

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN NEVADA SURGICAL CENTER, A SHARON C. FRANK PROFESSIONAL CORPORATION; SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP, D/B/A SOUTHERN NEVADA SURGICAL CENTER; SURGEX-SOUTHERN NEVADA, INC., GENERAL PARTNER OF SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP; AND SURGEX, INC., A FOREIGN CORPORATION,

Appellants,

vs.

N.A.D., INC., D/B/A NORTH AMERICAN DRAGER, A FOREIGN CORPORATION; AND INVIVO RESEARCH, INC., A FOREIGN CORPORATION,

Respondents.

No. 34853

FILED

JAN 17 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

SOUTHERN NEVADA SURGICAL CENTER, A SHARON C. FRANK PROFESSIONAL CORPORATION; SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP, D/B/A SOUTHERN NEVADA SURGICAL CENTER; SURGEX-SOUTHERN NEVADA, INC., GENERAL PARTNER OF SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP; AND SURGEX, INC., A FOREIGN CORPORATION,

Appellants,

vs.

N.A.D., INC., D/B/A NORTH AMERICAN DRAGER, A FOREIGN CORPORATION; AND INVIVO RESEARCH, INC., A FOREIGN CORPORATION,

Respondents.

No. 35135

01-00988

SOUTHERN NEVADA SURGICAL CENTER, A SHARON C. FRANK PROFESSIONAL CORPORATION; SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP, D/B/A SOUTHERN NEVADA SURGICAL CENTER; SURGEX-SOUTHERN NEVADA, INC., GENERAL PARTNER OF SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP; AND SURGEX, INC., A FOREIGN CORPORATION,

No. 35170

Appellants/Cross-Respondents,

vs.

INVIVO RESEARCH, INC., A FOREIGN CORPORATION,

Respondent,

and

N.A.D., INC., D/B/A NORTH AMERICAN DRAGER, A FOREIGN CORPORATION,

Respondent/Cross-Appellant.

SOUTHERN NEVADA SURGICAL CENTER, A SHARON C. FRANK PROFESSIONAL CORPORATION; SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP, D/B/A SOUTHERN NEVADA SURGICAL CENTER; SURGEX-SOUTHERN NEVADA, INC., GENERAL PARTNER OF SOUTHERN NEVADA SURGICAL CENTER, LP, A LIMITED PARTNERSHIP; AND SURGEX, INC., A FOREIGN CORPORATION,

No. 35697

Appellants,

vs.

N.A.D., INC., D/B/A NORTH AMERICAN DRAGER, A FOREIGN CORPORATION; AND INVIVO RESEARCH, INC., A FOREIGN CORPORATION,

Respondents.

ORDER DISMISSING APPEALS

These are consolidated appeals and a cross-appeal from multiple orders of the district court. Docket No. 34853 is an appeal from two district court orders granting respondents' motion to dismiss, filed on August 18, 1999, and August 23, 1999. Docket No. 35135 is an appeal from an order denying appellants' motion to amend findings of fact. Docket No. 35170 is an appeal and cross-appeal from an order awarding respondents costs. Lastly, Docket No. 35697 is an appeal from an order denying appellants' motion for reconsideration.

Our preliminary review of the documents transmitted to this court pursuant to NRAP 3(e) revealed several potential jurisdictional defects. In a previous order, we noted the following potential defects. First, respondent Invivo Research's and appellant Southern Nevada Surgical Center's (SNSC's) separate motions to alter or amend the judgment were apparently not formally resolved in a written order, and therefore all of the notices of appeal in these matters appeared premature. Second, with respect to the appeal in Docket No. 35135, we cautioned that an order denying a motion to amend findings of fact was not an appealable order. Third, with respect to the appeal in Docket No. 35697, we noted that an order denying a motion for reconsideration was not substantively appealable and that the notice of appeal was filed two days late. Fourth, with respect to the appeal and cross-appeal in Docket No. 35170, we noted that a final judgment in this case had apparently not yet been entered due to possibly pending tolling motions and therefore, the order awarding costs may not be a special order made after final judgment.

Based on the foregoing, we directed appellants and cross-appellant to show cause why these appeals and cross-appeal should not be dismissed for lack of jurisdiction.

Appellants did not file a response to our order, but Invivo and respondent/cross-appellant N.A.D., Inc., have both filed responses.

N.A.D. argues that the jurisdictional defect in Docket No. 34853 has been cured because the parties to these appeals have stipulated that the November 15, 1999, order was intended to resolve both Invivo's and SNSC's motions to alter or amend the judgment. To this end, N.A.D.'s response attaches an unfiled stipulation and nunc pro tunc order signed by the parties and the district judge, purporting to resolve SNSC's motion to alter or amend the judgment and Invivo's motion to amend the memorandum of costs as of November 16, 1999, and denying any other amendment to the judgment. For the following reasons, we conclude that respondents have not demonstrated that this court has jurisdiction over these appeals.

First, a nunc pro tunc order may not be utilized to retroactively supply judicial action which was previously omitted. See *Finley v. Finley*, 65 Nev. 113, 118-19, 189 P.2d 334, 336-37, 196 P.2d 766 (1948), overruled on other grounds by *Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964). The November 15, 1999, order, which respondents argue was intended to resolve Invivo's tolling motion, makes no allusion to the motion. Even if we were to accept respondents' argument that SNSC's motion to alter or amend the judgment was in fact only a motion to retax costs and was resolved by the district court's November 15, 1999, order retaxing costs, Invivo's motion to alter or amend the judgment was not similarly resolved in the order.¹ We conclude that such an

¹Additionally, the nunc pro tunc order grants Invivo's motion to amend the memorandum of costs—which was already granted in a written order dated November 8, 1999—and not its motion to alter or amend the judgment.

omission is not merely clerical, but judicial in nature, and cannot be retroactively cured by a nunc pro tunc order. Consequently, the notices of appeal in Docket Nos. 34853 and 35170 were premature and failed to vest jurisdiction in this court. See Rust v. Clark Cty. School District, 103 Nev. 686, 747 P.2d 1380 (1987).

Second, neither respondent addressed our concerns regarding this court's jurisdiction over the appeals in Docket Nos. 35135 and 35697. An order denying a motion to amend findings of fact is not an appealable order. See Landex, Inc. v. State, Dep't Commerce, 92 Nev. 177, 179, 547 P.2d 315, 316 (1976). An order denying a motion for reconsideration is also not substantively appealable. See Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983). Accordingly, we conclude that we lack jurisdiction over these appeals as well.²

Based on the foregoing, we dismiss all of these appeals for lack of jurisdiction.³

It is so ORDERED.⁴

Young J.
Young

Rose J.
Rose

Becker J.
Becker

²The tardiness of the notice of appeal in Docket No. 35697 is an additional ground for dismissing that appeal.

³In light of the dispositions of these appeals and cross-appeal, respondents' motion to strike or dismiss appellants' amended notice of appeal and third amended notice of appeal, and their motion to file a rebuttal are denied as moot.

⁴If appellants file a new notice of appeal after Invivo's tolling motion is formally resolved, and the appeal is assigned to the settlement program, appellants may request the settlement judge to recommend removal of the case from the program. See NRAP 16(a).

cc: Hon. Mark W. Gibbons, District Judge
Harrison Kemp & Jones, Chtd.
Edwards, Hale, Sturman, Atkin & Cushing, Ltd.
Perry & Spann
Clark County Clerk