depth analysis of the underlying case. Harvest's jurisdictional Motion is based solely on the fact that Mr. Morgan has not appealed from a final judgment — given that a motion is currently pending to resolve the sole remaining claim that the district court already determined was never presented to the jury.

Mr. Morgan has also failed to provide any reason why he is prevented from substantively opposing this Motion at this time. Mr. Morgan merely claims that it would be a waste of judicial resources for him to respond to this Motion before the mediation has occurred. In reality, it is a greater waste of

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[2] Opp'n to Mot. to Dismiss Appeal (July 7, 2016), *Park West Cos. v. Amazon Constr. Corp.* No. 70154, is attached as Exhibit 1.

[3] Mot. to Dismiss (Dec. 28, 2010), *West Charleston Lofts I, LLC v. Interior Specialists, Inc.*, No. 57152, is attached as Exhibit 2. The exhibits to the motion have been omitted in the interest of economy.

judicial resources, and Harvest's resources, to force the parties to mediate a case for which this Court lacks jurisdiction. It was Mr. Morgan's choice to file a premature appeal – therefore, he is not unfairly burdened by responding to this Motion. A final judgment is easily demonstrated by comparing the claims alleged in the complaint with notices of entry of judgment and/or orders of dismissal. Mr. Morgan chose not to oppose the Motion because it is indisputable that a claim against Harvest remains unresolved in the underlying case.

III. CONCLUSION

For the foregoing reasons, Harvest respectfully requests that its Motion be granted, and this appeal be dismissed. Further, Harvest requests that Mr. Morgan's Counter-Motion be denied in its entirety, for lack of good cause.

DATED this 22nd day of February, 2019.

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By: */s/ Dennis L. Kennedy*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 22nd day of February, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS PREMATURE; AND RESPONSE TO APPELLANT'S CONDITIONAL COUNTER-MOTION TO POSTPONE OR EXTEND TIME FOR CONSIDERATION OF MOTION TO DISMISS** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

PARK WEST COMPANIES INC., a Nevada Corporation, Appellant, vs. AMAZON CONSTRUCTION CORPORATION, a Nevada Corporation, Respondent.	Case No.: 70154 Appeal from the Eighth Judicial District Court, the Honorable Mark R. Denton Presiding

OPPOSITION TO MOTION TO DISMISS APPEAL

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Attorneys for Appellant, Park West Companies Inc.

I. INTRODUCTION

Respondent, Amazon Construction Corp. ("Amazon"), prematurely seeks dismissal of this appeal. Although Amazon confirmed, along with the Settlement Judge, in both May and June that this case is appropriate for the NRAP 16 settlement conference, Amazon now attempts to avoid participation in the settlement conference set for August 24, 2016. Additionally, Amazon's motion to dismiss seeks to resolve the threshold question in this appeal on the merits, which is inappropriate for a motion to dismiss. *See Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959). Finally, on the merits, the threshold question presented in this case deals with the collateral order doctrine, which Park West asks this Court to adopt. Since *State, Taxicab Authority v. Greenspun*, 109 Nev. 1022, 862 P.2d 423 (1993) was decided, in which this Court rejected the collateral order doctrine in a different context, several courts have addressed this doctrine in the same procedural posture as the instant case. The merits of this appeal are intertwined with this threshold jurisdictional issue. Therefore, the Court should first allow the case to proceed through the NRAP settlement program and through briefing.

II. LEGAL ARGUMENT

A. AMAZON'S MOTION TO DISMISS IS PREMATURE.

On May 26, 2016, the Settlement Judge entered a report indicating that this case is appropriate for the NRAP 16 settlement conference program based upon the

agreement of both Park West and Amazon. On June 15, 2016—the day ***after*** Amazon filed its motion to dismiss—the Settlement Judge again confirmed in another report that this case is appropriate for the NRAP 16 settlement conference program. In fact, the June 15, 2016 report sets the settlement conference for August 24, 2016. The premature timing of Amazon's motion to dismiss suggests that Amazon is attempting to avoid participation in the scheduled settlement conference program. Therefore, the Court should deny Amazon's motion to dismiss and allow the scheduled settlement conference to go forward.

B. AMAZON'S MOTION TO DISMISS IMPERMISSIBLY SEEKS TO CHALLENGE THE MERITS OF THIS APPEAL.

Park West has presented the threshold question in this case as the Court's adoption of the collateral order doctrine. Notably, since this appeal has only recently been docketed, Park West has only identified the expected issues to be briefed in the docketing statement, as required by NRAP 14. As stated in NRAP 14(a)(5), "the parties' briefs will determine the final issues on appeal." Despite the fact that the substantive issues of Park West's analysis of the collateral order doctrine will be briefed (assuming an unsuccessful settlement conference), Amazon impermissibly attempts to bring these substantive issues to a decision through a motion. As a matter of law, a motion to dismiss is an improper vehicle to resolve the merits of an appeal. In *Taylor v. Barringer*, 75 Nev. 409, 410, 344

P.2d 676, 676 (1959), this Court refused to dismiss an appeal based upon the alleged failure to state a claim and held, "This goes to the merits of the appeal and is not a proper ground for dismissal of appeal." Therefore, the Court should refuse to dismiss the merits of this appeal based upon the vehicle of Amazon's motion to dismiss.

C. PARK WEST'S APPEAL PRESENTS A REASONABLE REQUEST FOR THIS COURT TO ADOPT THE COLLATERAL ORDER DOCTRINE.

In *State, Taxicab Authority v. Greenspun*, 109 Nev. 1022, 862 P.2d 423 (1993), this Court rejected the collateral order doctrine in the context of an order of remand from the District Court back to the agency. In recognizing certain orders as falling within the scope of the collateral order doctrine, the United States Supreme Court has explained that these orders are treated as final for purposes of appealability. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). Since *Greenspun*, several courts in other states have discussed the appealability of orders denying summary judgment in the context of the collateral order doctrine.

In *Transp. Eng'g, Inc. v. Cruz*, 152 So.3d 37, 49 (Fla. Dist. Ct. App. 2014) *review denied,* 171 So.3d 115 (Fla. 2015), an appeal was brought on the issue of a denial of summary judgment. The court considered an appeal at the conclusion of the case was not an adequate remedy because, under the facts of the case, the ruling could result in irreparable harm if not addressed prior to the trial. *Id.* at 47. In that case, the appellate court quashed a trial court's order denying a motion for summary judgment because there was not the required expert testimony evidence to form an issue of material fact and preclude summary judgment on certain theories of liability in the case. *Id.* at 49. The court found that if the issue was not addressed at that time, prior to trial, there would be no remedy after the trial that would address the issue raised in the summary judgment motion. *Id.* at 46. *Cf. Florida Fish & Wildlife Conservation Comm'n v. Jeffrey*, 178 So.3d 460, 464 (Fla. Dist. Ct. App. 2015), *reh'g denied* (Nov. 20, 2015). Additionally, the adoption of the collateral order doctrine in the context of the denial of summary judgment has been extended to non-governmental parties. *See, e.g., Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1110 (9th Cir. 2002) (applying the collateral order doctrine to statutes of repose issues in denial of summary judgment context). Therefore, Park West's appeal presents a reasonable request to adopt the collateral order doctrine in certain circumstances applicable to this case.

III. CONCLUSION

Amazon's motion to dismiss is premature since this case is assigned to the NRAP 16 settlement conference program, and a settlement conference has been scheduled for August 24, 2016. Additionally, Amazon's motion to dismiss is an improper vehicle to resolve the merits of Park West's request for this Court to adopt the collateral order doctrine—in light of recent trends in other courts. Since Park West has presented a reasonable request for this Court to adopt the collateral order doctrine, the Court should allow this case to proceed to briefing.

Dated this 6th day of July, 2016.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO MOTION TO DISMISS APPEAL** was filed electronically with the Nevada Supreme Court on the 6th day of July, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert Schumacher, Esq.
Robert Larsen, Esq.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Lansford W. Levitt, Esq.
4747 Coughlin Parkway #6
Reno, NV 89519
Settlement Judge

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

WEST CHARLESTON LOFTS I, LLC Appellant, vs. INTERIOR SPECIALISTS, INC., Respondent.	CASE NO. 57152 District Court Case No. A594094 Consolidated with A570430

Respondent, INTERIOR SPECIALISTS, INC. ("ISI"), by and through its attorneys, McCULLOUGH, PEREZ & ASSOCIATES, LTD., pursuant to N.R.A.P. 27 and N.R.A.P. 4, herewith respectfully requests this Court dismiss the current appeal as untimely.

Respondent's Motion is based on the pleadings and papers on file herein, the attached points and authorities, exhibits submitted herewith and the argument of counsel, if any, at the time set for any hearing of this matter.

I.
BACKGROUND

The Appellant, WEST CHARLESTON LOFTS I, LLC ("WCL") and CHRISTOPHER COMMERICAL, LLC, ("CC"), an additional defendant below, contacted Respondent, INTERIOR SPECAILISTS, INC., ("ISI"), and requested it supply a large amount of labor and materials to a condominium project located in Summerlin, Las Vegas; near 11441 Allerton Park Drive. The project consisted of approximately forty (40) luxury condominiums called the C2 Lofts ("Loft Project"). ISI entered into a subcontract ("Subcontract") with CC to perform the requested work. ISI performed the work, submitted invoices, but was not fully paid. When WCL and CC failed to pay after multiple requests, ISI recorded a lien against the Loft Project. WCL filed a motion to

expunge and/or reduce the lien amount; which the District Court granted in part and reduced the lien to cover a single unit within the Loft Project.

ISI filed suit seeking lien foreclosure and additional breach of contract damages. CC then moved to compel arbitration pursuant to an arbitration provision in the Subcontract. The District Court granted the motion to compel arbitration and the claims were arbitrated. After a day-long arbitration, the arbitrator entered his decision on April 28, 2010. The arbitrator's decision was a full 17 pages and determined ISI was the prevailing party. ISI subsequently moved to confirm the arbitration award in the District Court. WCL and CC opposed the motion and filed a countermotion requesting the arbitration award be vacated. The District Court granted ISI's motion, denied the countermotion, and entered judgment in favor of ISI on July 27, 2010 ("Judgment"). Notice of Entry of the Judgment was provided to WCL and CC on July 28, 2010. On August 18, 2010, WCL filed a document with the District Court titled "NRCP 59 Motion to Alter or Amend Judgment." The District Court heard and denied the motion on September 30, 2010. WCL's appeal and the current motion to dismiss said appeal followed.

II.
RELEVANT LEGAL STANDARD

N.R.A.P. 27 states in relevant part,

> **"(a) In General.**
> **(1) Application for Relief. An application for an order or other relief is made by motion unless these Rules prescribe another form. A motion must be in writing and be accompanied by proof of service.**
> **(2) Contents of a Motion. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. The motion shall contain or be accompanied by any matter required by a specific provision of these Rules governing such a motion. If a motion is supported by affidavits or other papers, they shall be served and filed with the motion."**

III.
ARGUMENT IN SUPPORT OF MOTION

A. THE CURRENT APPEAL SHOULD BE DISMISSED AS UNTIMELY.

N.R.A.P. 4(a) states in relevant part:

> **"(1) Time and Location for Filing a Notice of Appeal. In a civil case in which an appeal is permitted by law from a district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the district court clerk. Except as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. If an applicable statute provides that a notice of appeal must be filed within a different time period, the notice of appeal required by these Rules must be filed within the time period established by the statute.**
>
> ***
>
> **(4) Effect of Certain Motions on a Notice of Appeal. If a party timely files in the district court any of the following motions under the Nevada Rules of Civil Procedure, the time to file a notice of appeal runs for all parties from entry of an order disposing of the last such remaining motion, and the notice of appeal must be filed no later than 30 days from the date of service of written notice of entry of that order:**
>
> **(A) a motion for judgment under Rule 50(b);**
>
> **(B) a motion under Rule 52(b) to amend or make additional findings of fact;**
>
> **(C) a motion under Rule 59 to alter or amend the judgment;**
>
> **(D) a motion for a new trial under Rule 59."**

Here, WCL is appealing the Order and Judgment confirming the arbitration award. Therefore, under N.R.A.P. 4(a) WCL had 30 days from notice of entry of the judgment to file the instant appeal. Notice of Entry of Order confirming the arbitration award was served by mail on July 28, 2010. (See Exhibit "A"). As such, WCL had up to, and including August 30, 2010, to file its notice of appeal. On August 18, 2010, WCL filed a document titled "NRCP 59 Motion to Alter or Amend Judgment." (See Exhibit "B"). While the motion was titled such, the motion did not seek to have the judgment "amended" in accordance with N.R.C.P. 59. A cursory review of the motion shows WCL actually sought reconsideration of a prior ruling and correction of an alleged clerical error. ISI believes WCL intentionally included the phrase "N.R.C.P. 59" in the title of its motion

simply to attempt to toll the N.R.A.P. 4(a) filing requirements and stall the proceedings.

Merely calling a document "N.R.C.P. 59 Motion to Alter or Amend Judgment" does not make it so. As this Court has stated, **"[c]alling a duck a horse does not change the fact it is still a duck."** Wolff v. Wolff, 112 Nev. 1355, 1363, 929 P.2d 916, 921 (1996). This Court should therefore look past the mere title of the document and review it based on substance. Because WCL's motion was not a motion to amend under N.R.C.P. 59, the 30-day deadline set forth in N.R.A.P. 4 expired on August 30, 2010; making the current appeal untimely.

B. THE ALLEGED N.R.C.P. 59 MOTION ACTUALLY SOUGHT RECONSIDERATION OF THE DISTRICT COURT'S PRIOR RULING.

WCL's alleged N.R.C.P. 59 motion requested the District Court **"amend its Order and vacate the arbitration award...."** (See Exhibit "B" at 2; emphasis added). While WCL used the term "amend," the request for relief shows WCL's true purpose was to vacate the arbitration award. A motion to vacate an arbitration award cannot be construed as a motion to amend under N.R.C.P. 59. Arbitration awards are vacated pursuant to NRS 38.241 and other common law grounds as set forth in Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 131 P.3d 5 (2006).[1] Therefore, a motion to vacate an award is separate and distinct from that of a motion to amend pursuant to N.R.C.P. 59. N.R.C.P. 59 is used when the movant seeks relief such as to **"alter a judgment of dismissal without prejudice to a dismissal with prejudice and vice versa; to include an award of costs; or to change the time and conditions of the payment of a master."** See Chiara v. Belaustegui, 86 Nev. 856, 477 P.2d 857 (1970).

[1] The common law standards as set forth in the case include: (1) whether the award is arbitrary, capricious, or unsupported by the agreement, and (2) whether the arbitrator manifestly disregarded the law. See Clark County Educ. Ass'n v. Clark County School Dist., 122 Nev. 337, 131 P.3d 5 (2006)

Not only was WCL incorrectly using N.R.C.P. 59 in effort to vacate the award, the motion was the second time WCL requested the District Court vacate the award. WCL's first request came in the form of a countermotion to ISI's motion to confirm the arbitration award. (See Exhibit "C"). The District Court denied WCL's countermotion and confirmed the arbitration award. (See Exhibits "D").

WCL's second request while under the guise of N.R.C.P. 59, again requested the award be vacated and not merely "amended." In requesting the award be vacated for the second time, WCL cited various rehearing standards. WCL's second motion to vacate stated **"[r]ehearings are granted when there is a reasonable probability that the court may have arrived at an erroneous conclusion or overlooked some important question necessary to a full and proper understanding of the case."** (See Exhibit "B" at 3). WCL also cited several authoritative cases discussing rehearings and their applicable standards; specifically, State v. Fitch, 68 Nev. 422, 233 P.2d 1070, 1072(1951); Moore v. City of Las Vegas, 92 Nev. 402, 551 P.2d 244, 246 (1976); Geller v. McCowan, 64 Nev. 102, 178 P.2d 380, 381 (1947). (See Exhibit "B" at 3).

After citing several cases discussing rehearings including the "erroneous conclusion" standard used in rehearings, WCL argued arbitrator's conclusion was erroneous and therefore should not have been confirmed by the District Court. (See Exhibit "B" at 5). WCL was not requesting amendment; it was really requesting the District Court rehear its decision to confirm the award, change its mind and vacate the award. By citing rehearing case law and using the "erroneous conclusion" standard to request the arbitration award be vacated, this Court should look past the phrase "N.R.C.P. 59" in the title and label the motion as what it truly was, a motion for rehearing.

As this Court is well aware, a motion for rehearing cannot reasonably be construed as a motion to alter or amend the judgment pursuant to Rule 59(e). See Alvis v. State,

Gaming Control Bd., 99 Nev. 184, 186 n. 1, 660 P.2d 980, 981 n. 1 (1983). A motion for rehearing does not toll the time in which a notice of appeal must be filed. See Arnold v. Kip, 123 Nev. 410, 168 P.3d 1050, 1054 (2007); In re Duong, 118 Nev. 920, 59 P.3d 1210 (2002); Gunlord Corp. v. Bozzano, 95 Nev. 243, 591 P.2d 1149 (1979). Because WCL's motion was in reality a motion for rehearing, the time period with which WCL had to file its appeal started upon notice of entry of judgment on July 28, 2010 and expired on August 30, 2010. See N.R.A.P. 4. Since the notice of appeal was filed on November 4, 2010, well after the 30-day appeal period passed, the current appeal is untimely and must be dismissed. See Whitman v. Whitman, 108 Nev. 949, 840 P.2d 1232 (1992).

C. THE ALLEGED N.R.C.P. 59 MOTION REQUESTED THE DISTRICT COURT CORRECT A CLERICAL ERROR AND WAS THEREFORE NOT A TOLLING MOTION.

WCL's alleged N.R.C.P. 59 motion also asserted ISI failed to include necessary language in the Judgment requiring ISI to comply with existing Nevada Law; specifically, compliance with NRS 21.130. [2] (See Exhibit "B" at 5). The motion requested the District Court include language in the Judgment that WCL believed was omitted and stated in part,

> **"the current orders allow ISI to proceed directly with the foreclosure and only vaguely identifies that ISI must comply with all necessary requirements to provide notice. The arbitrator's award, without consideration of these required steps, should be vacated and an award properly outlining ISI's responsibilities should issue."**

(See Exhibit "B" at 5).

If language in a judgment is omitted, N.R.C.P. 60(a), not N.R.C.P. 59, is the

[2] ISI disputes the Judgment is in any way deficient as it states:

> **"the real property subject to Interior Specialists, Inc.'s Mechanic's Lien shall be sold on or before September 17, 2010 in the manner provided for as sales on execution, issued out of any District Court, for the sale of real property. Plaintiff shall prepare and provide all statutorily required notices, writs, and instructions."**

(See Exhibit "D" at p. 3; emphasis added).

mechanism which allows a movant to include language; as N.R.C.P. 60(a) plainly states,

> **"[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."**

Here, if language were omitted from the Judgment, the omission was nothing more than a mere oversight by counsel, clerk and/or District Court and is a "clerical mistake" to be corrected in accordance with N.R.C.P. 60. This premise is in line with existing Nevada authority which states,

> **"[a] clerical error as applied to judgments and decrees is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function."**

In re Humboldt River System, 77 Nev. 244. , 362 P.2d 265, (1961) (citing N.R.C.P. 60(a)). In addition,

> **"[w]here item of award could not be reasonably attributed to exercise of judicial discretion in light of the evidence otherwise relied on by the trial court, item was subject to correction as clerical error."**

Kirkpatrick v. Temme, 98 Nev. 523, 654 P.2d 1011, (1982) (citing N.R.C.P. 60(a)).

Assuming arguendo, if additional language were required, the District Court would not need to review any evidence and would not exercise judicial discretion or function. Therefore, WCL's motion was an N.R.C.P. 60 motion; which is not a tolling motion set forth in N.R.A.P. 4(a). The Court should not allow WCL to gain a tactical advantage by allowing it to bring an N.R.C.P. 60 motion under the guise of N.R.C.P. 59(e) simply to toll the N.R.A.P. 4(a) filing requirements. Allowing WCL to bootstrap its N.R.C.P. 60(a) request into tolling motion promotes form over substance; which this Court has previously indicated it would not do. See Wolff, supra. Because WCL's request to add allegedly omitted language was in reality a motion to correct a clerical error under N.R.C.P. 60(a), the 30-day appeal period was not tolled and passed; therefore, the current appeal untimely

and subject to dismissal.

IV.
CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court should find WCL's Notice of Appeal was untimely filed and dismiss the current appeal for lack of jurisdiction.

DATED this 15th day of December, 2010.

Respectfully submitted,

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