IN THE SUPREME COURT OF THE STATE OF NEVADA

H/MX HEALTH MANAGEMENT SOLUTIONS, INC., A DELAWARE CORPORATION; AND NEVADACARE, INC., A NEVADA CORPORATION D/B/A NEVADA HEALTH SOLUTIONS,
Appellants,
vs.
CONVENTION CENTER DRUG, INC., A NEVADA CORPORATION D/B/A OPTION CARE OF NEVADA AND D/B/A OPTION CARE KIDS; AND MEDICAL EQUIPMENT AND OXYGEN, LLC, A NEVADA LIMITED LIABILITY COMPANY D/B/A OPTION CARE MEDICAL EQUIPMENT AND OXYGEN,
Respondents.

No. 46735

FILED

APR 26 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from the district court's findings of fact, conclusions of law and judgment and from the district court's order denying a motion to alter or amend the judgment. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Our preliminary review of the docketing statement and documents submitted to this court pursuant to NRAP 3(e) revealed two potential jurisdictional defects. First, it appeared that the notice of appeal was untimely filed as to the judgment. Second, it appeared that the order denying a motion to alter or amend the judgment was not an appealable order. Accordingly, we ordered appellants to show cause why this appeal should not be dismissed for lack of jurisdiction. Several days after the

order to show cause was entered, respondents filed a motion to dismiss this appeal based on the same jurisdictional defects identified in this court's order.

In response, appellants argue that the notice of appeal was timely filed because respondents did not properly file the notice of the judgment's entry. In particular, appellants argue that the notice of entry was electronically filed but that electronic filing was not authorized in this case. According to appellants, "[t]his appeal should not be dismissed because . . . a notice of entry of judgment has never been properly filed in accordance with NRCP 58(e)." We disagree.

Although NRCP 58(e) requires that the party serving a notice of entry also file a copy of the notice of entry with the district court clerk,[1] the rules governing the time to appeal and the time to file a tolling motion focus on the date that the notice of entry was served, not the date it was filed with the district court. The time for filing a notice of appeal in most civil actions is governed by NRAP 4(a)(1), which provides that the time to file a notice of appeal begins to run upon entry of a written judgment and

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[1]NRCP 58(e) provides, in relevant part,

> Within 10 days after entry of a judgment or an order, the party designated by the court under subdivision (a) shall serve written notice of such entry, together with a copy of the judgment or order, upon each party who is not in default for failure to appear and shall file the notice of entry with the clerk of the court.

See also NRCP 5(d) ("All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter . . . .").

expires "30 days after the date that written notice of entry of the judgment . . . is served." Thus, the 30-day appeal period is calculated from service of the notice of entry. That 30-day period is tolled if any of four motions specified in NRAP 4(a)(4) are timely filed in the district court. Of particular relevance in this case, a timely filed motion to alter or amend a judgment under NRCP 59 tolls the 30-day appeal period.[2] Under NRCP 59(e), the motion must "be filed no later than 10 days after service of written notice of entry of the judgment." Again, like the time for filing the notice of appeal, the time for filing a motion to alter or amend is calculated from service of the notice of entry. Based on these rules, the date that the notice of entry was filed in the district court is irrelevant for purposes of calculating the deadline for filing a notice of appeal or a tolling motion; rather, the relevant date is that on which appellants were served with the notice of entry.

The certificate of service attached to the notice of entry in this case represents that respondents served appellants with notice of the judgment's entry on December 28, 2005. The notice was served on appellants' counsel of record by mail.[3] The day after respondents served the notice of entry on appellants' counsel of record, appellants served respondents with notice that they had changed counsel. That change in

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[2]NRAP 4(a)(4).

[3]See NRCP 5(b)(1) (providing that when service is required "to be made upon a party represented by an attorney, the service shall be made upon the attorney unless the court orders that service be made upon the party"); NRCP 5(b)(2)(B) (providing that service may be made by mailing a copy to the attorney and that service by mail is complete on mailing).

counsel, which occurred after the notice of entry was properly served, does not render the earlier service of the notice of entry invalid. Moreover, appellants do not suggest that their new counsel was unaware that the notice of entry had been served. The only dispute raised by appellants is that the notice of entry was not properly filed, but as explained above, that dispute is not relevant to a determination of this court's jurisdiction because the time periods to file a tolling motion and a notice of appeal are based on the date that the notice was served, not the date it was filed.

Based on the documents provided to this court, the 30-day appeal period and the 10-day period to file a tolling motion are calculated from December 28, 2005. Appellants thus had until January 17, 2006, to file the motion to alter or amend the judgment under NRCP 59.[4] They filed the motion on January 23, 2006, after expiration of the 10-day filing period under NRCP 59(e). Therefore, the motion did not toll the time to file a notice of appeal from the judgment. Accordingly, appellants had until January 30, 2006, to file a notice of appeal.[5] Appellants filed the notice of appeal in the district court on February 2, 2006, after the expiration of the 30-day appeal period under NRAP 4(a)(1). Because an

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[4]The 10-day period to file an NRCP 59 motion is computed by excluding nonjudicial days and then adding 3 days for service by mail. Winston Products Co. v. DeBoer, 122 Nev. ___, 134 P.3d 726 (2006); NRAP 6(a), (e). In this case, after excluding nonjudicial days and then adding 3 days, the filing period would have expired on Sunday, January 15, 2006. Because that and the next day were nonjudicial days, the period expired on the next judicial day—Tuesday, January 17, 2006. See NRAP 6(a).

[5]See NRAP 4(a)(1); NRAP 26(c).

untimely notice of appeal fails to vest jurisdiction in this court,[6] we conclude that we lack jurisdiction over this appeal.[7] We therefore grant respondents' motion and

ORDER this appeal DISMISSED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Thomas F. Christensen, Settlement Judge
Meyer Hendricks PLLC
Snell & Wilmer, LLP/Las Vegas
Hutchison & Steffen, Ltd.
Eighth District Court Clerk

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[6]See NRAP 3(a)(1) ("Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . ."); Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983).

[7]Appellants filed a second notice of appeal on April 4, 2006, that also designated the order denying their motion to alter or amend. As noted in our order to show cause, this court has held that an order denying a motion to alter or amend is not substantively appealable. Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995).