

The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

**Wednesday, February 13, 2019, Harrah's Convention Center
12:00 p.m.**

State of the Second Judicial District Court with Chief Judge Scott Freeman

Chief Judge Scott Freeman will present his “State of the Court” during the February 13th WCBA luncheon. He will present on the Second Judicial District Court’s mission, where the Court is successfully fulfilling its mission, and the opportunities for improvement.

Chief Judge Freeman was elected Chief of the Second Judicial District Court in November 2017. He graduated from Ithaca College in New York with a degree in Politics and a minor in Economics. He received his Juris Doctorate from Southwestern University School of Law, Los Angeles, California. Chief Judge Freeman has been a resident of Northern Nevada since 1979.

Prior to his judicial appointment in 2012, Chief Judge Freeman led a distinguished legal career with an emphasis on advocacy for individuals



accused of crime. In 2008, he was named the Criminal Defense Attorney of the Year by the Nevada Attorneys for Criminal Justice. Additionally, Chief Judge Freeman formerly co-hosted the weekly television show “Lawyers, Guns & Money” on KRN TV, an NBC Network affiliate, with an interview format focusing on notable personalities in the legal, cultural and charitable communities.

Since becoming the Chief Judge, Chief Judge Freeman has focused his efforts on promoting public trust in an independent, transparent, and efficient judiciary. He welcomes your participation during this luncheon. If you have specific topics you would like addressed, please send to gina@wcbar.org.

RSVP by February 11, 2019.
\$25 per person for members and \$30 for non-members. Register online at www.wcbar.org or call 786-4494.

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APPELLATE BRIEFS

By Debbie Leonard, McDonald Carano

SUPREME COURT OVERRULES PRECEDENT REGARDING APPEALS FROM CONSOLIDATED CASES

For nearly thirty years, the rule in Nevada has been that cases consolidated by a district court become a single case for all appellate purposes. See *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990). That meant that even where an order resolved all claims in one of the constituent consolidated cases, the case still was not appealable until all claims in the consolidated action were finally resolved. On December 27, 2018, the Nevada Supreme Court overruled this precedent to allow an immediate appeal from an order that finally resolved a constituent consolidated case, even where claims remained pending in another consolidated constituent case. See *In re Estate of Sarge*, 134 Nev. Adv. Op. 105 (2018).

In *Estate of Sarge*, the Court reached its decision based on three analytical branches. First, the Court noted what it described as “foundational problems” with the *Mallin* decision. In *Mallin*, the Court *sua sponte* questioned whether an order that resolved one of two consolidated cases was appealable as a final judgment without first being certified as final under NRCP 54(b). Based on policy considerations that focused on judicial economy, the Court answered that question in the negative. The Court deemed the district judge best suited to determine whether allowing an immediate appeal of one constituent case would “frustrate the purpose for which the cases were consolidated.” The district judge could always engage in a Rule 54(b) certification to determine if an immediate appeal were warranted.

Second, the Court concluded that the language and history of NRCP 42(a) do not support the conclusion reached in

the *Mallin* case. NRCP 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Before *Mallin*, the Court had recognized that the term “consolidated” in the rule was ambiguous. Specifically, “[c]onsolidated” could mean that “several actions are combined into one, lose their separate identities and become a single action” or that “several actions are tried together but each retains its separate character.” *Randall v. Salvation Army*, 100 Nev. 466, 470, 686 P.2d 241, 243 (1984). The Court had long recognized this distinction, noting that the federal courts interpreting FRCP 42(a) “consistently held that consolidation for the purpose of joint trial does not merge the cases into a single cause of action.” *Mikulich v. Garner*, 68 Nev. 161, 169-70, 228 P.2d 257, 261 (1951) (interpreting Nevada Compiled Laws §9025, NRCP 42(a)’s predecessor and citing a U.S. Supreme Court case construing FRCP 42(a)). Yet this ambiguity was not addressed in the *Mallin* decision.

A year after *Mikulich* in 1952, Nevada adopted the Nevada Rules of Civil Procedure, which were largely based on their federal counterparts. The newly adopted NRCP 42(a) contained identical language to Nevada Compiled

Laws §9025. For that reason, in *Estate of Sarge*, the Court was troubled that *Mallin* did not acknowledge the history of NRCP 42(a) and its parallel to the federal rules or even discuss *Mikulich*.

Third, the Court in *Estate of Hage* was swayed by a recent U.S. Supreme Court decision, *Hall v. Hall*, 138 S.Ct. 1118 (2018), which held that an order that resolves one of several cases consolidated pursuant to FRCP 42(a) is immediately appealable because constituent cases retain their separate identities for the purpose of appeal. *Hall* expressly overruled one of the federal cases on which *Mallin* relied.

Although the Court is loath to overturn precedent, it concluded that *Mallin* contained too many structural problems to remain good law. Looking to *Hall* as persuasive authority, the Court concluded that “weighty and compelling circumstances exist warranting the departure from the doctrine of stare decisis.” As a result, the Court concluded:

We thus overrule our decision in *Mallin* to the extent it holds that cases consolidated in the district court become a single case for all appellate purposes. Consolidated cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1).

Not only is the *Estate of Sarge* decision important for this holding, but it also provides a window into the Court’s analysis of ambiguous language, its

view of precedent and the compelling circumstances under which it is willing to depart from that precedent.

Debbie Leonard is a partner and Chair of the Appellate Practice Group at McDonald Carano LLP, where her practice focuses on appeals before Nevada's appellate courts, the Ninth Circuit Court of Appeals and administrative agencies. She served as the 2013-2014 Chair of the State Bar's Appellate Litigation Section and is Lead Editor of the Nevada Appellate Practice Manual, 2016 and 2018 editions. She is also a mediator and Nevada Supreme Court settlement judge.



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