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### Summary of Bonnell v. Lawrence, 128 Nev. Adv. Op. No. 37

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CIVIL PROCEDURE – INDEPENDENT ACTION

**Summary**

Appeal from a district court order dismissing an independent action to obtain relief from an otherwise unreviewable final judgment.

**Disposition/Outcome**

An action to obtain relief from an otherwise unreviewable final judgment will only lie when needed to prevent a grave miscarriage of justice. In determining whether an appellant meets this standard, the Court will consider the utilization of available avenues for legal relief.

**Factual and Procedural History**

This case was the second of two lawsuits brought by Appellant, Francie Bonnell, against her daughter and son-in-law, Respondents. The first lawsuit ended in summary judgment against Appellant and she appealed, seeking to undo the summary judgment and its award of attorney's fees.

The source of the dispute was Appellant's \$135,000 payment ("payment") toward the mortgage on her daughter's home (referred to as "the Lindell premises"). In return for the payment, Appellant expected a life estate in the Lindell premises. Respondents acknowledged the payment, but claimed it was a loan that was repaid when Respondents deeded Appellant a different home ("the Arbor premises") with equity exceeding the amount of the payment. None of the terms were put in writing.

Appellant's first suit asserted several legal and equitable claims and was premised on her claimed life estate. After 14 months of litigation, Appellant's lawyer withdrew and Appellant proceeded *pro per*. Respondents then moved for summary judgment. Appellant received the motion but did not oppose it. Accordingly, the trial court granted summary judgment and determined Appellant's claims were "meritless" and that the statute of frauds defeated the life estate claim.<sup>2</sup> Following summary judgment, Respondents recovered their attorney's fees and costs. Appellant did not move for reconsideration or relief from judgment.

Over a year later, Appellant, with new counsel, filed a second suit in the same district that alleged the same claims as the first action. The case was assigned to a different judge than the first suit. Appellant alleged that she was able to proceed by independent action under Rule 60(b) because she was representing herself and Respondent's exploited her unrepresented status. Respondent's moved to dismiss the second claim under *res judicata*<sup>3</sup> and expiration of the six-

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<sup>1</sup> By Richard A. Andrews

<sup>2</sup> NEV. REV. STAT. § 111.205 (2007).

<sup>3</sup> *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1051-56, 194 P. 3d 709, 711-14 (2008).

month period for relief from judgment.<sup>4</sup> The district court rejected Appellant’s argument and dismissed this second suit with prejudice. Appellant timely appealed.

## **Discussion**

Justice Pickering wrote for the unanimous three justice panel,<sup>5</sup> noting that “[r]esort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances.”<sup>6</sup> Furthermore, to obtain relief by independent action, a claimant must meet traditional requirements that are more exacting than required for relief by motion under NRCP 60(b)(1)-(3). NRCP 60(b) permits relief from judgment by motion or by independent action. Addressing motions, the rule specifies both the permissible grounds and the time deadlines that apply. However, the rule does not name any such specifics in reference to relief by independent action. The Court adds to the standard by citing a Supreme Court holding that “under the Rule, an independent action [is] available only to prevent a grave miscarriage of justice.”<sup>7</sup>

Because NRCP 60(b)’s text makes its time deadlines applicable only to motions, not independent actions, Appellant argued that she could proceed by independent action to set aside the summary judgment and associate fee award, despite her delay. In essence, Appellant argued that a litigant seeking relief from a final judgment but allowed the time for doing so by motion under NRCP 60(b)(1) – (3) expire, could do so by independent action, as long as she alleged facts that might qualify for motion based relief under NRCP 60(b)(1)-(3). The Court disagreed.

The Court first reviewed the dismissal order under the standards for summary judgment because both Appellant’s new complaint and Respondents’ motion to dismiss included excerpts from the first case.<sup>8</sup> As to the standard of review, because the second action was brought before a new judge who determined its viability as a matter of law, the Court determined that de novo review applied. The Court then asserted that “the bar against relitigation of already-decided issues is, in essence, ‘an entitlement not to stand trial or face the other burdens of litigation’ and ‘should be resolved at the earliest possible stage in litigation.’”<sup>9</sup>

The Court went on to consider the comprehensive review of Rule 60(b) in *U.S. v. Braggerly*.<sup>10</sup> The Court highlighted the fact that the new rule abolished nearly all forms of post-judgment review, leaving only independent action for relief from judgment. Accordingly, independent action is to be reserved for those cases that violate justice to such an extent that a court must depart from following the doctrine of res judicata.

Appellant claimed that Respondents committed misconduct that resulted in legal error by the district judge in the first suit. Appellant also claimed that she did not receive proper notice of

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<sup>4</sup> NEV. R. CIV. P. §§ 60(b)(1)-(3).

<sup>5</sup> Justice Pickering was joined by Chief Justice Cherry and Justices Pickering and Hardesty.

<sup>6</sup> 11 Charles Alan Wright, Arthur R. Miller & Mary Kane, *Federal Practice and Procedure* § 2868, at 397-98 (2d ed. 1995).

<sup>7</sup> *United States v. Beggerly*, 524 U.S. 38, 47 (1998).

<sup>8</sup> See *Witherow v. State, Bd. of Parole Comm’rs*, 123 Nev. 305, 308, 167 P.3d 408, 409 (2007).

<sup>9</sup> *Butler v. Baye*, 123 Nev. 450, 458, 168 P. 3d 1055, 1061 (2007).

<sup>10</sup> 524 U.S. 38.

the motion for summary judgment in the first suit. The Court determined that these claims did not meet the standard of a “grave miscarriage of justice.”

Furthermore, the Court pointed out that Appellant neglected several legal remedies available to her, namely moving for a new trial, timely appeal, or moving for relief from judgment. The Court notes that Appellant’s argument that she has a partial performance defense against the statute of frauds would have been appropriate had it been timely filed within these avenues and that independent action was not an appropriate legal vehicle in this situation.

Finally, the Court determined that Appellant incorrectly interpreted two other independent action cases decided by the Court<sup>11</sup> and Appellant’s argument that independent action was available regardless of the grounds asserted was invalid.

### **Conclusion**

The Court concluded that neither Appellant’s arguments nor the record indicated the threat of a grave miscarriage of justice that is required to sustain an independent action for relief. Furthermore, the Court found that all other appropriate avenues for legal relief were bypassed and the sought independent action was untimely. Accordingly, the Court affirmed the trial court’s dismissal of the suit.

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<sup>11</sup> Picket v. Comanche Construction, Inc., 108 Nev. 422, 426-427, 836 P.2d 42, 45 (1992); Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 365, 741 P.2d 802, 805 (1987).