

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE N. KAJIOKA,  
Appellant,  
vs.  
DEAN Y. KAJIOKA,  
Respondent.

No. 72888

FILED

JUN 22 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Rene N. Kajioka appeals from a post-divorce decree order regarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia Dianne Steel, Judge.

Rene and her former spouse, Dean Kajioka, filed for divorce in late 2012.<sup>1</sup> They stipulated to the terms of their divorce, except for the issue of attorney fees and costs. They included a provision in their decree that they would attempt to resolve the issue of attorney fees and costs without court intervention, but should that fail, "Rene's claim for attorney fees shall rest with the sound discretion of the Court."

The decree of divorce was filed on April 24, 2014. Rene served the notice of entry of the decree electronically that same day. On May 16, 2014, Rene filed a motion for attorney fees. The district court awarded her fees and costs.

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

Dean appealed that award and this court was assigned Dean's appeal. We reversed and remanded the matter to the district court because we concluded the district court had abused its discretion in awarding Rene fees without conducting a proper evaluation of the factors described in *Brunzell*<sup>2</sup> or considering the disparity in incomes of the parties under *Wright*.<sup>3</sup> On remand, we instructed the district court to address, as a preliminary matter, whether it had "granted the parties an extension to file a motion for [attorney] fees, and if satisfied the motion was timely," to determine whether an appropriate basis to award such fees existed.

On remand, Rene filed a motion to adjudicate the attorney fees issue. There, she argued that her original motion for fees was timely under the Nevada Rules of Civil Procedure and, even if it was not, she and Dean had stipulated to extend the deadline to file the motion.

The district court denied Rene's motion to adjudicate. In so doing, it made a number of findings. First, it found that "there was no stipulation requested by the parties or acknowledged by Court Order to extend the time to file the Motion for Attorney Fees." Second, it found that "there was neither express written language nor any intent by the court to extend the deadline to file for attorney fee relief." Third, it found that "had [it] reviewed [NRCP 54(d)(2)(B)] at the time of the [hearing on Rene's original motion] for attorney fees, the Court would have found no jurisdiction to entertain the motion [because] [t]he rule is clear; the Court cannot extend the time to file for attorney fee relief once the time has expired." Finally, it found that the "time to file the post-Decree motion to

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<sup>2</sup>*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

<sup>3</sup>*Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

resolve attorney fee issues fell on or about May 14, 2014,” such that it did not have the authority to extend the time to file a motion for attorney fees when Rene filed her original motion.

Now, Rene appeals from the district court’s order denying her motion. She raises three assignments of error. First, she argues the district court erred by interpreting the decree of divorce’s attorney fees provision as not extending the deadline to file a motion for attorney fees. Second, she argues the district court improperly calculated the deadline to file a motion for attorney fees. Third, she argues the issue regarding the timeliness of her original motion for attorney fees was waived in the proceedings below following this court’s remand. Because Rene’s arguments are unpersuasive, we affirm.

*The terms of the decree did not extend Rene’s time to file a motion for attorney fees*

Rene argues that the decree’s attorney fees provision definitively established that she was entitled to an award of attorney fees and left open the question of the amount of fees to be awarded. Accordingly, Rene contends the district court had “continuing jurisdiction” to “issue a decision as to the amount” of attorney fees if the parties could not agree to an amount.

“When parties to pending litigation enter into a settlement, they enter into a contract.” *Grisham v. Grisham*, 128 Nev. 679, 685, 289 P.3d 230, 234 (2012). “Such a contract is subject to general principles of contract law.” *Id.* “Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances.” *Redrock Valley Ranch, LLC v. Washoe Cty*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011).

The attorney fees provision of the decree provides:

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Rene's claim for attorney fees shall rest with the sound discretion of the Court. The parties if they are unable to settle the issue, will submit briefs to the Court for a determination of the appropriate amount of fees to be awarded or placed on calendar for argument and decision.

The first sentence of this provision permits the district court to use its discretion to resolve Rene's claim for attorney fees. Accordingly, we conclude the provision neither guarantees nor establishes that Rene will receive an award of attorney fees.

The decree certainly does not expressly extend the deadline to file a motion for attorney fees. Even if the second sentence of the provision left open the amount of fees to award Rene, as she argues, such an interpretation would have no impact on the deadline to move for attorney fees. This reading would only limit the district court's discretion to deny Rene attorney fees *on the merits* were the question properly presented to the district court; this reading would not grant the district court unlimited jurisdiction to entertain Rene's motion for fees no matter when she filed that motion. Accordingly, we agree with the district court—the provision did not extend the deadline to file Rene's motion for fees.

*Rene's argument about the district court's calculation of the deadline to file a motion for fees is waived*

Rene argues the district court improperly calculated the deadline by which she had to file a motion for attorney fees when it found that May 14, 2014, was the deadline. She argues that the proper deadline was May 19, 2014, because NRCP 6(e) "permits both parties an additional

three days for service before the time to take any required action begins to run.”<sup>4</sup>

In her motion to adjudicate the issue of attorney fees after this court’s remand, Rene argued that her original motion was timely under NRCP 54(d)(2)(B) or, if not, that she and Dean stipulated to an extension of NRCP 54(d)(2)(B)’s deadline. She did not argue that NRCP 6(e) afforded her three more days to file her motion. Accordingly, this argument is waived and we will not consider it for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”).<sup>5</sup>

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<sup>4</sup>May 19, 2014, would be the proper deadline were NRCP 6(e)’s three-day extension to apply here because May 17, 2014, was a Saturday. *See* NRCP 6(a) (“The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a non-judicial day, in which even the period runs until the end of the next day which is not a Saturday, a Sunday, or a non-judicial day . . .”).

Rene also argues the district court incorrectly used December 10, 2013, as the “start date for [her] fee deadline.” This argument is without merit. The district court’s order states that the deadline was May 14. This date is 20 days from April 24, 2014, the date the notice of entry of the decree was filed.

<sup>5</sup>Even if Rene had properly preserved her NRCP 6(e) argument, we are skeptical that she could avail herself of this rule. In this case, the triggering event for NRCP 54(d)(2)(B)’s deadline was the “notice of entry” of the decree. Rene served the notice of entry electronically; she did not receive service of this notice nor was service made “upon” her.

NRCP 6(e) provides, in relevant part: “Whenever a party . . . is required to do some act . . . within a prescribed period *after the service of a*

*The timeliness of Rene's original motion for fees was not waived*

Rene argues that the timeliness of her 2014 motion for attorney fees was waived, pursuant to *Old Aztec*, because Dean did not raise this issue until his reply brief in the first appeal of this case and “never raised [it] at the District Court level.” She argues that Dean did not raise this issue because he “knew that the issue of fees had been adjudicated save and except for the amount of fees.” We disagree.

While the issue of the timeliness of Rene's original motion for attorney fees *may* have been waived in the first appeal of this case,<sup>6</sup> on

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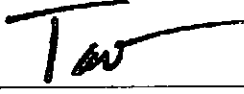
*notice . . . upon the party* and the notice or paper is served upon the party by mail or by electronic means, 3 days shall be added to the prescribed period.” (Emphasis added). NRCP 6(e) was designed “to provide an additional 3 days to act *in response to* a paper that is served by electronic means . . . .” NRCP 6(e) drafter's notes to 2004 amendment (emphasis added). As the party who served the relevant notice, we would not conclude that Rene could avail herself of NRCP 6(e)'s three-day extension in these circumstances, were it properly preserved on appeal. The federal approach to this issue supports this interpretation. See Fed. R. Civ. P. 6 advisory committee's note to 2016 amendment (permitting *the serving party* to avail itself of the extension provided in FRCP 6(d) (the federal cognate to NRCP 6(e)) would mean that “a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment”); see also *Dandino, Inc. v. U.S. Dep't of Transp.*, 729 F.3d 917, 921-22 (9th Cir. 2013) (“[T]he rules of procedure are written to allow *responding parties* the full benefit of the applicable time limits *after receiving the document being served.*” (emphasis added)).

<sup>6</sup>We maintain our skepticism towards the concept that the timing issues presented by NRCP 54(d)(2)(B)'s deadlines raise jurisdictional questions as expressed in our original order, though we again acknowledge that the Nevada Supreme Court has not addressed this issue. See *Kajioka v. Kajioka*, Docket No. 66560 (Order of Reversal and Remand, Nov. 25, 2015).

remand, we specifically instructed the district court to determine whether “it granted the parties an extension to file a motion for fees” and only address the merits of Rene’s motion if it “was timely.” Accordingly, because we directed the district court to address the timeliness of Rene’s original motion, the issue cannot have been “waived” after our remand. Moreover, *Old Aztec* does not establish waiver under these circumstances because *Old Aztec* waiver is predicated upon an issue not having been “urged in the trial court” and here the issue was squarely before the district court. *See* 97 Nev. at 52, 623 P.2d at 983. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division  
Carolyn Worrell, Settlement Judge  
Black & LoBello  
Nehme-Tomalka & Associates  
Eighth District Court Clerk