IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID STODDART, A/K/A WILLIAM DAVID STODDART AND JENCAR DEVELOPMENT CORPORATION, A NEVADA CORPORATION,
Appellants,
vs.
THE ESTATE OF WILLIAM PECCOLE; THE WILLIAM PECCOLE 1982 TRUST; WANDA PECCOLE; LAURIE P. BAYNE; LAURIE PECCOLE 1976 TRUST; LISA PECCOLE; AND LISA PECCOLE 1976 TRUST,
Respondents.

No. 38253

FILED

NOV 22 2002

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

LARRY MILLER, EXECUTOR OF THE ESTATE OF WILLIAM PECCOLE; THE WILLIAM PECCOLE 1982 TRUST; ESTATE OF WILLIAM PECCOLE; WANDA PECCOLE; LAURIE P. BAYNE; LAURIE PECCOLE 1976 TRUST; LISA PECCOLE; AND LISA PECCOLE 1976 TRUST,
Appellants,
vs.
DAVID STODDART, A/K/A WILLIAM DAVID STODDART AND JENCAR DEVELOPMENT CORPORATION, A NEVADA CORPORATION,
Respondents.

No. 38336

ORDER DISMISSING APPEALS

Docket No. 38253 is an appeal by David Stoddart and Jencar Development Corporation (collectively "Stoddart") from a judgment upon a jury verdict in their favor, certified as final under NRCP 54(b), as modified by a conditional order of remittitur; the conditional order of remittitur; an "Order Re: Post-Trial Motions," which denied Stoddart's request for

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prejudgment interest and granted a remittitur; and an order granting a motion under NRCP 41(b) to involuntarily dismiss two of Stoddart's claims.

Docket No. 38336 is an appeal by Larry Miller, executor of the estate of William Peccole, the William Peccole 1982 Trust, the Estate of William Peccole, Wanda Peccole, Laurie P. Bayne, the Laurie Peccole 1976 Trust, Lisa Peccole and the Lisa Peccole 1976 Trust (collectively "Peccoles") from the judgment upon a jury verdict, certified as final under NRCP 54(b); the conditional order of remittitur; the "Order Re: Post-Trial Motions," which denied in part a motion to amend the judgment, conditionally granted remittitur, denied judgment notwithstanding the verdict, denied a new trial, and denied a motion for factual findings and judgment on equitable issues; an order granting Stoddart's motion under NRCP 41(a) for voluntary dismissal of his counterclaim; and an order granting in part and denying in part a motion under NRCP 41(b) to involuntarily dismiss Stoddart's claims.

When our preliminary review of the docketing statement and the documents submitted to this court pursuant to NRAP 3(e) revealed several potential jurisdictional defects, we issued an order to show cause to appellants in both appeals, granting them thirty days within which to demonstrate that jurisdiction in this court is proper. Having reviewed appellants' responses, as well as the replies filed by the respondents in both cases, we conclude that we lack jurisdiction over these appeals.

The potential defects noted in Docket No. 38253 were that it did not appear that Stoddart was aggrieved by the January 19, 2001 judgment on the jury verdict, which was certified as final by the district court under NRCP 54(b), that it was not clear that the conditional order of

remittitur was appealable because it appeared to contemplate a further order to effectuate it, that the order denying prejudgment interest was not appealable absent a final judgment, and that the order dismissing two of Stoddart's claims was not appealable absent a final judgment or a proper NRCP 54(b) certification.

Stoddart argues that once he rejected the remittitur, the conditional order of remittitur became an order granting a new trial, which may be appealed under NRAP 3A(b)(2). Stoddart cites no authority in support of this argument, but our research reveals that Stoddart is correct in this regard. In Hahn v. Yackley,[1] we held that the failure of a prevailing party to accept a remittitur within the time stated in a conditional order of remittitur transformed the order into an order granting a new trial.

Stoddart further argues that the January 19, 2001 judgment was properly certified as final, at least as to his claims, and thus the order denying prejudgment interest is also appealable.[2] Finally, analogizing to federal cases under FRCP 54(b), Stoddart argues that while a written order dismissing two of his claims was not entered until several months after the January 19, 2001 judgment, certification of that judgment was

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[1]84 Nev. 49, 436 P.2d 215 (1968).

[2]Our order to show cause also noted that it did not appear that Stoddart was aggrieved by the judgment on the verdict in his favor; Stoddart asserts that he appeals from that judgment only as it was later modified by the denial of prejudgment interest and by the conditional order of remittitur. Accordingly, a determination of this issue depends on whether the order denying prejudgment interest and the conditional order of remittitur may be challenged at this time, which in turn depends on whether the January 19, 2001 judgment was properly certified as final.

nevertheless effective because the claims had been orally dismissed during trial. Stoddart asserts that were this court not to follow the federal courts, it would be "the first time" we had rejected federal authority interpreting the federal rules on which Nevada's were based. In the alternative, Stoddart argues that the two dismissed claims were severable from the other claims, and so certification of the January 19, 2001 order was proper.[3]

The potential defects noted in Docket No. 38336 were that the January 19, 2001 judgment did not appear to be properly certifiable as a final judgment, that the Peccoles did not appear to be aggrieved by the conditional order of remittitur or the order permitting Stoddart to voluntarily dismiss his counterclaim to counterclaim, and that the orders denying the Peccoles' motion to dismiss Stoddart's claims, to amend the

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[3]Our order to show cause invited appellants to obtain an order certifying the July 24, 2001 order dismissing two of Stoddart's claims as final, thereby curing any defect in certification of the January 19, 2001 order unless we determined that the civil RICO claim was not properly severable. The parties declined to seek certification. Since we have determined that the civil RICO claim was not properly severable, as discussed below, a certification of the July 24, 2001 order would not have been effective in any event, and so this issue is moot. We note, however, that the Nevada rules differ in a significant respect from the federal rules. Specifically, Nevada requires a formal written order resolving all claims before a judgment may be final and appealable, whereas the federal rules permit an appeal from an orally announced decision, with the notice of appeal being deemed filed on the same day as when a written order is eventually entered. Compare NRAP 4(a)(1) with FRAP 4(a)(2). We have consistently enforced the Nevada rule and required a formal written order. See, e.g., KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991); Rust v. Clark Cty. School District, 103 Nev. 686, 747 P.2d 1380 (1987). Accordingly, contrary to Stoddart's argument, these appeals would not have been "the first time" that we did not follow federal practice.

January 19, 2001 judgment, for judgment notwithstanding the verdict, and for additional findings were not substantively appealable.

The Peccoles concede that certification of the January 19, 2001 judgment was not proper, and assert that the appeals should be dismissed until all claims have been resolved, including their civil RICO counterclaim against Stoddart. The Peccoles also assert that even though NRAP 3A(b)(2) generally permits appeals from orders granting or denying a new trial, the appeals from those orders should be dismissed as well in these circumstances, since there has been no final judgment entered. The Peccoles cite no authority in support of this argument.

It thus appears that two issues must be resolved. First, we must determine whether the January 19, 2001 judgment was properly certified as final. If it was not, then almost all of the orders appealed from are not appealable, because they depend on the entry of a final judgment. Second, we must determine whether the conditional order of remittitur, which became an order granting a new trial as to damages, and the order denying the Peccoles' motion for a new trial, are properly appealed at this time.

A review of the claims asserted by Stoddart and the counterclaims asserted by the Peccoles reveal that they all revolve around a common nucleus of facts. Stoddart alleged that he was a partner and co-joint venturer with the Peccoles in a real estate development project, and that he was wrongfully deprived of the benefits he was to reap from the project. He asserted contract, equitable and tort claims based on these facts. The Peccoles alleged that Stoddart was a confidential consultant, and that he abused the relationship by inducing the Peccoles to guarantee a letter of credit for Stoddart's benefit, which the Peccoles were then

forced to repay when Stoddart did not. The Peccoles asserted a counterclaim for breach of fiduciary duty and several tort counterclaims based on Stoddart's alleged conduct. In their civil RICO counterclaim, the Peccoles also asserted that Stoddart engaged in a series of transactions in which he obtained loans or credit and failed to pay the sums owed. With the exception of the particular transaction underlying the remainder of the Peccoles' counterclaims, they do not allege that they were forced to pay the sums when Stoddart did not, but do allege that they were harmed by his actions. It therefore appears that the harm alleged by the Peccoles with respect to their civil RICO counterclaim arose from the formerly close relationship between Stoddart and the Peccoles that is part of all of the other claims and counterclaims. Under these circumstances, the facts underlying the claims and counterclaims, including the civil RICO counterclaim, are so intertwined that certification of the January 19, 2001 judgment was not appropriate.[4]

With respect to the new trial orders, NRAP 3A(b)(2), by its express terms, does not impose any restrictions on when an order granting or denying a new trial may be appealed. Nevertheless, we conclude that the orders regarding the new trial motions are not appealable at this time, absent a final judgment or a judgment properly certified under NRCP 54(b).

A recent Oklahoma decision is instructive. In LCR, Inc. v. Linwood Properties,[5] the Oklahoma Supreme Court held that a motion

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[4]See KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991); Hallicrafters Co. v. Moore, 102 Nev. 526, 728 P.2d 441 (1986).

[5]918 P.2d 1388 (Okla. 1996).

denominated a "motion for new trial" addressed to a judgment resolving some but not all claims was not a true motion for new trial. The motion did not address a final judgment, but rather an intermediate order that was still within the district court's control.[6] In addition, the Oklahoma trial court had not certified the judgment as final.[7] The Oklahoma Supreme Court concluded that the order granting the motion was not appealable. The Missouri Supreme Court has reached a similar conclusion.[8]

We conclude that the reasoning of these cases is persuasive. In addition, we note that under NRAP 4(a)(2), a motion for a new trial tolls the time within which an appeal may be taken from a final judgment. Without a final judgment, a motion for new trial cannot be a tolling motion, and thus the rule would make no sense. Accordingly, we conclude that an appeal from an order granting or denying a new trial motion is proper only when the new trial motion follows entry of a final judgment or a judgment properly certified under NRCP 54(b).

Having determined that certification of the January 19, 2001 judgment was improper, the proceedings as a whole remain within the district court's control until a final judgment resolving all claims is rendered. Consideration of these appeals only as to the orders granting

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[6]Id. at 1392.

[7]Id. at 1393-94.

[8]See Gier v. Clark, 300 S.W.2d 519, 520-21 (Mo. 1957) (holding that statute permitting an appeal from an order granting a new trial refers to such an order granting a new trial only after final judgment).

and denying a new trial would result in piecemeal litigation and would not contribute to judicial economy or efficiency.

Accordingly, as we lack jurisdiction, we ORDER these appeals DISMISSED.[9]

_____, V.C.J.
Maupin

_____, J.
Shearing

_____, J.
Leavitt

cc: Hon. Michael A. Cherry, District Judge
Law Offices of Richard McKnight, P.C.
Lionel Sawyer & Collins/Las Vegas
Beckley, Singleton, Chtd./Las Vegas
Dominic Campisi
Robert A. Kelley
Marc P. Cook & Associates, Ltd.
Clark County Clerk

[9]We deny the motion to consolidate, filed in both appeals on July 15, 2002, and the motion to set aside the bond, filed in No. 38336 on January 28, 2002, as moot in light of this order.