

# Abandonment Issues:

## Avoiding a Common Mistake That Will Result in Your Post-Trial Appeal Being Dismissed

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This article highlights a common mistake that will likely result in your post-trial appeal being dismissed. Specifically, the appeal will be dismissed as premature if the final order/judgment does not resolve all claims against all parties in the case, including claims that were abandoned prior to trial pursuant to Eighth Judicial District Court Rule (EDCR) 2.67.<sup>1</sup>

### **THE PROBLEM: Failing to Address Abandoned Claims in the Post-Trial Order/Judgment**

EDCR 2.67 requires parties in the Eighth Judicial District Court to file a pretrial memorandum that lists, among other things, “all claims or defenses to be abandoned.” EDCR 2.67(b)(4). There are many practical and strategic reasons for abandoning a particular claim before trial. For example, a party might abandon a claim that was pled in the alternative,

such as an unjust enrichment claim that was pled in the alternative to a breach of contract claim. A party might also decide to abandon a particular claim to focus on more important claims that are more likely to succeed. Whatever the reason, it can be easy to forget about the claims that were abandoned pre-trial when it comes time to draft the final post-trial order/judgment.

Forgetting to dispose of an abandoned claim in the post-trial order/judgment will likely be fatal to a subsequent appeal for two reasons.

First, a post-trial order/judgment is only appealable if it is “final.” NRAP 3A(b)(1). An order/judgment is only “final” if it “disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as



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attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). As such, post-trial orders/judgments are only appealable if all claims against all parties have been fully resolved in the district court.

Second, simply abandoning a claim in the pretrial memorandum does not constitute a final disposition for appellate purposes. See *KDI Sylvan Pools, Inc. v. Workman*, 107 Nev. 340, 342, 810 P.2d 1217, 1219 (1991) ("The fact that Workman may not be inclined to pursue his counterclaim also does not render the counterclaim moot or operate as a formal dismissal of the claim"); *Worldwide Holding, LLC v. E. Lake Mead Boulevard Tr.*, 2019 WL 6117566, n. 1, No. 76718, No. 77338 (Nev. Nov. 15, 2019) (unpublished disposition) ("To the extent appellants suggest that a final judgment has been entered because the counterclaims were abandoned, this contention lacks merit"). In other words, unless there is a file-stamped order/judgment specifically disposing of the abandoned claim, that claim is still technically pending in the district court. If an appeal is filed while the abandoned claim is still pending, the Nevada Supreme Court will likely dismiss the appeal as premature. This will force the appealing party to go back to the district court to dispose of the abandoned claim and then start the entire appellate process over.

**THE SOLUTION: Ensure That the Final Post-Trial Order/Judgment Disposes of All Pending Claims, Even Those That Were Abandoned Pre-Trial**

The solution to the foregoing problem is simple. When drafting the final order/judgment, simply include language that the claim was voluntarily abandoned before trial pursuant to EDCR 2.67(b)(4) and is therefore dismissed. Having this dismissal in the final written order/judgment will constitute a final disposition for appellate purposes under NRAP 3A(b)(1).

And if you've already filed the appeal without disposing of the

abandoned claim in the district court, there is still hope for avoiding dismissal. If all parties agree that the abandoned claim was mistakenly left out of the final order/judgment, you may seek leave from the Nevada Supreme Court to correct that mistake in the district court. See NRCP 60(a) ("But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave."). If the requested relief is granted, the parties may then file a stipulation in the district court to correct the final judgment pursuant to NRCP 60(b) to include dismissal of the abandoned claim. Once the corrected final judgment is filed in the district court, the jurisdictional issue caused by the abandoned claim should be resolved and the appeal can continue. The benefit of doing this is that you avoid having the appeal dismissed and having to start the entire appeals process over from scratch once the abandoned claim is disposed of in the district court.

Again, however, these issues can be avoided altogether if you simply ensure that the final order/judgment disposes of all claims against all parties, including any claims that were abandoned before trial.

1. This article addresses appeals from post-trial final judgments under NRAP 3A(b)(1), not other types of appeals under NRAP 3A.

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