IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT COLEMAN HART AND
ELIZABETH KATHLEEN HART,
Appellants,
vs.
CLARK COUNTY TREASURER,
LAURA B. FITZPATRICK,
Respondent.

No. 38272

FILED

DEC 06 2002

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

ORDER DISMISSING IN PART AND REVERSING AND REMANDING IN PART

This is a proper person appeal from a district court order dismissing appellants' complaint and from a district court judgment awarding respondent attorney fees under NRCP 11.

First, we conclude that a jurisdictional defect plagues the appeal from the dismissal order. To vest jurisdiction in this court, a notice of appeal must be filed no later than thirty days after service of written notice of the order's entry.[1] Three days are added to that period when the notice of entry is served by mail.[2] Here, notice of entry of the order dismissing appellants' complaint was served by mail on April 11, 2001. To be timely, a notice of appeal had to be filed by May 14, 2001. Appellants did not file their notice of appeal, however, until July 31, 2001. Consequently, this court lacks jurisdiction over the appeal from the

[1]NRAP 4(a)(1); Rust v. Clark Cty. School District, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

[2]NRAP 26(c).

dismissal of appellant's complaint, and we order this appeal dismissed to that extent.[3]

Second, regarding the NRCP 11 attorney-fee award, we conclude that the district court abused its discretion in setting the amount.[4] Fee shifting under Rule 11 is appropriate in frivolous actions.[5] Such an action is both baseless and instituted without a reasonable and competent inquiry.[6]

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[3]The June 7, 2001 motion for a new trial was untimely, see NRCP 59(b), and therefore, did not toll the time in which to file a notice of appeal. NRAP 4(a)(2). To the extent this appeal is taken from the order denying a new trial, the district court did not err because the motion was untimely. Ross v. Giacomo, 97 Nev. 550, 553, 635 P.2d 298, 300 (1981). Insofar as this appeal is taken from the district court's order denying reconsideration and denying entry of a default judgment, the order is substantively unappealable. See NRAP 3A(b); Alvis v. State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983); Kokkos v. Tsalikis, 91 Nev. 24, 530 P.2d 756 (1975). To the extent the district court's May 24, 2001 order denied the Harts' motion for injunctive relief, the notice of appeal, filed July 31, 2001, is untimely. NRAP 4(a)(1). Finally, because there is no authority permitting a district judge to review the rulings of another district judge, we treat the Harts' petition for judicial review as a renewed motion for reconsideration, the denial of which is not appealable. Alvis, 99 Nev. at 186, 660 P.2d at 981.

[4]See Barr v. Gaines, 103 Nev. 548, 551, 746 P.2d 634, 637 (1987) (stating that this court reviews an award of attorney fees under Rule 11 for an abuse of discretion).

[5]See Bergmann v. Boyce, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993).

[6]Id.

The crux of appellants' lawsuit to avoid paying real property taxes is that their liabilities arise only from express contract, and because they have not contracted with respondent to pay real property taxes, they are exempt. But the payment of real property taxes is not a contractual endeavor. Rather, it is a responsibility imposed by statute, obligated by the Nevada Constitution.[7] Aware of that responsibility, appellants have apparently paid the taxes in the past. Thus, because appellants' lawsuit and their post-dismissal motions were frivolous, the award of attorney fees under NRCP 11 was justified.

But if attorney fees are awarded under NRCP 11, the fees must be reasonable.[8] Respondent's counsel has not justified the $5,000 award, except to say that he "spent dozens of hours responding to" appellants' frivolous pleadings and motions, and that appellants exhibited a "persistent disregard for both substantive and procedural statutes and rules." And the district court has not explained its calculation of the $5,000 figure.

This court has not yet addressed what constitutes a reasonable attorney-fee award in the context of NRCP 11. Because NRCP

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[7]Nev. Const. art. 10, § 1 (declaring that all property shall be taxed); NRS 361.045 (stating that all property within Nevada shall be subject to taxation except as otherwise provided by law); NRS 361.450(1) (imposing a lien against taxable property until payment of the tax).

[8]NRCP 11.

11 is modeled after FRCP 11 (the pre-1993 version), federal decisions construing that rule are instructive in interpreting NRCP 11.[9]

An FRCP 11 attorney-fee award is limited to the minimum amount sufficient to deter future litigation abuse.[10] Thus, a reasonable attorney fee does not necessarily mean the actual expenses incurred by the victim of frivolous litigation.[11] To ensure that fee-shifting under FRCP 11 retains its deterrent purpose, a district court must scrutinize the amount requested in relation to the severity of the offense, and consider any misconduct on the victim's part, whether the offending party has the ability to pay, and whether the victim failed to mitigate its fees.[12]

Here, the $5,000 amount appears to have been randomly selected. Respondent's counsel did not document his fees or even request

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[9]See State ex rel. Iowa DHS v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991) (using FRCP 11 case law for guidance in construing analogous Iowa Rule of Civil Procedure 11); Miller v. Badgley, 753 P.2d 530, 538 (Wash. Ct. App. 1988) (looking to FRCP 11 case law to interpret Washington's analogous Superior Court Civil Rule 11); see also Las Vegas Novelty v. Fernandez, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990) (stating that federal cases interpreting the Federal Rules of Civil Procedure "are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts").

[10]White v. General Motors Corp., Inc., 908 F.2d 675, 684-85 (10th Cir. 1990).

[11]Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 879 (5th Cir. 1988); Matter of Yagman, 796 F.2d 1165, 1185 (9th Cir.), as amended, 803 F.2d 1085 (1986).

[12]See Matter of Yagman, 796 F.2d at 1185; In re Kunstler, 914 F.2d 505, 523 (4th Cir. 1990).

a particular amount. Further, the district court apparently determined the amount of the attorney-fee award without considering appellants' ability to pay or whether the amount was the least severe to accomplish the deterrent purpose. The $5,000 award against the proper person appellants is particularly harsh, given that the district court initially declined to sanction appellants for filing a frivolous complaint, and only assessed the sanction for appellants' filing of a motion for new trial and petition for judicial review. We can find nothing in the appellate record suggesting that respondent incurred $5,000 responding to those two filings.

Because the district court made the attorney-fee award without adequately explaining the basis for the amount, we vacate the award, reverse the judgment, and remand this case for further proceedings consistent with this order.[13] On remand, if the district court intends to impose a large sanction that is heavily influenced by respondent's documented attorney fees, due process warrants that

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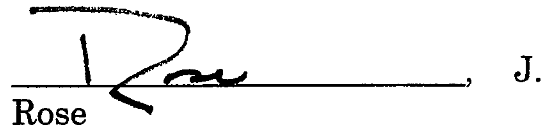
[13]White, 908 F.2d at 685 (vacating attorney-fee award and remanding because the trial court did not consider what amount was the least necessary to deter future misconduct); Crockett & Brown, P.A. v. Wilson, 901 S.W.2d 826, 831 (Ark. 1995) (reversing attorney-fee award because the trial court failed to explain why the amount of the sanction was appropriate); Williams v. Mount Jezreel Baptist Church, 589 A.2d 901, 912 (D.C. 1991) (reversing and remanding because the sanction was not based on a "careful consideration" of the victim's costs and fees or on the violator's ability to pay); Montgomery v. Jimmy's Tire & Auto Ctr., 566 A.2d 1025, 1030 (D.C. 1989) (reversing and remanding because the trial court failed to offer "any explanation" as to how it calculated the amount of the attorney-fee award).

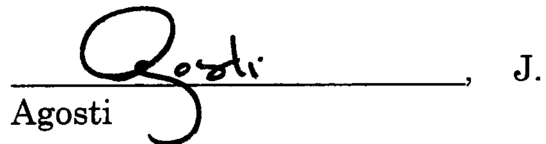
appellants be given an opportunity to review and contest the fee statement and to submit evidence of their ability to pay.[14]

It is so ORDERED.[15]

Young, C.J.



Rose, J.



Agosti, J.

cc: Hon. Sally L. Loehrer, District Judge
Clark County District Attorney
Clark County District Attorney/Civil Division
Elizabeth Kathleen Hart
Robert Coleman Hart
Clark County Clerk

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[14]In re Kunstler, 914 F.2d at 524; see also FRCP 11 advisory committee's note (1983 amendments) (observing that Rule 11 sanctions must comport with due process and that what process is due depends on the circumstances and the sanction's severity); accord K. Carr v. Hovick, 451 N.W.2d 815, 817-18 (Iowa 1990); Rivera v. Brazos Lodge Corp., 808 P.2d 955, 961 (N.M. 1991).

[15]Although appellants have not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered appellants' proper person documents.