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Summary of Foster v. Dingwall, 126 Nev. Adv. Op. No. 5

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**CIVIL PROCEDURE –RELIEF FROM UNDERLYING JUDGMENT BASED ON
NEWLY DISCOVERED EVIDENCE**

Summary

The Court clarifies and explains the procedure announced in *Huneycutt v. Huneycutt*² for seeking a remand to the district court to alter, vacate, or otherwise modify or change a district court order or judgment after an appeal to the Supreme Court has been perfected. Additionally, the Court explains that the perfection of the appeal does not toll the six-month period for seeking NRCP 60(b)(2) relief.

Disposition/Outcome

The perfection of an appeal does not toll NRCP 60(b)(2)'s six-month period for seeking relief. Accordingly, the appellants' request for NRCP 60(b)(2) relief was denied as untimely.

Factual and Procedural History

Appellants Ronald Foster, Patrick Cochrane, and Frederick Dornan challenge a final judgment filed on August 29, 2007. Appellants filed their notice of appeal on September 7, 2007. On July 29, 2009, Appellants filed a motion in the district court, seeking relief from that judgment under NRCP 60(b)(2) based on newly discovered evidence. Specifically, they sought to have the district court certify its intent to grant their motion. After the district court certified its intent to grant the motion, appellants filed a motion in the Supreme Court seeking to have the matter remanded for the entry of an order granting their motion for NRCP 60(b)(2) relief in accordance with the procedure established in *Huneycutt*.

Discussion

Procedure for seeking a remand to district court

In *Huneycutt*, the court adopted a procedure where a party, believing a basis exists to alter, vacate, or otherwise modify an order or judgment challenged on appeal after an appeal from that order or judgment has been perfected, must first file a motion for relief from the order or judgment in district court prior to filing a motion for remand in the Supreme Court.³ Despite the general rule that the perfection of an appeal divests the district court of jurisdiction, the district court retains a limited jurisdiction to review motions made in accordance with this

¹ By Anthony R. Sassi

² *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978).

³ *Id.* at 79-81, 575 P.2d at 585-86.

procedure,⁴ but it lacks jurisdiction to enter an order granting such a motion.⁵ However, the district court does have jurisdiction to deny such requests.⁶

If the district court is inclined to grant the relief requested, then it may certify its intent to do so.⁷ At this point, the moving party then files a motion in the Supreme Court, attaching the district court's certification, seeking remand for entry of an order granting the requested relief.⁸ If the district court is not inclined to grant relief, it may enter an order denying the motion.⁹

Foster, Cochrane, and Dornan's motion for remand

In the present motion the district court certified its intent to grant appellants' NRCP 60(b)(2) motion. Appellants now move the Nevada Supreme Court to remand the matter for entry of an order granting the relief requested. They assert, among other things, that their motion was timely.

A motion for relief from a final order or judgment based on newly discovered evidence must "be made within a reasonable time, and ... not more than 6 months after the proceeding was taken or the date that written notice of entry of the final judgment was served."¹⁰ Here the notice of entry of final judgment was entered on August 29, 2007, but appellants' NRCP 60(b)(2) motion was not filed until July, 29, 2009. This issue then is whether the perfection of the appeal tolls the running of NRCP 60(b)'s six-month limit.

Federal court opinion on Fed. R. Civ. P. 60(b), which was substantially similar to NRCP 60(b) prior to the 2007 revisions,¹¹ overwhelmingly concludes that the period for seeking relief under Fed. R. Civ. P. 60(b) is not tolled by the filing of a notice of appeal.¹² This court finds the federal approach to be sound practice and adopts the same approach with regard to requests for relief under NRCP 60(b). Accordingly the six-month time period for seeking relief under NRCP 60(b) is not tolled by the perfection of an appeal.

Because appellants' pending appeal did not toll the six-month period for seeking relief, appellants' motion for NRCP 60(b)(2) relief was untimely filed. Therefore the motion is denied.

⁴ See *Mack-Manley v. Manley*, 122 Nev. 849, 855-56, 138 P.3d 525, 529-30 (2006); *Huneycutt*, 94 Nev. 79 at 80-81, 575 P.2d at 585-86.

⁵ See *id.*, 94 Nev. 79, 575 P.2d 585; *King v. First Am. Investigations*, 287 F.3d 91, 94 (2d Cir. 2002); *Fed. Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 766-67 (8th Cir. 1989).

⁶ *King*, 287 F.3d at 94; *Fed. Land Bank*, 889 F.2d at 766.

⁷ *Mack-Manly*, 122 Nev. at 855, 138 P.3d at 530; *Huneycutt*, 94 Nev. at 81, 575 P.2d at 586.

⁸ See *Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530 (noting the court's discretion to grant a motion seeking remand to the district court); see also *Post v. Bradshaw*, 422 F.3d 419, 422 (6th Cir. 2005) (noting that appellate courts do not rubber-stamp or grant such motions as a matter of course.).

⁹ *King*, 287 F.3d at 94; *Fed. Land Bank*, 889 F.2d at 766.

¹⁰ NEV. R. CIV. P. 60(b).

¹¹ *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

¹² See *Tool Box v. Ogden City Corp.*, 419 F.3d 1084, 1088 (10th Cir. 2005); *King*, 287 F.3d at 94; *Berkwin Grain v. Ill. Dept. of Agric.*, 189 F.3d 556, 559 (7th Cir. 1999); *Fed. Land Bank*, 889 F.2d at 766-77; *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 239 (3d Cir. 1987); *Carr v. Dist. of Columbia*, 543 F.2d 917, 925-26 (D.C. Cir. 1976); *Transit Cas. v. Sec. Trust*, 441 F.2d 788, 791 (5th Cir. 1971); see also 12 JAMES WM. MOORE, ET AL. MOORE'S FEDERAL PRACTICE ¶60.65[2][d] (3d ed. 2009) (stating that "virtually all courts agree that a pending appeal does not toll" the Rule 60(b) time limit).

Conclusion

The *Huneycutt* remand procedure is clarified specifically noting that district courts do have jurisdiction to deny requests for relief under NRCP 60(b). Additionally the six-month time period for seeking relief under NRCP 60(b) is not tolled by the perfection of an appeal.